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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



APR 08 2003

File: EAC 01 281 50514 Office: VERMONT SERVICE CENTER Date:

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 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 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiggmann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in the year 2000 in the State of New York and is claimed to be a subsidiary [REDACTED], Ltd., located in Korea. The petitioner is engaged in the business of importing, exporting, and manufacturing embroidery laces and head-ties. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors 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 the beneficiary had been and will be employed in a managerial or executive capacity.

On appeal, counsel submits a brief refuting the director's findings. Additional evidence is also submitted.

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.

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

which 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.

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 the initial filing, the petitioner stated that the beneficiary would be "responsible for managing and directing our New York and New Jersey customer base" and provided the following description of the beneficiary's prospective duties:

- correspond with parent company in Korean [sic] on establishing company objectives and goods
- attend trade shows as representing the company in the capacity as president to negotiate and enter into sales contracts with major clients; responsible for negotiating and finalizing the terms, delivery and payment of orders.
- establishing company sales objectives and implementing policies and procedures to meet company's objectives.
- attending company meetings to discuss and analyze company production performance and to implement distribution expansion.
- supervise and oversee the doing activities of U.S. personnel . . . such as reviewing and approving all pertinent sales, distribution, and production orders.
- making executive decisions that affect company's legal and financial matters.
- supervise the production in Korea
- review performance of U.S. staff in connection with sales, distribution, production, and design
- outline and forecast company's performance direction for upcoming fiscal year to determine, assess, and implement new policies and procedures

On November 15, 2001, the director instructed the petitioner to submit further evidence to establish that the beneficiary had acted, and would continue to act, in an executive or managerial capacity.

In response, the petitioner submitted its business organization chart which identifies three employees in the following positions: the beneficiary as president, Mr. Un Lee as vice president/secretary and import/export/sales, and Mr. Sun Lee as the manager of accounting.

The petitioner also provided the identical position description for the beneficiary as provided previously with the initial filing. The only additional information submitted with the most recent description is an hourly breakdown of the beneficiary's duties on a weekly basis.

In addition to the beneficiary's position description, the petitioner provided the position descriptions for the beneficiary's two subordinates. The secretary and sales/import/export position involves arranging trade show activities, buyer conferences, and sales/distribution schedules for approval by the beneficiary, coordinating sales presentations, and meeting with customers for design specifications and delivery schedules. The accounting manager position involves revenue and expense generation, providing financial analysis in connection with available letters of credit, import and export custom duty matters, and coordinating releases of merchandise/goods for delivery at ports of entry.

The director denied the petition, noting in particular that the petitioner did not identify who is responsible for basic warehouse functions even though the record clearly indicates that the U.S. office has inventory.

On appeal, counsel responds to the director's objection by stating that the petitioner employs two warehouse employees who are "under the control of the beneficiary." The petitioner also submits correspondence, dated April 5, 2002, indicating that one of the warehouse employees receives a weekly salary of \$300 and that the other employee receives a weekly salary of \$360. However, the correspondence is dated nearly seven months after the petition was filed. It is noted that the Bureau may not approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The Bureau will adjudicate the appeal based only on the record of proceedings before the director. See, *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). There are no tax documents or any other documentation which would indicate that either of the claimed warehouse employees were working for the petitioning business at the time the petition was filed. In fact, the petition indicates that at the time of the filing the petitioner had only two employees.

This indication contradicts counsel's recent claim. 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, 591-92 (BIA 1988). Therefore, the Service is led to conclude that the beneficiary was at the very least assisting with warehousing duties, if not

performing the majority of those duties, at the time the petition was filed. Such duties are not considered managerial or executive.

The director ultimately concluded that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial capacity.

Counsel asserts that the beneficiary is a manager because his immediate subordinates include a vice president and an accounting manager, both of whom, counsel claims, are professional positions.

However, section 101(a)(32) of the Act states that the term "profession" includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teacher of elementary or secondary schools, colleges, academies, or seminaries. Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term "profession" includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. Based on these definitions, it cannot be concluded that the beneficiary supervises subordinates who are professional as neither employee's job description requires a baccalaureate degree as prerequisite. To the contrary, the vice president's position appears to be nothing more than the beneficiary's personal assistant or secretary whose main task is scheduling events for the beneficiary to attend. Similarly, the position of accounting manager requires such clerical level knowledge as paying accounts, and handling customs and delivery issues. Based on their respective duties, it cannot be concluded that the employees whom the beneficiary supervises are professional or managerial, even though their job titles suggest otherwise.

Counsel further argues that the beneficiary does not perform the essential functions of the corporation but, instead, assumes a supervisory role. Counsel explains that, because the petitioner's main function is the sale of products, "it is virtually impossible for the beneficiary's position not to [be] involve[d] with the objectives of sales or sales related policies for implementation by the beneficiary" However, in light of counsel's awareness of the nature of the petitioner's business, the petitioner leaves unanswered the question of who is doing the actually selling of the petitioner's product. The job descriptions of the beneficiary's subordinates do not suggest that either of those employees are involved in selling the product. One of the employees appears to deal with setting up meetings, conferences, and presentations to enable the petitioner to sell its product, while the other employee deals with delivery and customs issues that affect merchandise which has already been ordered. It is therefore unclear who, if not the beneficiary, takes care of selling the petitioner's products. According to his job description, the beneficiary

attends trade shows as a means of soliciting business for the company and negotiates as well as finalizes "the terms, delivery and payment of major orders."

While counsel maintains that the beneficiary performs strictly managerial duties, his arguments are not persuasive. 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). 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). The beneficiary's job description indicates that one of the beneficiary's more important duties involves selling the product, a task that is neither managerial nor executive. 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).

Upon review, the description of the beneficiary's job duties, as well as the job duties of the beneficiary's subordinates, indicate that the beneficiary is performing as a professional or "staff officer," but not as a manager or executive. The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity. Further, the record is not persuasive in demonstrating that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The description of the duties to be performed by the beneficiary in the proposed position does not persuasively demonstrate that the beneficiary will manage 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 a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

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 sustained that burden.

ORDER: The appeal is dismissed.

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