



BH

U.S. Department of Justice
Immigration and Naturalization Service

Identifying data deleted to
prevent clearly unwarranted
invasion of personal
privacy."/

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC 01 008 50511 Office: CALIFORNIA SERVICE CENTER Date: 12 SEP 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:
[Redacted]

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 organized in the state of California and is engaged in international trade and marketing. The petitioner seeks to employ the beneficiary as its president. Accordingly, 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 an executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the Service's decision was arbitrary and capricious.

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. 8 C.F.R. 204.5(j)(5).

The issue in this proceeding is whether the beneficiary has been and will be performing managerial or executive duties.

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.

In support of the original petition, the petitioner submitted an unendorsed Form ETA 750, Application for Alien Employment Certification, with a description of the beneficiary's job duties. The petitioner described the beneficiary's proposed duties as follows:

To manages [sic] accounting, sales, planning, general affairs and importing synthetic rubbers and managing by object for volume enlargement. Negotiating the pricing with customers. Market development & sales promotion and collecting informations [sic] etc. Overseas [sic] business for marketing, negotiating and collecting information of market price trend of products. Attending seminars for introducing products and exchanging informations [sic]. Managing by object for volume enlargement and supporting its technical services.

The director requested a more detailed description of the beneficiary's duties in the United States. The director specifically requested a list of all the employees under the beneficiary's direction.

In response, the petitioner provided its letter of appointment of the beneficiary to the position of president and stated in the letter that the beneficiary's major responsibilities were management of the corporation, the international trade of the company's products, and marketing. The beneficiary also provided a description of his duties and the time spent on those duties as follows:

Visiting customers in the U.S. for sales promotion/new market development of Synthetic rubbers and Thermoplastic elastomers (50%)
 Importing as importer of records and distributing in the market
 Managing customers at field
 Planning/Reporting the sales/market information
 Developing new market with our new products
 Analyzing field movement relates to sales
 Market survey
 Supporting our new overseas projects (30%)
 Maintaining/Supervising Corporation (20%)

The petitioner also provided a letter from the president of the petitioner's parent company stating that the beneficiary was employed as the petitioner's president and that his responsibilities included:

Overall U.S. operation of [the petitioner] according to the company policies and Board directives. He will be planning and reporting to [the parent company] . . .

in setting company policies and objectives and will be responsible for implementing those policies to fulfill the objectives. His responsibilities also include reviewing status reports to determine progress of the operation in accordance with its policies and objectives, coordinating activities between [the petitioner] and its parent company . . . to achieve maximum efficiency, and supervising staffs. He will have the full authority to hire and to terminate employees subject to [the parent company's] president's approval.

The beneficiary as president of the petitioner, also noted that there were two employees under his direction. The petitioner also provided California Form DE-6, Employment Development Department (EDD), Quarterly Wage Reports for the year 2000. The Forms DE-6 reflected that the petitioner employed the beneficiary and one other individual.

The director determined that the record did not establish that the majority of the beneficiary's duties would be primarily directing the management of the organization. The director indicated that it appeared the beneficiary was performing the day-to-day operations of the company. The director concluded that the petitioner had not established that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the Service's decision was arbitrary and capricious in light of the evidence in the record. Counsel also asserts that the beneficiary directs the management of a major function of the petitioner by overseeing the trading of synthetic rubbers and thermoplastic elastomers with its parent company in Korea. Counsel further asserts that the beneficiary also "manages the warehouse and the secondary office, including management personnel who is responsible for overseeing the sales staff for [the petitioner]."

Counsel also submits a letter signed by the beneficiary as president of the petitioner and the president of the parent company dated September 5, 2001. The letter outlines several areas of responsibilities for the beneficiary including, "Draft and Performance of Projects for Long-term view," "Grove for an advance to overseas market," "Conception of Future plans," and "Establish the Goals and Policies of the organization for an aggressive marketing." The letter also listed the responsibilities of "Decision of Pricing and Policy," "Market report and overall sales report to the parent company," and "Compilation of the budgets, handling of legal claims/disputes that will arise and general operation of corporation."

Upon review, counsel's assertions and petitioner's statement 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 managing the accounting, sales, and planning, and negotiating with customers, and market development, and sales promotion, and collecting information of market price trends. In the response to the request for evidence the petitioner provided a breakdown of the beneficiary's duties to include 50 percent of his time spent visiting customers in the United States. The petitioner also noted that 30 percent of the beneficiary's time was spent supporting new overseas projects but did not define the projects. The petitioner stated that only 20 percent of the beneficiary's time had been or would be spent maintaining and supervising the corporation.

The petitioner's description of the beneficiary's duties is indicative of an individual marketing the petitioner's product, engaging in the sale of that product, and importing and distributing the product. 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). The petitioner confirms that at least 50 percent of the beneficiary's time is spent performing these services for the company. The petitioner does not provide a comprehensive description of the support the beneficiary provides to the proposed overseas projects. The Service is unable to determine from this brief statement exactly how the beneficiary will be spending 30 percent of his time. The petitioner confirms that the beneficiary spends a minimal amount of time (20 percent) engaged in maintaining and supervising the company. It is also not possible to determine from this overly broad statement if the beneficiary is actually engaging in executive or managerial duties with respect to maintaining and supervising the company or whether the beneficiary is performing the functions necessary to manage the company.

On appeal, neither counsel nor the petitioner further enlighten the Service regarding the beneficiary's daily activities on appeal. Counsel's assertion that the beneficiary directs the management of a major function of the petitioner 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). Counsel's assertion that the beneficiary also manages a warehouse and a secondary office is also not substantiated. We note petitioner's submission on appeal of an additional outline of the beneficiary's duties that contains references to a warehouse and other offices. However,

the record does not contain information that substantiates the nature of the petitioner's involvement or relationship to either a warehouse or another office. Moreover, the outline does not clearly set out the beneficiary's duties but rather provides headings and graphs that are not presented in an understandable format. Finally, where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal 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).

The record contains insufficient evidence to demonstrate 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. The description of the duties to be performed by the beneficiary does not demonstrate 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 will manage 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 title. The petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has provided only a brief description of the beneficiary's duties for the parent company abroad. This description also lacks detail and is more indicative of an individual performing basic functions for the parent company. The petitioner does not substantiate the managerial or executive nature of the overseas position. As the petition 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.