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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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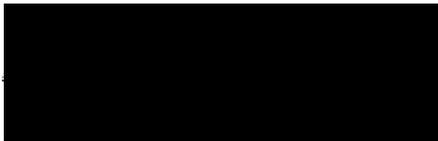
File: [Redacted] Office: CALIFORNIA SERVICE CENTER

Date: 11 APR 2002

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:



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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner was incorporated in March of 1988 in the State of California and claims to be a subsidiary of China Everbest Machinery Enterprises Co., Ltd. The petitioner is engaged in the business of import and export of equipment, machinery and technologies. It seeks to employ the beneficiary as its marketing 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 petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel submits a statement and additional documents for consideration.

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.

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

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 described the beneficiary's skills and prospective duties in a letter accompanying the petition as follows:

With a bachelor's degree in mechanical engineering attained from a reputable university in China, years of professional training in English, and three years of work experience in our China holding company as its import manager leading overseas purchasing and market development, [the beneficiary] has surpassed all his colleagues in marketing and marketing management in the United States. As a result of [the beneficiary's] expertise, our California subsidiary has been able to establish a branch office in Beijing, which provides timely technical support to Chinese customers and streamlines import-export functions by working closely with the California corporation. More importantly, [the beneficiary] has contributed significantly to establishing another subsidiary (KHK Diamond Products Inc.) in California to handle certain specific lines of mechanical products.

[The beneficiary] co-chairs as President of KHK Diamond Products Inc. which hires only local workers, in addition to managing the marketing function of our California subsidiary. [The beneficiary] now directly and indirectly supervises twenty-one U.S. workers, including workers on salary and on commission, and professionals. [The beneficiary's] duties in the U.S. include setting marketing policies and making fundamental business decisions, setting guidelines for products support and product return, authorizing contracts and credit terms, hiring and dismissing sales and operational managers, authorizing and terminating sales agency/distribution agreement [sic]. [The beneficiary's] duties constitute the bulk part [sic] of the managerial duties of the entire organization.

The petitioner also submitted an organizational chart showing the beneficiary as CEO of the petitioner. The chart also indicated that the beneficiary supervised a salesperson, an accountant and four individuals employed in the Beijing office in his CEO position. The chart also placed the beneficiary in the position of president of another company called KHK Diamond Products, Inc. (KHK). In the position of president of KHK, the beneficiary

apparently had authority over the same individual identified as a salesperson for the petitioner but now called a sales manager for KHK. The chart also indicated the beneficiary in his position for KHK supervised one other individual and seventeen sales representatives. The petitioner asserted that KHK was its subsidiary.

The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity and denied the petition.

On appeal, counsel submits an organizational chart revised as of May 5, 2000. The revised chart places the beneficiary in the position of chief financial officer and director of operations and marketing. The chart indicates that the import manager and the export manager report to the beneficiary. The export manager is located in Beijing and apparently works with three individuals. The import manager communicates with six commissioned sales groups. Each group is labeled as containing a supervisor though three of the "sales groups" employ only one individual. The import manager is also included as one of the "sales groups." Counsel also submits a description of the beneficiary's duties as follows:

CFO/Operation/Marketing Director

Being an officer (chief financial officer) and member of the Board of Directors, set company goals, policies and organizational planning with other member(s) of the Board; review all business reports and activities to determine and recommend for the reasonableness of budgeting and expenditures

Being the general operation/marketing director, set up goals, guidelines, branches/sub-companies and schedules for business development; hire all departmental (e.g., import sale department and export sale department currently) managers and sale's supervisors, and authorize all employment contracts; determine commission structure for all sales and sales supervisors; approve credit extension to customers; approve and participate in negotiations of major transactions (transactions involving substantial amount); authorize settlement of business disputes; chair as president for certain branches/subsidiaries of the company

Counsel asserts that based on the evidence submitted that the beneficiary supervises about twenty subordinates, including sales managers and supervisors. Counsel also asserts that the beneficiary manages two essential functions, marketing of technical products and financial operation.

On review of the complete record, the petitioner has not provided sufficient information to demonstrate that the beneficiary will be directing the management of the organization or a major component or function of the organization. There is also insufficient information in the record to conclude that the beneficiary will be managing the organization or a department, subdivision, function, or component of the organization. The petitioner provides no information describing the day-to-day activities of the beneficiary. The description of the beneficiary's job duties is vague and general in nature. Counsel's assertions that, "the beneficiary is the decision-maker in all business development and financial operation activities" is not supported by the record. 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). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

In addition, the two organizational charts submitted are inconsistent and the chart submitted on appeal was prepared more than a year after the petition was filed. 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). Further, 8 C.F.R. 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." The first chart submitted indicates that the beneficiary is a first line supervisor of non-professional employees. There is no supporting evidence that the accountant included in the organizational chart was or is a full-time employee. There is also no supporting documentation that the beneficiary actually supervised and controlled the four individuals located in the Beijing office. It also appears from the organizational chart that the seventeen sales representatives are in direct contact with the beneficiary and are supervised only by the beneficiary. Given the lack of concrete information regarding the beneficiary's day-to-day duties, the record does not support a conclusion that the beneficiary is directing the management of the organization or managing the organization or a department or subdivision of the organization.

Further, counsel's assertions that the beneficiary is managing essential functions of the petitioner labeled the "marketing of technical products function" and the "financial operation function" has not been established. The record demonstrates that the beneficiary is primarily performing the financial operation function and the marketing of technical products function of the petitioning organization as opposed to primarily directing or

managing those functions through the work of others. As noted above, there is no supporting documentation that an accountant has been employed full-time and there are no other individuals that have been tasked with handling the finances of the petitioner. There is also insufficient evidence to conclude that the beneficiary is managing the work of other individuals associated with marketing technical products. The record is incomplete in this regard.

On review of the record, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not established a qualifying relationship between itself and the alleged parent company or between itself and its alleged subsidiary, KHK. The petitioner's tax returns for 1996 and 1997 do not indicate that the petitioner is owned primarily by a foreign entity, neither do the tax returns reflect that the petitioner owns stock in a domestic corporation. As the appeal will be dismissed for the reason stated above, this issue 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.