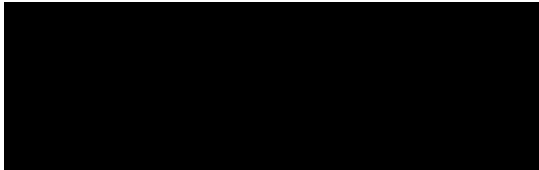


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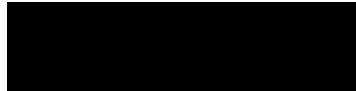
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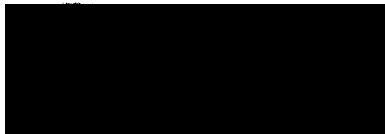
FILE: EAC 03 011 51160 Office: VERMONT SERVICE CENTER Date: **APR 04 2005**

IN RE: Petitioner:
Beneficiary:



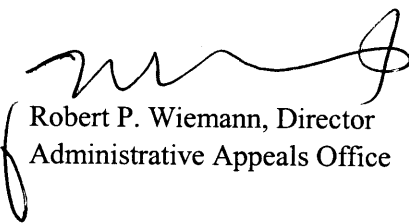
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a Delaware corporation operating as a software development, distribution, and consulting company. It seeks to employ the beneficiary as its managing director. 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 executive or manager. The director determined that the beneficiary would not be employed in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

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 which 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.

The issue in this proceeding is whether the beneficiary would be employed in a capacity that is managerial or executive.

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.

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

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the petition, the petitioner submitted the following description of the duties to be performed by the beneficiary under an approved petition:

- Policy Setting and General Management: average 5 hours per week

Prepare annual budget

Approve expenditures for travel, training, and trade shows

Set compensation levels

Review proposals and decide on benefit programs (401(k), medical, vacation)

Determine medical leave policies

Coordinate outside legal, accounting, and bookkeeping professionals

Supervise administration of 401(k) retirement plan

Liaise with Managing Director Europe

- Invoice clients for consulting and/or software
- Pay all invoices received and/or setup automatic payments
- Evaluate employees' hour registration
- Oversee payroll
- Review all correspondence to [the petitioner]

- Business Development: average 15 hours per week

- Supervise International Sales Manager
- Identify and cultivate new clients
- Maintain existing customer relationships
- Supervise development of written marketing materials
- Attend and meet with prospective customers at annual trade shows
- Provide software demonstrations and power point presentations to . . . potential customers
- Identify areas of research and development for [the petitioner's] products
- Prepare bids, [t]erms and [c]onditions, and responses to RFP's . . . and RFI
- Negotiate contracts with customers
- Identify and implement partnership strategies with other U.S. companies

- Project Planning and Management: average 16 hours per week

- Meet with customers' project managers and/or supervisors throughout project planning
- Conduct on-site investigation and prepare project specifications document
- Supervise preparation of technical design document by computer programmers
- Assign programming and project tasks to computer programmers
- Monitor project progress
- Review results of computer programmers' internal testing of software
- Interface between computer programmer and customer
- Advise computer programmers on solutions to programming problems
- Supervise installation of computer software and hardware

- Personnel Management: average 5 hours per week

- Determine requirements for all job positions in U.S.
- Interview, hire, and fire all U.S. employees
- Negotiate employment terms and conditions with employees
- Conduct weekly meetings
- Monitor performance of U.S. employees and review quality of work product
- Conduct three month, six month, and annual reviews
- Authorize pay increases, bonuses, perquisites, vacation and sick leave
- Responsible for disciplinary action against employees

- Technical Work: average 9 hours per week

- Programming
- Prototyping new technologies

In a notice, dated June 23, 2003, the director requested that the petitioner submit additional information, including the names and job titles of the employees presently employed by the petitioner. The director stated that the petitioner's small staff gives rise to questions regarding the beneficiary's actual duties and whether such duties are primarily of a qualifying nature.

The petitioner responded in a letter dated September 3, 2003. The petitioner stated that it currently has two employees, including the beneficiary, and claimed that it was attempting to fill one additional computer programmer position. The petitioner also submitted its 2002 corporate tax return, as well as its two most recent quarterly income tax returns. The petitioner further stated that the beneficiary's duties with its "small, but growing U.S. presence, are demonstrably managerial and executive." The petitioner stressed the beneficiary's authority to make executive decisions that impact the financial well-being of the organization and claimed that the beneficiary devised the petitioner's marketing strategy and is directly involved in executing the business plan that he created.

The director denied the petition noting that the petitioning entity has only two employees, and that based on this personnel structure it is unlikely that the beneficiary would primarily perform qualifying duties.

On appeal, counsel asserts that the beneficiary "oversees highly specialized workers both in the U.S. and the Netherlands" and claims that because the U.S. and foreign entities are involved in similar types of businesses the petitioner uses the foreign entity's personnel. However, the statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Thus, while counsel seemingly explains who performs the petitioner's daily operational tasks, it is noted that the petitioner has submitted no documentary evidence to substantiate counsel's claim. Furthermore, counsel has offered no explanation for not presenting this claim prior to denial of the petition. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Counsel also states that the petitioner is "a small business that hires only highly specialized professionals" and claims that the director failed to consider the petitioner's reasonable needs in light of these pertinent facts. However, the reasonable needs of the petitioning organization do not override the petitioner's burden of establishing that the beneficiary performs primarily managerial duties. To the contrary, if the petitioner's reasonable needs are such that the beneficiary is required to be directly involved in performing daily operational tasks, that factor alone suggests that the petitioner has no need for a primarily managerial or executive position.

Furthermore, even though 8 C.F.R. § 204.5(j)(4)(ii) instructs CIS to consider the "reasonable needs" of the petitioning entity, such consideration in no way suggests that CIS should relax the petitioner's statutorily-imposed burden of establishing that the beneficiary's duties are primarily managerial or executive.

While counsel is correct in pointing out that the size of the petitioning organization should not be the director's primary concern in determining the nature of the duties primarily to be performed by the beneficiary, the director can and should consider the size of the petitioner's personnel for the purpose of establishing whether the petitioner has a sufficient staff to relieve the beneficiary from performing non-qualifying duties. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant case, the description of the

beneficiary's duties suggests that the beneficiary performs non-qualifying tasks, including sales, marketing, customer relations, and even programming. Therefore, regardless of the petitioner's size the beneficiary does not primarily perform managerial or executive duties. Counsel attempts to dissuade the AAO from reaching this conclusion by stating that the petitioner hires contracted employees to handle its day-to-day operations leaving the beneficiary to supervise only the "key specialized people." However, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner in the instant case has submitted no documentary evidence to suggest that it has any contractual employees. This lack of evidence coupled with the beneficiary's description of duties strongly suggest that it is the beneficiary, and not the claimed contractual employees, who performs a significant portion of the daily operational tasks. It is noted that 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).

In addition, counsel asserts that the beneficiary manages the petitioner's essential functions and should therefore be considered the petitioner's function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. As previously stated, 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)).

In this matter, counsel states that the beneficiary manages three essential functions—business development, project management, and personnel management and policy making. Counsel further states that the first function comprises 50% of his time, the second function comprises 30% of his time, and the third function comprises 20% of his time. In regard to the function of business development, counsel states that the international sales manager reports to the beneficiary on issues concerning customer relations and new business ventures, including new areas of research and product development. However, based on the petitioner's description of duties (initially provided in support of the petition) the beneficiary is the one who deals directly with existing clients in providing customer service and seeking out new clients through demonstrations and power point presentations. Furthermore, the record indicates that at the time the petition was filed the petitioner had two employees—the beneficiary as managing director and ~~Matthew Edwards as the GIS consultant~~. There is no documentary evidence that the petitioner employed an international sales manager. Therefore, the record lacks evidence that the beneficiary manages the essential function of business development.

Counsel also claims that the beneficiary is a project manager. However, he indicates that of the five employees the beneficiary supervises, four employees are located in the Netherlands. Counsel provides no clear explanation as to how the beneficiary spends one third of his time supervising individuals most of who

are located thousands of miles away from the petitioning entity for whom the work is purportedly being done. Moreover, if it is counsel's claim that the beneficiary is able to supervise workers from another continent, the AAO must inquire as to the need for the beneficiary to be employed in the United States rather than the Netherlands where most of his purported subordinate staff is located. Based on the evidence of record, counsel's claim that the beneficiary spends a significant portion of his time as project manager is not credible.

Finally, counsel indicates that 20% of the beneficiary's time is spent managing personnel and making policy. However, the record consistently indicates that at the time the petition was filed the petitioner's entire U.S. staff consisted of two individuals, which included the beneficiary. Although the record indicates that the petitioner was in the process of expanding its staff, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner's mere intent to hire additional employees in the future is irrelevant in this proceeding.

On review, the record does not contain sufficient evidence to support the claim that the beneficiary performs in the role of function manager. Based on the beneficiary's description of duties and the petitioner's personnel structure, the beneficiary has been and continues to actually perform many of the daily operational tasks of the company. The petitioner's apparent lack of a support staff strongly suggests that the petitioner has not reached a level of complexity where the beneficiary can primarily focus on managerial or executive duties. Although the AAO does not dispute the claim that the beneficiary has a high degree of discretionary authority over all matters concerning the petitioner, the record does not indicate that the beneficiary primarily performs duties of a managerial or executive capacity. For this reason the petition cannot be approved.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.