



U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[REDACTED]

File: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JAN 18 2001

IN RE: Petitioner: [REDACTED]
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)

IN BEHALF OF PETITIONER:

[REDACTED]

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

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FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. A subsequent appeal was filed, and the director treated it as a motion because the appeal was filed untimely. The director denied the motion and the petitioner subsequently filed another appeal, which was dismissed by the Executive Associate Commissioner for Examinations, as was a subsequent motion to reconsider the dismissal. The petitioner filed a second motion to reconsider, which is now before the Associate Commissioner for Examinations. The motion will be granted. The previous decision of the Associate Commissioner will be affirmed.

The petitioner is a Washington corporation that claims to be engaged in the import and export of seafood and other products. It seeks to employ the beneficiary as its president and, therefore, endeavors to classify him as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C).

The issue to be examined in this motion is whether the beneficiary is currently and will continue to be employed in a primarily executive or managerial capacity. On motion, counsel submits a brief. The petitioner submits letters from representatives from other companies who attest to the beneficiary's role as an executive within the company. The petitioner also submits documents that show the beneficiary signs contracts and corporate documents as the president of the company.

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.

On motion, counsel submits several arguments in support of his claim that the beneficiary works in a primarily executive or managerial capacity. First, counsel argues that the beneficiary, who held a managerial position with the foreign entity, would not

be transferred to the petitioner to assume a "rank and file" position with the U.S. entity because he was the person responsible for opening the petitioner's operations. Second, counsel contends that the letters from business associates of the beneficiary substantiate counsel's and the petitioner's claim that the beneficiary is a senior executive within the company. Finally, counsel finds that the petitioner's submission of various business documents, all of which list the beneficiary as president, show that he functions at a senior level within the organization and maintains ultimate authority over the petitioner's business operations.

Counsel's arguments are not persuasive. Eligibility for this visa classification hinges on whether the beneficiary's duties met the definition of managerial capacity or executive capacity at the time the petition was filed, which was July 17, 1995. 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 record reflects that at the time the initial petition was filed, the beneficiary was the sole employee of the petitioner. Although the petitioner hired at least two employees after the petition was filed, the Service cannot consider this information when determining the beneficiary's eligibility for classification as a multinational executive or manager. The decision of the Service must be based solely upon the evidence that relates to the beneficiary's job duties and the petitioner's corporate structure as of the date the petition was filed (July 1995).

8 C.F.R. 204.5(j)(2) states, in pertinent part:

Executive capacity means an assignment within an organization in which the employee primarily:

- (A) Directs the management of the organization or a major component or function of the organization;
- (B) Establishes the goals and policies of the organization, component, or function;
- (C) Exercises wide latitude in discretionary decision-making; and
- (D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Managerial capacity means an assignment within an organization in which the employee primarily:

(A) Manages the organization, or a department, subdivision, function, or component of the organization;

(B) 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;

(C) 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

(D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

It is the petitioner's burden to establish that the beneficiary's job responsibilities will be primarily executive or managerial. Pursuant to 8 C.F.R. 204.5(j)(5), a petitioner must submit a job offer in the form of a statement, which clearly describes the duties to be performed by the alien. The Service looks at this job description in order to determine whether the beneficiary works in a primarily executive or managerial capacity.

In response to the director's August 31, 1995 request for additional information regarding the beneficiary's proposed job duties, the petitioner described the beneficiary's role within the company as follows:

Likewise, first, Mr. [REDACTED] as the president of [REDACTED] of United States of America, has an absolute authority to hire/fire United States personnel/employees. Second, Mr. [REDACTED] has the full control and discretion to make any decision necessary to cause business contracts with various countries, including [the] United States. Third, as such, Mr. [REDACTED] establishes [REDACTED] of United States of America's projection policies and goals for the company and make necessary reports back to [REDACTED] of Korea. Under Mr. [REDACTED] management authority as the president of [REDACTED] Mr. [REDACTED] negotiates and enters into contracts worth millions of dollars.

The job description submitted by the petitioner is deficient in establishing the beneficiary's primary executive or managerial capacity within the company. The job description merely paraphrases the definition of executive capacity. It does not provide any insight into the beneficiary's daily activities, as it

is comprised merely of broad statements, such as "has absolute authority" and "has the full control and discretion." Without any specificity to the beneficiary's exact job responsibilities, the Service is unable to find that the beneficiary's job duties are primarily managerial or executive in nature.

The evidence in the record suggests that the beneficiary, as the company's only full-time employee at the time of filing the petition, is responsible for the day-to-day operations of the company. For example, in a motion to reconsider an earlier dismissal of the petitioner's appeal, counsel claimed that the beneficiary "has been directly involved in performing the services necessary to maintain the business." Certainly, these services are comprised of the day-to-day operations, which include, among others, sales and bookkeeping services. The petitioner did not present any evidence that it employed any individuals, either on the company payroll or as contractual employees, who could relieve the beneficiary from performing nonqualifying duties.

Counsel contends that the beneficiary should be deemed a multinational executive or manager simply on the basis of the beneficiary's title as president. In Fedin Bros. Co., Ltd. v. Sava, 724 F. Supp. 1103 (E.D.N.Y 1989), the court held that even though the plaintiff was the president of the American subsidiary, the subsidiary had not grown to a size that would realistically support an executive or manager, because the subsidiary employed only one individual other than the president. In the instant case, the petitioner employed only the beneficiary at the time it filed the petition, and had, therefore, not reached a stage of organizational development that could support a individual who would only serve in a primarily executive or managerial capacity.

Finally, counsel presents letters from the petitioner's business contacts as persuasive evidence of the beneficiary's executive and managerial role within the company; however, these letters carry little weight. Although each individual may believe that the beneficiary is an executive or manager, none of the letters contain specific information that would support a finding that the beneficiary works in a primarily executive or managerial capacity.

Based upon evidence in the record, the petitioner has not established that the prior decisions of the director and the Executive Associate Commissioner for Examinations should be withdrawn.

Beyond the decisions of the director and the Executive Associate Commissioner for Examinations, the record does not support a finding that a qualifying relationship exists between the U.S. and foreign entities.

The petitioner claims to have a qualifying relationship with a

foreign entity, [REDACTED] of Korea. The petitioner, however, did not present any evidence of its ownership, such as a stock certificate. The petitioner only submitted its Articles of Incorporation, which state that the petitioner has the authority to issue 10,000 shares of its stock, but does not state who or what entity purchased that stock. The petitioner has not clearly established that it has a qualifying relationship with [REDACTED] Corporation of Korea because no evidence of ownership of both the U.S. and foreign entities has been submitted.

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 met that burden.

ORDER: The decision of the Associate Commissioner dated August 12, 1999, is affirmed.