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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 98 099 52618 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:



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 immigrant visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal is dismissed.

The petitioner claims to be engaged primarily in the procurement, purchase, and export of various kinds of commercial and industrial products. The petitioner seeks to employ the beneficiary in the United States as its general manager. Accordingly, it seeks 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 it was doing business in the United States. The director also determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial capacity.

On appeal, counsel for the petitioner asserts that the petitioner is engaged in business in the United States and is not merely an agent. Counsel also asserts that beneficiary's duties are primarily managerial and executive in nature.

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.

The United States petitioner is a California company incorporated in February of 1996.<sup>1</sup> At the time of filing, the petitioner claimed a gross annual income of \$424,705 and a net loss of \$6,636. The petitioner claimed to employ four individuals. The petitioner intends to employ the beneficiary as its general manager at a salary of \$30,000 per annum.

The first issue in this proceeding is whether the petitioner has been doing business in a regular, systematic, and continuous manner.

8 C.F.R. 204.5(j)(2) states, in pertinent part:

*Doing business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

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

(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:

\* \* \*

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

Upon review of the initial petition, the director requested clarification of certain evidence submitted by the petitioner. The director noted that an individual not listed as an employee of the petitioner signed purchase orders that were submitted by the petitioner to show that it was doing business. The director also noted that the petitioner had submitted shipping orders for an unrelated company in support of the petition. The director requested that the petitioner provide proof that it was conducting business and to clarify its relationship with Double T, Inc., apparently another United States entity.

In response, the petitioner stated that its parent company enjoyed a business relationship with [redacted] Inc. and that the beneficiary on behalf of the petitioner had signed a business agreement with [redacted] Inc. The petitioner stated that it had entrusted [redacted] Inc. to represent it in export matters and

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<sup>1</sup> We note that California State corporate records indicate that the petitioner is inactive and dissolved as of January 10, 2000. Accordingly this issue appears moot. However, we will address the issues raised in the appeal to examine the director's decision.

that the individual signing purchase orders was the president of [REDACTED]. The petitioner also stated that it had leased an office in June of 1997 and that the office was close to the offices of [REDACTED]. The petitioner attributed the submission of [REDACTED] shipping orders to the closeness of [REDACTED] both in physical proximity and business relations to the petitioner. The petitioner also submitted copies of checks payable to [REDACTED] Inc., as well as other companies. The petitioner also submitted purchase and sales orders, invoices, and bills of lading, all dated after February 1, 1998.

The director determined that the petitioner existed on paper only and that the petitioner's alleged business transactions were conducted through and actually performed by [REDACTED]. The director concluded that the petitioner was acting as an agent between the claimed parent company and [REDACTED] and was not engaged in doing business.

On appeal, counsel for the petitioner asserts that [REDACTED] represented the petitioner only in export matters for the period of July 1996 to June 1998. Counsel references its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, filed in 1997. The IRS Form 1120 for 1997 reveals gross receipts in the amount of \$424,705, and a negative taxable income of \$6,636. Counsel states that the petitioner has been handling its export matters since June of 1998. Counsel submits copies of the petitioner's sales contracts, purchase orders, and bills of lading dated subsequent to July of 1998 in support of this statement. Counsel asserts that the petitioner has been doing business in the United States in a regular, systematic, and continuous manner.

Counsel's assertions are not persuasive. The petitioner has not provided the required evidence demonstrating that it has been engaged in providing continuous goods or services for one year prior to the filing of the petition. The petition was filed February 23, 1998 and the first documentation indicating that the petitioner provided goods or services was in July of 1998, more than four months after the petition was filed. Although the petitioner provided checks made out to [REDACTED] Inc. and two other companies prior to July of 1998, the checks alone are not sufficient to establish that the petitioner is engaged in doing business. The documentation submitted on appeal does not overcome the director's determination on this issue. The director correctly determined that the evidence provided by the petitioner showed at most that the petitioner was a mere agent for the claimed foreign entity.

The second issue in this proceeding is whether the beneficiary has been or 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.

The petitioner initially provided a broad overview of the beneficiary's duties for the petitioner stating that:

To facilitate corporate take-off and growth, he has been directing contact [sic] and networking with American manufacturers, suppliers and trade associations for business opportunities and arrangements. He has also been overseeing the negotiation and progress of various contracts with both Chinese and American companies. [The beneficiary] has supervised the proper negotiation, administration and performance of business contracts and agreements. Meanwhile, [the beneficiary] has also been playing a critical role of coordinating the business, financial and administrative transactions between the US subsidiary and its overseas counterparts. Finally, he has interviewed and recruited corporate employees in accordance with the subsidiary's corporate needs.

[The beneficiary] has been, and will continue to be, in essence, directing the management of [the petitioner], establishing [the petitioner's] goals and policies, exercising wide latitude in discretionary decision making, and receiving only general supervision from the Board of Directors and the Chinese parent company. His duties are in conformance of "executive capacity" . . . Similarly, he has been managing [the petitioner], supervising and controlling the work of his subordinate managers, managing virtually all essential functions within [the petitioner] such as administration, financial and business development, exercising personnel authority, and exercising direction over the day-to-day operations of [the petitioner].

The petitioner also submitted an organizational chart depicting the beneficiary as president, a corporate secretary/trade department manager, a financial department manager/marketing and purchasing representative and a marketing and purchasing employee. The petitioner further submitted IRS W-2 Forms, Wage and Tax Statements for the year 1997. The 1997 IRS W-2 Form issued to the beneficiary was in the amount of \$30,000. The remaining three 1997 W-2 Forms totaled \$19,020.

The director requested additional evidence detailing the beneficiary's specific job duties.

In response the petitioner provided the following description of the beneficiary's duties:

Manage and oversee the overall export business and financial operations of the company; coordinate and report to Chinese parent company regarding development and adjustment of corporate business activities; interview and recruit local employees, etc.

The petitioner also provided brief descriptions for the three remaining employees. The petitioner noted that it also used a certified public accountant to provide financial consulting services.

The director determined that since the petitioner was serving only as an intermediary for the parent company, the beneficiary's duties were not at a managerial level. The director concluded that the evidence submitted was insufficient to establish that the beneficiary had been functioning and would function in a managerial capacity.

On appeal, counsel for the petitioner re-states the job descriptions previously provided and asserts that even if the petitioner is mischaracterized as an intermediary, the beneficiary is still the petitioner's decision maker and policy setter and is functioning in a managerial capacity.

It is noted that the petitioner did not clearly state whether the beneficiary would be engaging in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. At various times the petitioner seemed to indicate that the beneficiary met the criteria set forth in the definition of both managerial and executive capacity. However, the petitioner must establish that the beneficiary is acting primarily in either an executive or managerial capacity by providing evidence that the beneficiary's duties comprise duties of each of the four elements of the two diverse statutory definitions. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Counsel's assertion that the beneficiary meets the criteria for either an executive or a manager is 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 directing contact with American manufacturers, overseeing and supervising the negotiation and administration of contracts, and coordinating the business, financial and administrative transactions between the petitioner and its overseas counterparts. The job duties described are too vague and too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis. The additional paraphrasing of the statutory definition of "managerial" and "executive" capacity do not further enlighten the Service on the beneficiary's daily activities. At most, the job duties described are indicative of an individual performing the basic operations of the petitioner. 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). As determined by the director, at the time the petition was filed the petitioner and the beneficiary as the primary employee were mere agents of the overseas entity performing the basic functions 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 record does not contain sufficient evidence to establish that the beneficiary was engaged in managerial or executive duties while employed overseas.

Also beyond the decision of the director, the petitioner claims that it is a wholly-owned subsidiary of a Chinese company. However, the petitioner's IRS Form 1120 Schedule K, Line 5 refers to an attachment to the return. The attached statement indicates that the beneficiary owns 100 percent of the petitioner. These inconsistent statements cast doubt on the ownership and control of the petitioner. 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).

As the appeal will be dismissed for the reasons stated above, these additional issues are not examined further.

**ORDER:** The appeal is dismissed.