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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



File: WAC 98 250 51896

Office: CALIFORNIA SERVICE CENTER

Date: 25 JAN 2004

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)

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


for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the immigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a California corporation that is engaged in the import and export of garments. It seeks to employ the beneficiary as its branch president and, therefore, endeavors to classify the beneficiary 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 director denied the petition because the petitioner failed to establish that it currently employs and would continue to employ the beneficiary in a primarily managerial or executive capacity.

On appeal, counsel submits a brief and additional evidence.

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 director denied the petition because the organizational structure of the petitioner at the time the petition was filed could not support a position where the beneficiary would devote the primary amount of his time to executing executive or managerial tasks.

On appeal, counsel submits evidence in support of his claim that the beneficiary is a multinational manager or executive of a multinational company. First, counsel submits a letter from the petitioner, which states that since the filing of the petition in December of 1999, the petitioner's gross sales have increased and it has hired two additional employees in the areas of sales and

marketing, and accounting and inventory control.¹ Second, counsel submits a new organizational chart, which shows that the petitioner now employs five (5) individuals instead of three (3) individuals. Third and finally, counsel submits a copy of the petitioner's payroll records for the period ending on March 31, 2000 to evidence that the petitioner's staff has increased in size.

Although counsel does not present a brief or an argument in rebuttal on appeal, the documents submitted by counsel indicate that he believes that the petitioner's increase in its staff and revenues since the filing of the petition should be sufficient to overcome the director's objection to the denial of the petition. The Service, however, does not concur with counsel. The lack of supporting evidence to establish the beneficiary's proposed function as an executive or manager compels the Service to affirm the director's original decision to deny the petition.

It is important to note that the merits of this case are being judged according to the organizational structure of the petitioner at the time the petition was filed on September 21, 1999. The Service focuses solely on the petitioner's operations and staffing levels as they existed at that time because 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).

Therefore, while the record reflects that the petitioner may have hired two additional individuals since the filing of the petition, the Service will not consider this increase in staff on appeal. A determination on this appeal will be made based on whether the organizational structure, at the time the petition was filed, could have supported a primarily executive or managerial position.

If the petitioner would like the Service to consider any increase in staff or additional duties of its employees, the petitioner should file a new I-140 petition so that the Service may fully consider this information.

The record reflects that at the time the petitioner filed the Form I-140 in September of 1999, it employed three individuals who were the president (beneficiary), the general manager, and the assistant.

In order to be found eligible for this immigrant visa classification as an executive, the record must clearly show that the beneficiary *primarily*:

¹ It is noted that the I-140 petition was filed on September 21, 1999, not in December of 1999 as the petitioner claims in its May 6, 2000 letter.

- (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.

See. 8 C.F.R. 204.5(j)(2).

The petitioner has failed to establish that the beneficiary currently works and will continue to work in a primarily executive role because the evidence does not support a finding that the beneficiary directs the management of the organization or a major component or function of the organization on a primary basis.

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. In the initial I-140 petition filing, the petitioner described the beneficiary's duties as follows:

As the Branch President, [REDACTED] is overseeing the new expansion of the company. [REDACTED] has discovered and is in charge of directing all facets of the operations concerning wholesale of garment products. [REDACTED] is the key personnel [sic] to lead the company to its success in its expansion oversees [sic]. He will ensure that the overall operation of the branch office will meet the standards of the parent company. [REDACTED] will act as the channel to communicate for the U.S. subsidiary and the Korean parent company.

The petitioner's description of the beneficiary's role with the company is generalized. For example, the petitioner states that the beneficiary will oversee the company's expansion; yet, fails to specify the duties that the beneficiary executes to perform this job function. Merely stating that the beneficiary "is in charge of directing" the petitioner's operations is not sufficient evidence that the beneficiary directs the management of the organization. To direct the management of a company, a beneficiary may perform duties that could be classified either as executive or non-executive in nature. By failing to list the beneficiary's specific job responsibilities and delineating those job responsibilities between executive and non-executive

functions, the petitioner does not satisfy the Service that the primary amount of the beneficiary's time as a executive is, and would be, consumed with executing executive tasks. Additionally, the petitioner fails to describe in any detail how the beneficiary will exercise wide latitude in discretionary decision-making or how those individuals who have authority over the beneficiary will provide supervision and direction to the beneficiary. Therefore, the petitioner has not met its burden of establishing that the beneficiary currently holds and would continue to hold a primarily executive role with the company.

In order to be found eligible for this immigrant visa classification as an manager, the record must clearly show that the beneficiary *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.

See. 8 C.F.R. 204.5(j)(2).

The petitioner also fails to show that the beneficiary currently functions and will continue to function primarily as a manager. The petitioner has not explained, with any degree of detail, how the beneficiary manages the petitioner through subordinate managerial, supervisory or professional employees, or manages an essential function of the petitioner.

First, the petitioner fails to present comprehensive information regarding the positions and job descriptions of its two (2) other employees. For example, the petitioner listed the job duties of its general manager as "purchase, sales, accounting and inventory control." In addition to the vague nature of these job duties,

none of the duties are managerial functions; they are duties that comprise the day-to-day services that the petitioner provides. The petitioner presents an organizational structure, which indicates that the beneficiary is merely a first-line supervisor to non-professional employees.

Second, the petitioner does not state the essential function that the beneficiary allegedly manages. Although the petitioner believes that the beneficiary's job in expanding the company's operations is essential, the petitioner has not specifically outlined the job duties that the beneficiary must execute in order to execute this rather vague job duty. Accordingly, the Service concludes that there is insufficient evidence to find that the beneficiary currently works, and will continue to work, in a primarily managerial capacity.

It appears that in this case, the director was correct in concluding that the organizational structure of the petitioner as of the date of filing the petition (September of 1999) could not support a primarily executive or managerial position. As previously stated, if the petitioner's staffing levels and business operations have changed since the initial petition filing, the petitioner may file a new I-140 petition so that the Service may fully consider any new evidence.

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 appeal is dismissed.