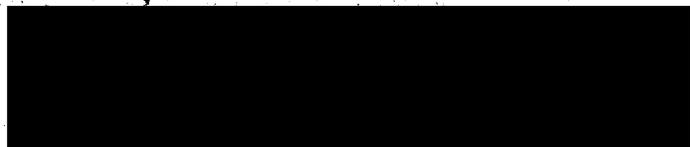


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U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

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



File: WAC 99 246 52229 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:

SELF-REPRESENTED

**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 an organization in California that seeks to employ the beneficiary as its deputy director. 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 grounds that: (1) the proffered position is neither executive nor managerial; and (2) the petitioner is not doing business.

On appeal, the petitioner submits a statement and additional evidence.

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 Korean government-sponsored international trade and investment promotional organization. The Los Angeles branch, where the beneficiary would be employed, was established in November 1962 as a nonprofit foreign agent and employs 12 individuals. The petitioner currently employs the beneficiary in A-2 nonimmigrant status in the proffered position, and it is offering the beneficiary the same position on a permanent basis at a salary of \$5,000 per month.

The first issue to be discussed 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.

In the initial petition filing received by the director on September 14, 1999, the petitioner described the proffered position as follows:

The most significant duties to be performed by the Deputy Director will include planning, implementing, and executing [the petitioner's] policies and objectives in the Market Research Division, directing overall trade and investment promotion operations through subordinate professionals and staff. [The beneficiary] will also be responsible for planning marketing strategies for the promotion of trade and investment between the U.S. and Korea as well as South and North Korea. He will have the responsibility for hiring and terminating all employees under his supervision.

In an accompanying organizational chart, the petitioner listed its organizational structure. According to this chart, the petitioner was organized into a market research division, an investment division and a trade promotion division, all of which were under the direction of the director and the director general. The organizational chart indicated that two deputy directors and one staff member staffed the market research division, which was the beneficiary's area of employment. The petitioner did not specifically state the names, titles or job descriptions of its employees.

On September 15, 2000, the director requested additional evidence. In particular, the director requested a new organizational chart depicting the petitioner's organizational hierarchy and staffing levels, and an explanation of why the beneficiary's services were needed with the U.S. entity.

In response, the petitioner's former counsel stated that beneficiary's services were needed to increase the promotion of trade between the United States and South Korea. The petitioner also submitted a new job description and an organizational chart.

The new organizational chart showed that the beneficiary's title had changed from deputy director to director. According to this chart, the beneficiary would direct five departments and 10 employees. The beneficiary's new job description for the director position indicated the following responsibilities:

Responsible for planning, implementing and executing Korea Trade Center (Kwangju, Chonnam) policies and objectives in the market research, division, trade promotion and fair/exhibition div.

Direct overall trade activities through subordinate professionals.

Responsible for development and planning of marketing strategies for the trade promotion for the businesses in Kwangju, Chonnam Province.

Supervise [a] professional manager and staff in the office.

Will have an authority to hire and terminate employees under supervision.

On May 4, 2001, the director issued a second request for evidence to the petitioner. The director requested that the petitioner explain why two deputy directors were needed in the market research division. The director also copies of Form DE-6, Quarterly Wage Report, for the last four quarters.

The petitioner's former counsel responded to the director's request for evidence. Regarding an explanation of why the petitioner required two deputy directors in the market research division, counsel stated that this information had been previously furnished and he would not be submitting any additional evidence on this point. The petitioner, however, did submit copies of the DE-6 forms.

The director denied the petition because the petitioner's evidence did not establish that the beneficiary would function in an executive or managerial capacity. The director referred to the first organizational chart, which showed the beneficiary's position as deputy director, and noted that the petitioner did not provide job descriptions of the employees in the market research division. The director concluded that the beneficiary would perform the services of the organization rather than manage the provision of those services through other employees.

On appeal, the petitioner does not directly address the director's reasons for denial on this issue. The petitioner states that the beneficiary has accumulated more than enough experience in international business over his 21 years of employment. The

petitioner further states that the beneficiary plans to set up a corporation that will sell electronics throughout the Americas, and he has negotiated funding and developed a marketing plan. In support of the appeal, the petitioner submits a printout from KOTRA's website, a copy of a page from a brochure for a DVD receiver player, and a product list.

The petitioner has not established that the position of deputy director initially offered to the beneficiary is in an executive or managerial capacity.

The Bureau notes that, in response to the director's first request for evidence, the petitioner indicated that the beneficiary's position had changed from deputy director of the market research division to director of the petitioner's entire operations. However, Bureau regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the I-140 petition was filed merits classification as a multinational executive or managerial position. See *Matter of Michelin Tire*, 17 I&N Dec. 248,249 (Reg. Comm. 1978); *Matter of Katigbak*, *supra*. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

The director appropriately declined to consider the change in the beneficiary's title and job description when determining whether the beneficiary would be employed in an executive or managerial capacity. The description of the deputy director position does not contain the level of detail necessary to establish that the beneficiary would primarily execute executive or managerial duties.

The beneficiary's job description indicates that the beneficiary would direct trade and investment promotion operations, plan marketing strategies and hire and fire employees. The petitioner fails to state any specific job duties that would be associated with these broad responsibilities. Absent specific information regarding how and at what frequency the broad job responsibilities are performed, the petitioner's job description of the proffered position merely reiterates the statutory definitions of managerial capacity and executive capacity. The job description does not establish that the position offered to the beneficiary involves primarily executive or managerial

duties. *Fedin Bros. Co., Ltd. v. Sava*, 724 F.Supp. 1103, (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990).

Additionally, evidence regarding the petitioner's staffing levels fails to establish that the beneficiary would direct and control the work of supervisory, managerial or professional employees. The petitioner bears the burden of establishing 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). Therefore, the petitioner must not only specify the number of individuals that the beneficiary would supervise, but it must also provide the names, titles, and job responsibilities of these individuals. The beneficiary shall not be considered to be acting in a managerial capacity merely on the basis of the number of employees that he supervises or directs. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C).

The petitioner indicated in its initial organizational chart that the beneficiary would supervise one employee in the marketing support division, who would answer inquiries and support market research. The petitioner did not provide the name of this individual or his or her job description. Absent a listing of the names and specific duties of persons supervised by the beneficiary, the petitioner has not shown that the beneficiary would direct and control the work of supervisory, managerial or professional employees.

Based upon evidence before the Administrative Appeals Office at the present time, the proffered position is not in an executive or managerial capacity. Therefore, the director's decision to deny the petition on this basis shall not be disturbed.

The second and final issue to be discussed is whether the petitioner had been doing business for at least one year at the time the petition was filed.

At the time of filing a petition for this immigrant visa classification, a petitioner must establish that it has been doing business for at least one year. 8 C.F.R. § 204.5(j)(3)(i)(D). The term *doing business* is defined as "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." 8 C.F.R. § 204.5(j)(2). As the petition was filed on September 14, 1999, the petitioner must establish that it had been engaged in the regular, systematic and continuous provision of goods and/or services as early as September 1998.

In the first request for evidence on September 15, 2000, the director did not ask the petitioner to submit evidence establishing that it had been doing business for the requisite period of time at the time the petition was filed. In the May 4,

2001 request for evidence, the director requested that the petitioner submit its corporate income tax returns for the 1999 through 2001 years.

In response, the petitioner's former counsel stated that, because the petitioner was deemed a "miscellaneous foreign government office" by the U.S. Department of State, Office of Protocol, the petitioner was not required to pay federal income tax. Counsel stated that the petitioner was not required to file any tax returns, so the petitioner would be submitting copies of its bank account statements and financial statements for the 1997 through 2000 years.

The director denied the petition because the petitioner "is merely a research and advertising arm of the South Korean government for South Korean importers, exporters and investors." The director concluded that the petitioner had not been engaged in the regular, systematic and continuous provision of goods and/or services for at least one year at the time the petition was filed.

On appeal, the petitioner states that it provides marketing services for small and medium companies and that it has conducted "real business activities" such as participating in exhibitions and marketing surveys on behalf of Korean companies. However, the petitioner has not presented any documentary evidence to show that it had been doing business for at least one year at the time the petition was filed. Although the petitioner states on appeal that it has provided marketing services to companies, the petitioner does not submit any evidence to support its assertion, such as evidence of its participation in trade shows and exhibitions. Simply 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). The petitioner states that it is in the process of establishing a company that will sell electronic equipment in the Americas. However, the petitioner's proposed business venture does not relate to whether it had been engaged in the regular, systematic and continuous provision of goods and/or service at the time it filed the petition. See 8 C.F.R. § 103.2(b)(12). Accordingly, the director's denial of the petition on this basis will not be disturbed.

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 that burden.

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