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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.
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Washington, D.C. 20536

File: WAC 99 193 50163

Office: CALIFORNIA SERVICE CENTER

Date: **MAY 07 2002**

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

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 is a corporation incorporated in Texas in 1982. The petitioner is involved in establishing sales and distribution of cable television equipment through its Chinese subsidiary. It seeks to employ the beneficiary as its vice-president in charge of Chinese operations and business development. 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.

On appeal, the petitioner contends that the Service's denial is erroneous as the beneficiary is a high-level executive and manager for the petitioner.

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.

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 petitioner was incorporated in Texas in 1982. Its initial corporate headquarters were also located in Texas. In 1991 the petitioner established an office in Beijing, China. In 1992 the shareholders of the petitioner exchanged all their shares in the petitioner for shares in another Texas company (Rimports, Inc.) resulting in the petitioner becoming a wholly-owned subsidiary of this "holding company." Also in 1992 the petitioner established a subsidiary company located in China. At some point the petitioner moved its corporate headquarters to Sacramento, California.

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 submitted a letter with the petition outlining the beneficiary's duties as follows:

1. U.S. vendors management including assurance of compliance with the Chinese technical standards and market requirements;
2. Training of U.S. employees for serving the PRC [Chinese] market;
3. Coordination of the Beijing office activities with those of our corporate headquarters in Sacramento, California;
4. Study and analysis of new U.S. technology for sale and application in the PRC [China]; and
5. Business planning, development, and evaluation (specifically, development of the petitioner's export strategies); [sic]

The petitioner also indicated that since June of 1996 the beneficiary had only been in the United States from November 8 to November 14, 1996, and April 7 to April 12, 1997. The petitioner noted that the beneficiary's most recent entry into the United States was in June of 1999.

In a letter dated May 26, 1999 signed on behalf of the petitioner, the beneficiary was identified as the general manager of the petitioner's liaison office in China since 1992 and that the beneficiary, "manages this office and all of its daily activities." The petitioner further identified the beneficiary's duties for its liaison office as overseeing and managing the sales staff and the nationwide marketing for the petitioner's subsidiary in China. The petitioner also noted that the beneficiary, "is responsible for the operations of [the subsidiary] in China, including accounting, human resources, finance, sales, communication with the US office of [the petitioner], vendor relations, and new business development." A duplicate letter but signed on behalf of the petitioner's Chinese subsidiary was also submitted.

The director requested additional evidence including a specific day-to-day description of the duties the beneficiary had performed. The director also requested a list of all the employees under the beneficiary's supervision as well as all employees of the petitioner by name and job title. The director further requested the source of remuneration of all employees and whether the employees were on salary or were paid by commission. The director also requested California Employment Development Department (EDD) Forms DE-6, Quarterly Wage Reports for all employees in 1999.

In response, the petitioner emphasized that the beneficiary had been in charge of the operations of the petitioner and its Chinese subsidiary since 1991. The petitioner stated that the beneficiary "establishes sales goals for the company and each sales person,"

and "interviews and evaluates each candidate for positions in the [the Chinese subsidiary]," and "communicates with Motorola's offices in China," and establishes "inventory levels." The petitioner also noted that the beneficiary had been assigned the goal of expanding NMC's territories in China. The petitioner concluded by providing the following description of the beneficiary's duties as general manager of the petitioner's operations in China:

Negotiating and signing sales contracts with customers, overseeing the sales and administrative staff, coordinating the technical personnel and equipment repair, managing financial transactions and decisions, ensuring that the Company adheres to all legal requirements, coordinating the importation of equipment from the US into China, and meeting with Motorola to coordinate NMC's sales policy's with Motorola's.

The petitioner also provided a lengthy description of the beneficiary's duties as general manager of the petitioner's Chinese subsidiary.

The petitioner concluded with a description of the duties of its president and the statement that the beneficiary will take over most or all of the day-to-day activities of the president of the petitioner in the United States. The listed duties of the president included vendor relations, new product development, management of the company's finances, legal issues, corporate strategy and coordination with the Chinese office. The petitioner also noted that the beneficiary would be managing its export manager. The petitioner also stated that the president and the export manager presently are responsible for its business in the US and that the petitioner requires the beneficiary to be in the United States to take over the responsibilities of its current president.

The petitioner also provided the petitioner's organizational chart as of October 24, 2000 listing a president, the vice president (the beneficiary) and an export manager. The petitioner also submitted its California DE-6 Forms for 1999 showing two employees (the president and the export manager) for the first quarter and the three employees (president, vice-president and export manager) listed on the organizational chart for the remaining three quarters.

The director determined that the beneficiary was a first-line supervisor who was in charge of one non-professional employee. The director concluded that the petitioner had not established that the beneficiary had been or would be employed in a primarily executive or managerial capacity, or that the petitioning organization required an executive or managerial position.

On appeal, counsel for the petitioner asserts that the Service misunderstands the beneficiary's executive duties for both the petitioner and its Chinese subsidiary. Counsel also asserts that the Service is mistaken when it determines that the petitioner does not require professional employees and does not require an executive or managerial position. Counsel further asserts that the Service misunderstands the petitioner's organizational charts. Counsel finally asserts that the Service has failed to consider the prior approvals of two L-1A petitions for the beneficiary.

Upon review 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, "U.S. vendors management," and "coordination of the Beijing office activities with those of our corporate headquarters," and "study and analysis of new U.S. technology," and finally "business planning, development, and evaluation (specifically, development of the petitioner's export strategies)." This job description is too vague and general to convey an understanding of what the beneficiary is or will be doing on a daily basis.

In response to the director's request for additional evidence, the petitioner provided a job description that was more indicative of an individual providing necessary services to the company rather than managing or directing the organization through the work of others. For example, the beneficiary not only established sales goals for the company but also did so for each sales person, the beneficiary also was the person interviewing and evaluating candidates for positions and the person that established inventory levels. The beneficiary was also responsible for expanding the territory of the petitioner in China. Furthermore, the petitioner's description of the beneficiary's duties was clearly for the petitioner's overseas office and subsidiary. Although these descriptions are helpful when analyzing the petitioner's duties while abroad, the descriptions do not support a finding that the beneficiary is or will be acting as a manager or an executive for the petitioner's United States office. The record does not support counsel's assertion that the Service misunderstood the beneficiary's duties for the petitioner's overseas office and its overseas subsidiary and the organizational charts provided by the petitioner.

Counsel's assertion that the petitioner requires professional employees and an executive or managerial position is not supported in the record. The record contains little information about the petitioner's United States office. In the response to the director's request for evidence the petitioner did state that, "[u]ntil the present, [the petitioner] in the United States functioned under the supervision of its current president and largest shareholder." The organizational chart provided by the

petitioner depicts a president, a vice-president (the beneficiary) and an export manager employed by the petitioner's United States office. The description of the petitioner's current president's duties is vague and general and also does not convey an understanding of the president's daily activities. The assertion that the beneficiary will be taking over many of these duties is not helpful in making a determination that the beneficiary will be performing in a managerial or executive capacity. In addition to the general description of the president's duties, the petitioner has not adequately shown that the job description for vice-president, the beneficiary's proposed position, now encompasses the outlined duties of the president. The petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45,49 (Comm. 1971).

In addition, the organizational chart and the California EDD DE-6 Forms for 1999 show three employees, all in positions identified as managerial or executive in nature. The record does not contain evidence of any support staff that will perform the actual day-to-day, non-managerial operations of the company. Counsel's assertion that the petitioner may use the employees of an overseas subsidiary to establish that the day-to-day tasks of the petitioner's United States office are being met is not persuasive. The classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager is for an individual managing or directing the management of a United States entity through its employees in the United States. To allow otherwise would defeat the necessity of having a United States organization at all.

Counsel's final assertion that the Service has failed to consider the prior approvals of two L-1A petitions for the beneficiary is without merit. The Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g., Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988). Clearly with the petitioner's own admission that the beneficiary has not been in the United States for most of the time the L-1A classification was valid, and thus could not be managing or directing the management of the petitioner's United States office, the previous approvals were erroneous. Further, the Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the rulings of service centers that are contradictory. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000).

Beyond the decision of the director, the petitioner appears to have been established only to serve as an agent or office in the United States.

8 C.F.R. 214.2(1)(1)(ii)(H) states:

Doing Business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner's business appears to depend on the actual work and operations of its Chinese office and Chinese subsidiary. The record contains no evidence of transactions between the petitioner's United States office and other entities. Although the petitioner identifies an individual in its United States office as an export manager, there are no transactions documented to support a finding that the United States office is providing goods or services in a regular, systematic and continuous fashion.

As the appeal is dismissed for the reason stated above, this issue is not 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.