

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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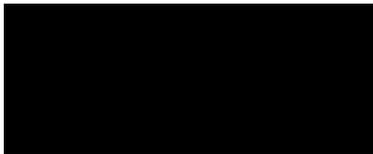
File: [REDACTED] Office: CALIFORNIA SERVICE CENTER

Date: OCT 30 2003

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)

ON BEHALF OF PETITIONER:



PUBLIC COPY

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 Citizenship and Immigration Services (CIS) 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

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 December 1998 in the State of California. It is engaged in marketing and distributing products manufactured by its parent company. It seeks to employ the beneficiary as its president. 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 petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity. The director also determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer.

On appeal, counsel for the petitioner asserts that the beneficiary is an executive, has managerial capacity, and although the beneficiary manages employees, she is not required to do so. Counsel also asserts that the petitioner is a wholly owned subsidiary of the beneficiary's overseas employer.

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. See 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the beneficiary will perform primarily executive or managerial 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.

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.

The petitioner initially indicated:

[The beneficiary] will assume overall responsibility for overseeing the management, administration and analysis research [of] the projects of the corporation of the Company, including budget control, cost accounting and management of capital investment; prepare business plans and policies of the parent company in China; determine business goals of the parent company; direct and guide the implementation of the parent company [sic] work plans; report periodically to the board and parent companies regarding work performance and progress.

The petitioner also submitted a Form ETA 750, Application for Alien Employment Certification that included the following description of the beneficiary's job duties:

Full discretionary authority and control of the company's international business and market operation. Authority to hire and fire supervisory personnel and to plan, develop and implement international business policies, standards, guidelines, procedures, goals and objectives so to [sic] obtain optimum efficiency and maximize profits.

The petitioner also submitted a chart listing employees and positions. The chart included the beneficiary's position as president, one operation manager, one operation department staff person, a sales manager, and two sales staff.

The director requested further evidence including a more detailed description of the beneficiary's duties and the petitioner's California Forms DE-6, Quarterly Wage Report for the second and third quarter of 2002.

In response, the petitioner stated that the beneficiary supervised, recruited, trained, and evaluated the petitioner's staff including the operation manager, sales manager, and an independent accountant and attorney. The petitioner indicated that the operation manager was responsible for managing the ocean and inland shipping, custom

clearance, ocean freight searching, administration of the operation department, and managing the operations support staff. The petitioner indicated that the sales manager was responsible for overseeing sales, analyzing market prices, generating sales and marketing reports, developing sales promotions, supervising and training sales staff, and setting sales targets.

The petitioner also stated that the beneficiary was responsible for developing and supervising all marketing strategies, sales promotions, participation in trade fairs and advertising, managing all administrative marketing, shipping and packing functions and staff, conducting market research, analysis and providing feedback to the overseas factory, as well as, serving as liaison with the overseas factory on production schedules and inventory control and management. In addition, the petitioner indicated that the beneficiary would maintain inventory control, oversee the financial administration of the company, prepare business plans and policies, prepare reports to set goals for the parent, direct and guide the implementation of the parent company's work plans, and report to the board of the parent company.

The petitioner provided a revised organizational chart showing the beneficiary as president, an operation manager over one operation staff person, and a sales manager over one salesperson. The petitioner also provided its California Form DE-6 for the third quarter of 2002. The California Form DE-6 showed that the petitioner employed individuals in the positions identified on the revised organizational chart as president, operation manager, sales manager, operation staff member, and salesperson. The California Form DE-6 also showed the employment of two other individuals in the positions depicted on the original organizational chart as sales manager and a second sales staff member.

The director determined that the petitioner did not have a reasonable need for an executive. The director also determined that the petitioner's job description for the beneficiary did not describe a position that was primarily managerial or executive. The director determined that the petitioner employed the beneficiary, two managers and two part-time employees. The director concluded that it was reasonable to believe that with the petitioner's organizational structure the beneficiary would perform non-qualifying duties. The director noted that the individuals holding the position of "manager" were not managing professional employees. The director concluded that these "managers" were not managers for immigration purposes; thus, the beneficiary would not be supervising subordinate managers or professional employees. The director finally determined that the petitioner had not demonstrated that the beneficiary would be a functional manager.

On appeal, counsel asserts the beneficiary has managerial authority over the company's operations, and its supervisory, professional, and support staff. Counsel asserts that the positions of operations manager and sales manager should be considered

managerial and professional positions. Counsel references the U.S. Department of Labor's *Dictionary of Occupational Titles* in support of this assertion. Counsel asserts that, even if the operation and sales manager positions are not managerial or professional positions, both positions are supervisory positions. Counsel further asserts that the beneficiary manages an essential function, as the beneficiary is responsible for overseeing the operations of the company and developing and implementing company guidelines and policies. Finally, counsel maintains that the director ignored the reality of a small business and failed to provide reasoning for his conclusion that the beneficiary would be participating in non-supervisory tasks. Counsel also cites several unpublished decisions to support the assertions made.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The petitioner must establish that the facts of the instant petition sufficiently convey an understanding of the beneficiary's duties coupled with substantiating documentary evidence that the beneficiary's assignment is primarily executive or managerial.

In this matter, it appears that the petitioner is claiming that the beneficiary is engaged both in managerial duties under section 101(a)(44)(A) of the Act and in executive duties under section 101(a)(44)(B) of the Act. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Instead, a petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

The petitioner's initial description of the beneficiary's duties does not sufficiently detail the beneficiary's duties. The duties are more indicative of an individual who is performing the services of an agent for the claimed parent company, rather than performing in a position that is primarily managerial or executive. The petitioner's description of the beneficiary's duties on its Form ETA 750 is general and does not contribute to an understanding of the beneficiary's actual duties.

The petitioner's response to the director's request for evidence focussed on two disparate areas of the beneficiary's responsibilities. The petitioner first noted the beneficiary's supervision of other staff and an outside accountant and attorney. The petitioner indicates that the beneficiary manages an operation manager and sales manager who in turn supervise other staff. The petitioner's California Form DE-6 substantiates that the petitioner employs five full-time workers and one part-time worker in addition to the beneficiary. However, the two organizational charts provide conflicting and unclear depictions of the duties each employee

fulfills. For instance, it appears two of the beneficiary's subordinates hold the position of sales manager and the petitioner has one part-time sales associate. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

In addition to the unclear duties of the petitioner's sales staff, the record does not establish that the individuals identified as managers spend the majority of their time managing or supervising subordinate staff. Instead, the individuals labeled as managers appear to be responsible for performing the day-to-day tasks of shipping, custom clearance, and developing sales by analyzing market prices and promoting the product. Their duties indicate that each of the individuals with managerial titles may be senior staff but not to the extent that the "managers'" primary assignment is to supervise subordinates.

The second facet of the beneficiary's duties relates to the beneficiary's supervision of particular tasks such as marketing strategies, sales promotions, participation in trade fairs and advertising, administrative marketing, shipping and packing functions. The petitioner's operations staff and sales staff performs many of the day-to-day activities of their respective departments leaving the beneficiary free to focus on supervising the tasks and the staff carrying out the duties. However, a managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The description of the beneficiary's duties is insufficiently comprehensive to conclude that the beneficiary's duties extend beyond that of a first-line supervisor.

Further, the beneficiary herself appears to conduct market research, maintain inventory control, implement the overseas company's work plans, and prepare reports setting goals for the overseas company. It is not possible to discern whether these duties are primarily managerial or executive duties or whether the beneficiary is providing services to the petitioner and the overseas company. 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). Finally, the only documentary evidence of the beneficiary's daily activities are invoices which she signed. Signing invoices is indicative of an individual carrying out routine operational functions of the petitioner.

Counsel's assertion that the beneficiary has managerial authority over the company's operations, and its supervisory, professional,

and support staff is not persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As stated above, the record does not support a conclusion that the beneficiary's primary duty is to manage the petitioner's operations but is more indicative of an individual performing the function of a first-line supervisor as well as providing some services directly to the petitioner. 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).

Counsel's assertion that the positions of operations manager and sales manager should be considered managerial and professional positions is also not persuasive. At most, the descriptions of duties for the two positions demonstrate that the jobs require experience in carrying out technical and sales functions. Also as stated previously, the descriptions are indicative of individuals performing operational functions instead of managerial or professional functions. Further as stated previously, the petitioner has not provided sufficient evidence to establish that either of the positions are primarily supervisory positions.

Counsel's assertion that the beneficiary manages an essential function by being responsible for overseeing the operations of the company is not persuasive. To allow the broad application of the term "essential function" to include all individuals who head organizations would render the term meaningless. The term "essential function" applies generally when a beneficiary does not supervise or control a petitioner's staff but instead is primarily responsible for managing a function. A petitioner that claims a beneficiary is managing an essential function, must identify the function with specificity, articulate the essential nature of the function, as well as, establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive description of the beneficiary's duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Counsel's assertion that the director ignored the reality of a small business and failed to provide reasoning for his conclusion that the beneficiary is participating in non-supervisory tasks is persuasive in part. The director did not clearly set out the basis for his determination that the beneficiary was participating in non-supervisory tasks. The director did not reference the portions of the petitioner's description that were unclear regarding the nature of the beneficiary's duties or that indicated the

beneficiary was providing services to the petitioner. Nevertheless, as more completely discussed above, the petitioner did not provide substantiating evidence of the beneficiary's managerial or executive capacity. The petitioner did not provide evidence of how the beneficiary allocated her time among providing services to the organization, providing the services as a first-line supervisor of non-professional employees, and acting as an agent on behalf of the overseas entity. In sum, the record does not contain sufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non-qualifying duties.

Counsel's citation to unpublished decisions is not persuasive. Unpublished decisions are not binding on CIS in its administration of the Act. See 8 C.F.R. § 103.3(c). The record does not establish that the nature of the petitioner's business necessarily requires an executive or manager or that the beneficiary is primarily providing an executive or managerial service as defined by immigration regulations.

The second issue in this proceeding is whether the petitioner has sufficiently established a qualifying relationship with the beneficiary's overseas employer. See 8 C.F.R. § 204.5(j)(2).

The petitioner claims that it is a wholly owned subsidiary of a Chinese entity. The director found two deficiencies in the record regarding this claim. First, the director noted that the petitioner's minutes of its organizational meeting indicated that the consideration for the petitioner's one million shares was set at \$1,000,000. The minutes also stated "the value per share for purposes of this issuance shall be fixed at \$1.00." The director, referencing the petitioner's Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return and wire transfer provided by the petitioner, determined that the overseas entity had only partially paid for the issuance of the petitioner's outstanding shares. The second deficiency is also contained in the petitioner's IRS Forms 1120, on Schedule K, Line 4. The petitioner indicated that the petitioning corporation is not a subsidiary in an affiliated group or parent-subsidiary relationship.

On appeal, counsel for the petitioner asserts that the petitioner does not claim that the value of each of its share is set at \$1.00. Counsel further asserts that even if the overseas entity had purchased only a portion of authorized stock the overseas entity is the sole shareholder of the petitioner.

Counsel's assertions are not persuasive. First, the minutes of the petitioner's organizational set the value of each share of the petitioner's stock at \$1.00. Counsel offers no explanation or evidence for his assertion that the petitioner never made such a claim. Second, the record does not contain information that partial consideration for the petitioner's shares is sufficient to establish ownership in those shares. The record lacks a purchase agreement or other evidence that partial consideration for the purchase of stock vests ownership of the stock in the purchaser. Third, counsel does not address the petitioner's lack of acknowledgement on Forms 1120 of a parent-subsidiary relationship. Counsel's assertions on appeal are not sufficient to overcome the director's determination on this issue.

Beyond the decision of the director, the petitioner has not sufficiently established the managerial or executive capacity of the beneficiary for the overseas entity for one year prior to entering the United States as a non-immigrant. See 8 C.F.R. § 204.5(j)(3)(i) for required evidence to establish eligibility for this visa classification. The description of the beneficiary's duties for the overseas entity does not provide sufficient information to conclude that the beneficiary primarily performed in a managerial or executive capacity. Instead, the beneficiary apparently provided operational or first-line supervisory services to the overseas entity. See *Matter of Church Scientology International, supra*. For this additional reason the petition will not 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.