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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
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Washington, DC 20536

PUBLIC COPY

[redacted]

MAY 16 2003

File: WAC 02 026 56760 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in February 1990. It is a production base for Japanese commercial film work. It seeks to employ the beneficiary as its production manager/associate producer. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational manager. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity. The director also concluded that the petitioner had not submitted sufficient evidence to show it was housed in a viable work site.

On appeal, counsel for the petitioner asserts that the evidence submitted supports approval of the petition.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the

United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The primary issue in this proceeding is whether the beneficiary will perform managerial or executive duties for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
>
> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

The petitioner is claiming the beneficiary's position is a managerial position, rather than an executive position. The record, thus, must demonstrate the beneficiary's assignment within the organization fulfills the criteria set out in the above referenced statutory provision.

The I-140, Immigrant Petition for Alien Worker, indicated that the petitioner currently employed five individuals. The petitioner's I-140 Form also provided an initial description of the beneficiary's job duties as follows:

- prepare and develop project plans for production and implement them to completion;

- write and present proposals to clients and conduct contract negotiations with clients;

- hire and negotiate with contractors and crew;

- create production schedules and organize crew for production;

- coordinate audio work, scenes, music, timing, camera work, and script writing to develop desired production;

- ensure that the project is completed within time frame and budget; [sic]

The petitioner's letter in support of the petition provided essentially the same description of the beneficiary's duties. The petitioner added that the beneficiary was responsible for the development and production of a weekly cable television series and the production of an ongoing series of cultural programs.

The petitioner also included its Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S corporation for the year 2000. The IRS Form 1120S showed $20,000 had been paid to officer(s) of the corporation and the corporation had ordinary income of $108,844 for the year 2000.

The director requested a more detailed description of the beneficiary's duties, including the percentage of time the beneficiary spent on each of the duties. The director also requested the petitioner's organizational chart and the job titles and job descriptions of all employees under the beneficiary's supervision. The director also requested copies of the petitioner's California Form DE-6, Employers Quarterly Wage Report and the source of remuneration of all employees under the beneficiary's supervision.

In response, the petitioner, through its counsel, stated that it was difficult to set strict percentages of time for the beneficiary's duties because each project required different functions. The petitioner indicated that, once the beneficiary had secured a client and created the project plan for production, the bulk of her time was spent hiring crew, creating the production schedule and overseeing production. The petitioner indicated further that toward the end of production the beneficiary spent most of her time overseeing production and focussing on locating new clients.

The petitioner also stated that the majority of the individuals who worked or would work on the petitioner's projects were or would be

independent contractors who are paid per job. The petitioner indicated that it did not maintain wage records for these employees. The petitioner included a list of the independent contractors and companies that the beneficiary allegedly supervised and managed. The petitioner noted further that the beneficiary was paid by the petitioner's branch office located in Japan and, as such, did not have a California Form DE-6, Quarterly Wage Report showing the beneficiary's salary in California.

The director noted that the petitioner had submitted names and positions of six workers allegedly supervised by the beneficiary. The director also noted that the petitioner had not supplied position descriptions for these workers. The director determined that the petitioner had not established a reasonable need for an executive because it had not shown it possessed the organizational complexity to warrant having such an employee. The director also determined that he could not determine who performed the everyday clerical and lower level tasks because the petitioner had not clearly defined the number or type of employees supervised by the beneficiary. The director concluded that it appeared the beneficiary would be performing the everyday tasks. The director further determined that the petitioner had not provided sufficient evidence to establish that the beneficiary would supervise employees holding professional positions. The director finally determined that the petitioner had not submitted sufficient evidence to show that the beneficiary managed a function of the organization rather than performing the function(s) of the organization.

On appeal, counsel for the petitioner asserts that sufficient documentation has been submitted to show that the petitioner requires the beneficiary to fill a managerial position. Counsel asserts that the beneficiary is primarily responsible for overseeing and developing a specific department and is managing an essential function within the company. Counsel also asserts that the petitioner intends to hire additional employees. Counsel further asserts that the beneficiary is not the photographer, film editor, graphic designer, or camera operator, but instead, is the individual who ensures that the correct individuals/entities are contracted to perform these functions.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary the Bureau will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The description of the beneficiary's duties throughout the record indicates that the beneficiary finds clients, creates a production plan, hires the crew, oversees production, and then finds new clients beginning the cycle over again. It is not possible to determine from this broad position description whether the beneficiary primarily performs managerial duties in relation to these tasks or whether the beneficiary is primarily performing these operational tasks for the petitioner. An employee who primarily performs the tasks necessary to produce a

product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Neither counsel nor the petitioner has provided a position description that enables the Bureau to conclude that the beneficiary is primarily overseeing a department or managing a specific function for the petitioner. The petition must document the beneficiary's daily duties in a more comprehensive manner in order to offer a better understanding of the beneficiary's actual role within the company.

In addition, counsel's assertion that the petitioner has provided sufficient documentary evidence to establish the employment of independent contractors is not persuasive. Counsel and petitioner's statements that the petitioner employs independent contractors and that the beneficiary supervises these workers are not sufficient. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has not provided contractual agreements, IRS Forms 1099 (Miscellaneous Income Statements), or other documentary evidence demonstrating the ongoing employment of any individuals.

Further, counsel's reference to the petitioner's plan to hire employees in the future is not relevant to the petition at hand. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel's assertion that the beneficiary does not perform the camera work or editing on the projects she is involved with does not lead to a conclusion that the beneficiary is primarily performing managerial tasks for the petitioner. As noted by the petitioner, the beneficiary finds new clients and locations, creates the production plan, and hires the crew. As previously discussed, it is not possible to conclude that the beneficiary is primarily performing managerial tasks with respect to these duties.

In sum, the record does not provide sufficient evidence of the beneficiary's actual duties and does not provide sufficient documentation of the employment of independent contractors. The petitioner has not established that the beneficiary will be primarily performing managerial tasks for the petitioner.

The director also concluded that the petitioner had not established it was housed in a viable work site. Although the relevance of this conclusion is not clear from the director's decision, the AAO notes that the petitioner has provided a valid lease agreement and

has adequately explained the use of this small facility in relation to its particular type of business. The director also noted that the petitioner had not presented evidence that it had paid the beneficiary the proffered wage. It does not appear from the director's decision that the director actually determined that the petitioner had not established its ability to pay the proffered wage. However, for clarification purposes, the petitioner's IRS Form 1120S for the year 2000 does show sufficient net income to pay the beneficiary the proffered wage of $39,000 for the year 2000. The petitioner has not established that it continues to have the ability to pay the beneficiary the proffered wage in subsequent years. However, as the appeal is dismissed for the reasons above, these issues will not be examined further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.