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

PUBLIC COPY

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

APR 08 2003

File: WAC 01 244 60020 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

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:

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

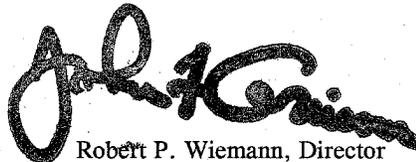
INSTRUCTIONS:

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 preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner was incorporated in the year 2000 in the State of California and is claimed to be a wholly-owned subsidiary of [REDACTED] located in China. The petitioner is engaged in the business of importing and exporting raw pharmaceutical and herbal extract products. It seeks to employ the beneficiary as its national sales manager. 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 will be employed in a managerial or executive capacity.

On appeal, counsel submits a statement and additional documentation.

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 described the beneficiary's duties in the United States as follows:

In this position, he is responsible for the day-to-day operations of the company's sales and marketing department. This position would also be responsible for overseeing the training of new and current sales persons; developing new market[s]; helping in obtaining the proper licensing; enforcing company policies and rules; and assigning sales territories. He also represents the company at trade association meetings to promote our products. [REDACTED] is currently supervising three salespersons with authority to hire and fire as necessary and his department is to grow rapidly in the coming years.

On November 19, 2001, the director instructed the petitioner to submit further evidence to establish that the beneficiary had been and would be employed in an executive or managerial capacity.

In response, the petitioner provided the following breakdown of duties performed by the beneficiary:

- Responsible for the day-to-day operations of the company's sales and marketing department (50%)
- He is also responsible for overseeing the training of new and current salespersons and sales organization (15%)
- Developing new market (10%)
- Helping in obtaining the proper licensing (5%)
- Enforcing company policies and rules (4%)
- Assigning sales territories (1%)
- He represents the company at trade association meetings to promote the company's products (15%)
- [REDACTED] is currently supervising two employees with authority to hire and fire as necessary and his department is expected to grow rapidly in the coming years.

The petitioner also submitted its organizational chart which identified the beneficiary as the national sales manager and a west coast sales representative and sales clerk as the beneficiary's two subordinates. Although the organizational chart also identifies a

general manager as the beneficiary's immediate supervisor, the petitioner explained in a separate statement that this individual has not yet received permission to enter the United States and, therefore, is not listed among the petitioner's employees on the DE-6 Quarterly Wage Form.

The director denied the petition, concluding that the beneficiary would be primarily involved in performing the day-to-day functions of the business, further stating that the beneficiary was principally functioning as a staff officer.

On appeal, counsel asserts that the beneficiary is performing in a managerial capacity because the position of sales representative, which he manages, is a professional position. Counsel further asserts that the beneficiary is highly educated and is, therefore, qualified for a managerial position which requires "planning, organizing, directing and controlling the organization's major functions through other employees and subcontractors." While counsel clearly indicates that the beneficiary does not actually perform the functions he manages, the record lacks evidence to determine that the petitioner has a sufficient staff of permanent employees and/or contractors to relieve him from performing nonqualifying duties. The organizational chart indicates that the beneficiary's subordinates include a part-time clerk and a west coast sales representative whose sales duties are limited to a specific region. Since the petitioner has not indicated that its sales activity is limited to a particular location, the Bureau is left to question who, if not the beneficiary, is selling the petitioner's product throughout the remaining parts of the United States. Counsel states that the petitioner intends to eventually hire six sales representatives. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the instant case, the petitioner indicates that, at the time of filing, it had four employees, one of whom has been unable to enter the United States. Only one of the employees who is currently working for the petitioner was performing the sales function. Therefore, the Bureau is led to believe that a significant portion of the sales function is being performed by the beneficiary.

Upon review, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity. 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 this instance, the job duties described by the petitioner are vague and too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis. The summary of the beneficiary's duties does not include a description

of any subordinate positions that would perform the essential functions of the petitioner's business or the beneficiary's duties. The evidence submitted indicates that the beneficiary is performing as a professional or "staff officer," not as a manager or executive as statutorily defined.

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 he 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.