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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 02 041 58814 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:



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/chief executive officer (CEO). 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 director made errors of fact and law by deeming the proffered position not managerial or executive.

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 Koshida Corporation of Japan that markets and sells cathode ray tube monitors, liquid crystal monitors, and related electronics components for personal computer and consumer electronics products. The petitioner states that it employs four persons and has an approximate gross annual income of \$250,000.

According to the petitioner, it currently employs the beneficiary as its president/CEO in L-1A nonimmigrant status and it is offering him the same position on a permanent basis at an annual salary of \$100,000.

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 November 15, 2001, the petitioner stated the proposed duties of the proffered position as follows:

As Chief Executive Officer/President, [the beneficiary] manages all corporate matters and serves as the primary decision-maker for the company. He therefore exercises a wide latitude of managerial authority and discretion over day-to-day matters related to the company's fiscal, administrative, and personnel operations. Specifically, [the beneficiary] manages the strategic planning process from inception to implementation. He oversees all activities related to budget planning and control of business planning and development, recruits key members of the management team, determines corporate policies, establishes long-term goals, and directs the development of business and marketing strategies to attain and maximize market share and profitability. Reporting directly to the Board of Directors, he is authorized to recommend various personnel actions, including the hiring and firing of employees. . . .

With the initial filing of the petition, the petitioner did not submit an organizational chart with the names, titles and job descriptions of its other three employees, or any other evidence of its staffing levels.

On February 20, 2002, the director requested additional evidence from the petitioner. In particular, the director requested a more detailed description of the proffered position and an organizational chart that included the names, titles, and job duties of the individuals who would be employed in positions subordinate to the beneficiary. The director also requested the Form DE-6, Quarterly Wage Report, for the eight quarters in the 2000 and 2001 calendar years.

In response, the petitioner submitted the requested materials. The petitioner provided this additional description of the proffered position:

In this executive position, [the beneficiary] exercises full authority over all corporate matters for the company as the ultimate decision[-]maker. His duties include leading the strategic business planning process with the senior management team and ensuring its execution. His job duties include developing, monitoring, and achieving revenue, expense and profit budgets for each financial year. He also oversees the development of sales and marketing strategies that target both existing and potential Koshida (U.S.A.) customers. [The beneficiary] ensures that decisions regarding the positioning and direction of Koshida (U.S.A.) products in the marketplace are justified through profitability and customer needs. Further, he is responsible for creating and maintaining a professional organizational environment within Koshida (U.S.A.) that allows employees to be motivated and rewarded to achieve both personal and company goals. [The beneficiary] also plans the development of personnel resources. In addition, [the beneficiary] develops and maintains business partner relationships that will provide value and benefits to Koshida (U.S.A.) and its customers. [The beneficiary] sets corporate policies and long-term goals, and exercises authority over the day-to-day operations of the company. [The beneficiary] has full personnel authority and control of finance and administration. In this position, he directs the work of three degreed professionals. Further, he reports directly to the Board of Directors.

The petitioner also submitted an organizational chart, which showed the petitioner's staffing levels as chief operating officer (COO)/secretary, general manager, and assistant administrator. The COO's/secretary's job was described as "chief of San Diego office, marketing and business planning." The general manager's job was described as "chief of Silicon Valley branch office, sourcing for the new business." The assistant administrator's job was described as "accounting and supporting for the CCO and manager." The DE-6 forms that the petitioner submitted showed these three individuals on the petitioner's payroll during the quarter that the petition was filed.

The director denied the petition because the petitioner's type of business and size of its operations would not require the services of an individual in an executive or managerial capacity. The director found that, because the petitioner employed only three individuals in addition to the beneficiary, the beneficiary would necessarily be required to perform "numerous menial tasks involved

in marketing and sales because there aren't enough employees left to perform them." The director also concluded that the beneficiary would not be supervising managerial, supervisory or professional employees and would be, in essence, a first-line supervisor.

On appeal, counsel states that the size of a petitioning entity's operations is not a factor in determining whether a position is in an executive or managerial capacity. Counsel asserts that while the regulations allow the Bureau to consider a petitioner's staffing levels, they are not the only factor that should be considered. According to counsel, nothing in the beneficiary's job description indicated that the beneficiary would perform any support tasks as claimed by the director. Counsel further notes that the beneficiary would supervise three professional employees, two of whom are currently employed by the petitioner in H-1B status. Counsel states that the beneficiary qualifies for this immigrant visa classification as a "functional manager" because the beneficiary would manage all aspects of the strategic planning function. Finally, counsel notes that the beneficiary's position was found to be in an executive or managerial capacity at the time the L-1A nonimmigrant visa petition was approved on his behalf.

Counsel correctly asserts on appeal that 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 contains many elements that restate the responsibilities listed in the definitions of executive and managerial capacity. The petitioner states that the beneficiary would set corporate policies and long-term goals, and exercise authority over the day-to-day operations of the company. The petitioner does not, however, specify the activities associated with these broad job responsibilities. 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).

Additionally, the petitioner has not sufficiently described the job responsibilities of the three individuals who would hold positions subordinate to the beneficiary as its company president/CEO. In its organizational chart, the petitioner provides very brief job descriptions for its employees. Stating that the general manager would be the chief of the Silicon Valley office does not establish that it is a managerial position,

despite its managerial title. 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).

On appeal, counsel states that the beneficiary would act as a "functional manager" because he would manage the strategic planning function. Counsel's assertion, however, is not supported by evidence included in the record. The petitioner does not explain how this function, which is quite broad in its scope, is essential to its operations. 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). Counsel's assertion, by itself, does 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).

Based upon the evidence that the petitioner has submitted to the Bureau in conjunction with this petition, the petitioner has not established that the proffered position is in an executive or managerial capacity. Counsel asserts on appeal that this immigrant petition must be approved because the facts here are identical to the facts in a previously approved L-1A nonimmigrant petition.

Each petition filing is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, the Bureau is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). This record of proceeding does not contain any of the supporting evidence submitted to the California Service Center in association with the L-1A nonimmigrant petition. Although the Administrative Appeals Office may attempt to hypothesize as to whether the prior approval was granted in error, it would be inappropriate to make such a determination without reviewing the original L-1A nonimmigrant petition filing in its entirety. However, whether or not the approval of the nonimmigrant petition was in error, the Administrative Appeals Office is never bound by a decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), *aff'd*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The petitioner must establish that the beneficiary qualifies for this immigrant visa classification as a multinational executive or manager regardless of any nonimmigrant petitions that the Bureau may have approved on the beneficiary's behalf. Accordingly, the director's decision shall not be disturbed.

Beyond the decision of the director, the evidence presently in the record does not show that 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 November 15, 2001, the petitioner must establish that it had been engaged in the regular, systematic and continuous provision of goods and/or services as early as November 2000.

A review of the record reveals that the petitioner was incorporated in the State of California in September 2000. The record includes a March 1, 2001 compilation report from the petitioner's certified public accountant (CPA), which covers the period from September 28, 2000 through December 31, 2000. The CPA refers to the petitioner as "a development stage company," and the report, itself, lists the petitioner's income only as interest income (\$4,862) for the 2000 calendar year. Additionally, the record contains a list of the petitioner's sales commissions for the 2001 calendar year. According to this list, the petitioner's sales commissions started in April 2001.

The CPA's compilation report shows that the petitioner was not doing business in November 2000. The sales commissions list shows that the petitioner began doing business in April 2001, only seven months prior to filing the petition. The petitioner has not presented any documentary evidence to show that it had been engaged in the regular, systematic and continuous provision of goods and/or services for one full year as of the filing date of the petition. 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, supra*. However, as this matter is being dismissed on other grounds, this issue will not be examined further.

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.