

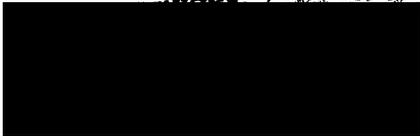


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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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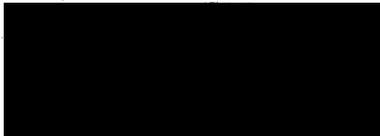
04 SEP 2002

File: WAC 99 245 51691 Office: CALIFORNIA SERVICE CENTER Date:

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, California 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 import, export and wholesale of industrial fabrics. 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 established that the beneficiary had been or would be employed in a primarily executive or managerial capacity.

On appeal, the petitioner asserts that it has demonstrated that the beneficiary is qualified for the classification sought.

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 was incorporated in the State of California in September of 1996. The petition was filed in September of 1999. The petitioner claims to be 70 percent owned by a Korean company with the beneficiary owning the remaining 30 percent. The petitioner confirms that it employs three individuals, the beneficiary as a branch manager or president, a vice president and one other individual.

The petitioner identified the beneficiary as its branch manager on the petition and indicated that he would be employed at a salary of \$80,000 per year. The beneficiary did not provide further detail with the initial petition regarding the beneficiary's proposed duties.

The petitioner further included copies of its Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return for the years 1997 and 1998. The IRS Form 1120 for 1997 reflected gross receipts in the amount of \$1,429,659, compensation paid to officers in the amount of \$74,000 and salaries paid in the amount of \$69,500. The IRS Form 1120 for 1998 reflected gross receipts in the amount of \$1,936,434, compensation paid to officers in the amount of \$166,500 and salaries paid in the amount of \$23,900. The 1997 IRS 1120 indicated that the beneficiary owned 51 percent of the petitioner's common stock. The 1998 IRS 1120 indicated that the beneficiary continued to own 51 percent of the petitioner's common stock and that the vice-president owned 49 percent of the petitioner's common stock.

The director requested further details on the beneficiary's duties in the United States.

In response the petitioner described the beneficiary's duties as follows:

[The beneficiary] has been the President of the U.S. subsidiary for the past 4 years from November 1996 to present. President is the highest position in [sic] subsidiary. He is essentially unsupervised, except by the parent company's board of directors, and his duties entail directing the overall management and control of the enterprise, establishing policy and goals, all exercising wide latitude in discretionary decision-making, subject only to supervision by the parent company's Board of Directors [sic]. In addition to the foregoing executive duties, the beneficiary is also responsible for managing and controlling the work of other enterprise officers, managers, and supervisors, including hiring, firing, promoting, and demoting personnel. He plans and formulates aspects of research

and development projects, and developing long range goals and objectives. Finally, he exercises complete discretion over the enterprise's day-to-day operations. The beneficiary possess [sic] the skills requisite for this position as can be seen from the previous recount [sic] of how he successfully has served the parent enterprise in the former position of President.

[The beneficiary] is a key member in implementing his expert [sic] in trading and marketing through the establishment and organization. He is intimately familiar with both companies' operations, and thus intimately qualified to assume the position offered in the U.S. subsidiary.

The petitioner confirmed that it employed only three individuals including the beneficiary.

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

On appeal, the petitioner provided the following description of duties for the beneficiary in the United States:

[The beneficiary] is responsible for financing part of transactions which is L/C (Letter of Credit) [sic], contacting manufacturer in Korea for special orders. If the contract is confirmed by the buyer, [the beneficiary] will contact the bank to open L/C. The petitioner participates in approximately 80 to 100 containers per year. [The beneficiary] is the final decision maker [sic] in most important matters for the petitioner. He makes decisions such as, margin ratio, order volume, shipment date and sales price. Those are the most important decisions to make in the petitioner.

The petitioner also stated that it was planning to hire additional sales representatives as sales increased. The petitioner asserts that it has demonstrated that the beneficiary is qualified and that the qualifications have been demonstrated with the enclosures.

Upon review, the petitioner's evidence and its assertion 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). Initially, the petitioner did not provide a position description as required under section 203(b)(1)(C) of the Act. In the response to the request for further information regarding the beneficiary's duties in the United States, the petitioner paraphrased certain elements of the statutory definition of executive and manager without describing the actual duties of

beneficiary with respect to the daily operations. The only non-statutory phrases in the description contain vague references to planning and formulating aspects of research and development projects and implementing his expertise in trading and marketing. 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. The petitioner's attempt on appeal to clarify the beneficiary's duties also fails to convey an understanding of what the beneficiary does in the daily operation of the petitioner. The petitioner explains that the beneficiary "is responsible for financing part of transactions," and "contacting manufacturer in Korea for special orders," and "make[ing] decisions such as, margin ratio, order volume, shipment date and sales price." These job duties are more indicative of an individual primarily performing the basic operations of the 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).

In addition, the record reveals that at the time of filing the petition, the petitioner did not have a staff sufficient to relieve the beneficiary from performing non-qualifying duties. The organizational chart of the petitioner reveals that the petitioner employs a president, a vice-president, and one other individual. The petitioner thus employs two individuals with position titles that are executive in nature, leaving only one employee to actually conduct the day-to-day business of the enterprise. The petitioner's plan to hire additional salespeople is not relevant to the adjudication at hand. 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). The record does not sufficiently demonstrate that the majority of the beneficiary's actual daily activities have been and will be managerial or executive in nature rather than primarily performing the services necessary to continue the operation of the company.

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 duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are vague and fail to describe the actual day-to-day duties of the beneficiary. In addition, a portion of the position description serves to merely paraphrase the statutory definitions of managerial and executive capacity. 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 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 an executive or 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 not established that a qualifying relationship exists between the petitioner and a foreign company. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and a foreign entity, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas company.

The petitioner's IRS Forms 1120, Schedule E Line 1 for the years 1996, 1997, 1998 and 1999 all reflect that the beneficiary owns 51 percent of the petitioner. The petitioner's stock certificate number 1 is issued to Newman Industry Development Co., Ltd., a Korean company in the amount of 7000 shares. The petitioner's stock certificate number 2 is issued to Chong Koo Kang in the amount of 3000 shares. The petitioner's Articles of Incorporation indicate that it is authorized to issue 10,000 shares of common stock. The petitioner's 1999 IRS Form 1120 at Schedule L, Line 22(b) indicates \$27,000 in common stock have been issued. The record is insufficient to establish the ownership of the petitioning company. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, 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). The petitioner has failed to provide consistent evidence to show that the petitioner is the same employer, a subsidiary or affiliate of a foreign entity. The petitioner has failed to establish that a qualifying relationship exists between the petitioner and a foreign entity. For this additional reason the petition may not be approved.

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.