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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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

[Redacted]

File: WAC 02 023 56927 Office: CALIFORNIA SERVICE CENTER

Date: APR 01 2003

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)

ON BEHALF OF PETITIONER:

[Redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the employment-based preference visa and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a California corporation that seeks to employ the beneficiary as its president. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager 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 on the ground that the proffered position is not in an executive or managerial capacity.

On appeal, counsel submits a brief. Counsel states, in part, that the proffered position is clearly managerial and executive because the beneficiary will set and monitor policies and objectives, and run, direct and supervise the petitioner's operations.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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 an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner describes itself as a subsidiary of [REDACTED] of Taiwan. The petitioner states that it imports and distributes automobile parts, particularly aluminum wheels and suspension parts, and employs six persons.

According to the petitioner, it currently employs the beneficiary as its sales manager in L-1A nonimmigrant status. However, it is seeking this immigrant visa classification so that the beneficiary may assume the position of president on a permanent basis at a salary of \$3,000 per month. The petitioner states that the petitioner's current president will leave its employment upon approval of this petition.

The issue to be discussed in this proceeding is whether the proffered position is in an executive or managerial 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.

At the time of filing the petition on October 5, 2001, the petitioner described the beneficiary's proposed duties as follows:

Plans, develops and establish[es] policies and objectives of business organization in accordance with board directives and corporation charter. Confers with company officials to plan business objectives, to develop organizational policies to coordinate functions and operations between departments, [and] to establish responsibilities and procedures for attaining objectives. Reviews activity reports and financial statements to determine progress and satus [sic] in attaining and revis[ing] objectives [and] plans in accordance with current conditions. Directs and coordinates financial programs to funding [sic] continuing operations to maximize returns on investments, and to increase productivity. Incharge [sic] of personnel, etc.

The petitioner also submitted an organizational chart, which indicated that it employed six individuals in the positions of president, sales director, sales manager, sales representative, operation manager, and warehouse manager.

On February 8, 2002, the director requested additional evidence from the petitioner. In particular, the director requested a more detailed description of the proffered position and a list of the names, titles, and job duties of the individuals who would be employed in positions subordinate to the beneficiary. The petitioner, however, failed to provide the requested description of the proffered position or list its employees when it responded to the director's request for evidence.

The director denied the petition because the petitioner's staffing levels included four managerial positions under the position of president and only one nonmanagerial employee. The director concluded that each manager would necessarily perform the day-to-day tasks of each department because none of the managers supervised any support/administrative personnel.¹

On appeal, counsel states that the proffered position is clearly executive or managerial because it involves setting and monitoring policies and objectives, and running the petitioner's operations. Counsel states that, while the junior level managers may conduct some support tasks, the president does not perform any nonqualifying duties. Counsel maintains that the petitioner employs a sufficient staff to perform the everyday nonmanagerial and nonexecutive duties and notes that the petitioner's organizational structure calls for hiring additional employees, such as sales assistants and warehouse personnel, once the petition is approved.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Instead, the duties of the proffered position must be the critical factor. See Sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B).

The petitioner's description of the proffered position is not sufficiently detailed. The petitioner states that the beneficiary would plan, develop and establish policies, and direct financial programs. The petitioner does not, however, specify the activities associated with these broad job responsibilities. Similarly, the duties of conferring with company officials and reviewing reports are not, by themselves, exclusively executive or managerial tasks. Without more specific information regarding how and at what frequency the stated duties are performed, the petitioner's job description of the proffered position merely reiterates the definition of executive capacity. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990).

¹ The director erroneously concluded that the beneficiary was serving in the proffered position of president, when evidence in the record showed that he was serving the petitioner as its sales director. This mistake, however, is not material. The director analyzed the duties of the proffered position, not the beneficiary's current duties as sales manager, when determining whether the proffered position was in an executive or managerial capacity.

Regarding the petitioner's staffing levels, it is not possible to determine from reviewing the record whether the beneficiary would perform managerial or executive duties with respect to the duties generally described in the petition or would be actually performing the duties. 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 Bureau notes that the petitioner has never described the job responsibilities of the five individuals who would hold positions subordinate to the beneficiary as its company president. Absent a listing of the employees' specific duties, the petitioner has not established that the beneficiary would serve as more than a first-line supervisor as required by the regulations. See *Republic of Transkei*, 923 F. 2d 175, 177 (D.C. Cir. 1991). Counsel states that the petitioner intends to hire individuals to relieve the petitioner's current staff from performing support tasks. The Bureau, however, cannot consider any facts that may come into being subsequent to the filing of a petition. See *Matter of Bardouille*, 18 I & N Dec. 114 (BIA 1981). The petitioner bears the burden of establishing that its staffing levels are adequate to support a primarily executive or managerial position at the time it files the petition. See *Matter of Michelin Tire* 17 I&N Dec. 248, 249 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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. The petitioner has not met its burden of establishing that the beneficiary merits classification for an employment-based preference visa as a multinational executive or manager.

ORDER: The appeal is dismissed. The petition is denied.