

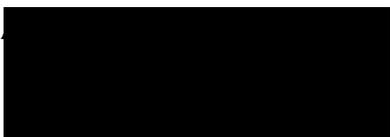


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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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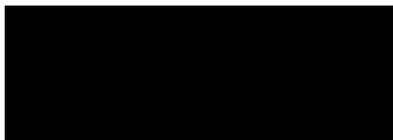


File: [Redacted] Office: TEXAS SERVICE CENTER Date: **AUG 26 2002**

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 employment-based visa petition was denied by the Director, Texas Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation engaged in investments and the import and wholesale of medical supplies. It seeks classification of 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 demonstrated that the beneficiary's job duties were primarily executive or managerial in nature. The director also determined that the petitioner had not established that the beneficiary supervised and controlled the work of other supervisory, professional or managerial employees.

On appeal, counsel for the petitioner asserts that the beneficiary is responsible for managing the operations of the company and is involved in the supervision of managerial or supervisory employees.

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.

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.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

(i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

The issue in this proceeding is whether the beneficiary will be employed in a primarily managerial or executive capacity with 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 was incorporated in the State of Texas in June of 1994. The petitioner has offered the beneficiary the position of general manager at a salary of \$30,000 per year. The petitioner initially described the beneficiary's job duties as general manager as follows:

...set up policy and develop strategy to implement directive [sic] from corporate headquarters. Direct and coordinate promotion of products to develop new markets. Analyze financial condition to determine in which reduction can be made and allocate operating budget. Review activity, operating and sales reports to make proper change in operation. Supervise, hire and fire employees.

The petitioner also included its Texas Workforce Commission

Employer's Quarterly Reports for the year 1997. Each report reflected five employees, three of whom worked all three months of each quarter and two that worked only one month of each quarter.

On December 4, 1998 the director requested clarification regarding previous I-140 petitions filed for the beneficiary. The director also requested that the petitioner provide a list of its employees, including their title, salary, brief job description and length of time with the company. The director further requested an organizational chart.

In response, the petitioner through its counsel indicated that an I-140 petition had previously been filed on behalf of the beneficiary and that it had been denied in December of 1996. The petitioner also provided a list showing the positions of including general manager (the beneficiary's position), a vice general manager/sales manager identified as [REDACTED] an office staff person, a secretary, and a salesperson identified as [REDACTED]. The petitioner noted that it had four sales representatives paid on a commission basis. The organizational chart described the same positions and indicated that the vice general manager and the office staff person reported to the beneficiary.

On January 29, 2001, the director requested additional information regarding the proposed position of the beneficiary and specifically requested a description of the beneficiary's daily duties and the percentage of time spent on those duties. The director also requested an organizational chart of the company and evidence of wages paid to its employees.

In response, the petitioner listed the beneficiary's duties as vice general manager of the [REDACTED] an office of the petitioner. The petitioner listed the beneficiary's duties for the [REDACTED] as being:

in charge of the company's import, export and trade expansion, also to understand the market and customer needs and the company's daily activity needs. [The beneficiary] is responsible for the reception of delegations of medicine circles from Liaoning, China, and other delegations from China, he should introduce Chinese delegations the American cultures and traditions and the purposes of exchange and cooperation between both countries [sic]. Introducing the latest Chinese achievements to American specialists and scholars, engaged in cooperation and exchange of science and technology between China and the U.S. recommending the businessmen in the U.S. to invest in China and to conduct loans that link up and develop the exchange between businessmen of two countries [sic].

The petitioner also provided an organizational chart for the

petitioner doing business as Texas International USA Co. The chart depicted a general manager and the beneficiary as vice general manager. Under these two positions boxed together on the chart, the petitioner listed a main office box, a sales office box, a warehouse box and a customer service box. The chart also depicted four companies as partners and "manufactories" [sic]. The petitioner also provided an assumed name certificate filed with the Texas Secretary of State showing the petitioner had assumed the name of Texas International (U.S.A.) Co. in October of 1995. Accompanying the certificate of assumed name was an "Assumed Name Records Certificate of Ownership for Unincorporated Business or Profession" that was filed with the county clerk's office of Travis County, Texas. The certificate listed the business name as Texas International (U.S.A.) Co. owned by Zhi Ming Ji.

The director determined that the beneficiary would in large part be performing the day-to-day functions of the company and would not be primarily functioning in an executive or managerial capacity. The director also determined that the petitioner had not established that the United States position involved the supervision and control of other supervisory, professional or managerial employees.

On appeal, counsel for the petitioner asserts that the beneficiary is managing the organization in general and the import/export trade function in particular through the work of others. Counsel provides a statement from the petitioner dated June 8, 2001 in support of his assertion. Petitioner's statement indicates that the sales manager and the office manager are both under the beneficiary's supervision. The petitioner also provides a description of the sales manager's duties in the letter and provides copies of documents showing that the sales manager is a contact for the company and that a [REDACTED] handles the company's shipping duties. Counsel further asserts that the beneficiary is in charge of supervising two managerial or supervisory employees. In support of this assertion, counsel notes that the sales manager directs and coordinates a staff of sales representatives, and that, the office manager also directs and supervises a secretary making both individuals managers or supervisors.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). In the initial petition, the petitioner submitted a broad position description that vaguely refers, in part, to duties such as "set[ting] up policy and develop[ing] strategy," and "direct[ing] and coordinate[ing] promotion of products," and "analyze[ing] financial condition," and "allocate[ing] operating budget." The Service is unable to determine from these statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities.

In the April 17, 2001 response to the director's second request for evidence, the petitioner states that the beneficiary's proposed position is that of vice general manager of a purported office of the petitioner rather than general manager of the petitioner. In addition to this confusing change of title and position for the beneficiary, the petitioner again provided a general and disjointed position description stating that the beneficiary was "in charge of the company's import, export and trade expansion," and was "responsible for the reception of delegations of medicine circles from Liaoning, China, and other delegations from China," and was "engaged in cooperation and exchange of science and technology between China and the U.S. recommending the businessmen in the U.S. to invest in China." The Service is unable to decipher the exact nature of the beneficiary's job duties in this new position. Moreover, if the beneficiary's position has changed, we question whether an amended petition might have been the more appropriate avenue to request the benefit of a preference visa. Regardless, the description of the beneficiary's position in front of the director was unclear and had not been adequately clarified despite the director's second request for information regarding the beneficiary's position. We find that the petitioner was put on notice that the description of the beneficiary's position was not adequate and the petitioner was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. As such, evidence submitted on appeal on this issue will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. Matter of Soriano, 19 I&N Dec. 764 (BIA 1988).

In addition, to the confusing description of the beneficiary's job description, the record contains inconsistencies that further cast doubt on the reliability of the evidence submitted by the petitioner. In the first response to the director's request for evidence, the petitioner identified the sales manager as [REDACTED] Ji and the salesman as [REDACTED]. In the second response to the director's request for evidence, the salesman describes himself as the petitioner's owner in documents filed with the Travis County clerk's office. On appeal, the salesman/owner is now a sales manager, whom counsel and the petitioner claim that the beneficiary supervises. No explanations are given to clarify the various positions accorded to this individual within the petitioning company. 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, the petitioner has not provided evidence substantiating its use of sales representatives. The petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax

Return for 2000 does not reveal that any commissions have been paid to outside contractors. Although the Form 1120 indicates that \$90,000 has been paid in salaries, these monies apparently have been paid to the petitioner's four managers and one secretary and not to outside contractors. 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).

Given the indefinite description of the beneficiary's job duties and the indiscriminate manner in which the petitioning company uses position titles, the petitioner has not established that the beneficiary is to be employed in a primarily managerial or executive position. The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's job duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are vague and indecipherable and fail to describe the actual day-to-day duties of the beneficiary. The description of the duties to be performed by the beneficiary in the proposed position 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 him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has provided inconsistent information regarding its ownership. As noted above, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Matter of Ho, supra. As the appeal is dismissed for the reason stated above, this issue is not examined further.

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, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.