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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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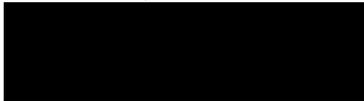
ADMINISTRATIVE APPEALS OFFICE
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Washington, DC 20536



File: WAC 00 243 56673 Office: CALIFORNIA SERVICE CENTER

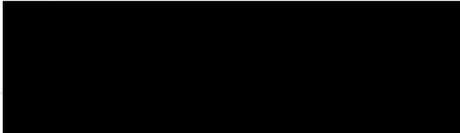
Date: **APR 14 2003**

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)

IN 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 petition and the matter is now before the Administrative Appeals Office 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 grounds that: (1) the petitioner was not doing business; (2) the proffered position was not in an executive or managerial capacity; and (3) the beneficiary was not employed in an executive or managerial capacity for at least one year in the three years preceding his entry into the United States in a nonimmigrant status.

On appeal, counsel submits a brief. Counsel states, in part, that the director inappropriately considered the size of the petitioner's operations and the number of its employees when determining that the beneficiary would not be employed in an executive or managerial capacity.

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 the People's Republic of China (China) and as an import and export business. The petitioner asserts that it employs six persons, including the beneficiary, who is currently occupying the proffered position as an L-1A nonimmigrant worker. The petitioner is offering to employ the beneficiary on a permanent basis at a salary of \$40,000 per year.

The first issue to be discussed is whether the petitioner had been doing business according to the pertinent regulation at 8 C.F.R. § 204.5(j)(3)(i)(D).

To establish eligibility for this immigrant visa classification, a petitioner must demonstrate that it had been doing business for at least one year at the time it filed the petition. 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).

The petitioner filed the I-140 petition on August 1, 2000; therefore, it must show that it had been engaged in the regular, systematic and continuous provision of goods and/or services as early as August 1999.

In the initial petition filing, the petitioner submitted copies of its invoices from the 1999 and 2000 years to establish that it had been doing business for the requisite period of time. The petitioner also submitted a copy of its Articles of Incorporation (Articles), which indicated that the petitioner had been incorporated in 1996. The director determined, however, that the evidence was insufficient to establish the petitioner's eligibility for the benefit sought. Therefore, on December 11, 2000, he requested the petitioner to submit the following:

- Federal Income Taxes: Provide signed and certified copies of the U.S. company's Federal income taxes, to include Forms 1120, 2220, 4526, and 5472 as appropriate, for the date the U.S. company was established to the present, except for 1999.
- Telephone Directory Listing: Submit a copy of the U.S. company's telephone directory listing.

- Major Sales Invoices: Submit legible copies of the U.S. company's major sales invoices that identify the gross sales amount reported on the Income and Expenses Statement or on Federal and State Corporate income taxes.

Invoices should be submitted prior to 1999.

- Telephone Bills: Submit copies of the U.S. company's business telephone bills, prior to 1999.

In response, the petitioner submitted copies of its federal income tax returns, copies of major sales invoices, and copies of its telephone bills. However, the director denied the petition, in part, because the copies of the major sales invoices did not pertain to any years prior to 1999, and because the petitioner did not submit any evidence to show from where it derived the gross receipts that were listed on its corporate income tax returns.

On appeal, counsel submits additional evidence regarding the petitioner's business activities. Counsel states that the director went beyond the scope of the regulation by requiring the petitioner to establish that it had been doing business for more than one year prior to the filing of the I-140 petition.

Counsel presents a persuasive claim on appeal. The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) requires at petitioner to establish that, at the time of filing the petition, it had been doing business for at least one year. The petitioner submitted sufficient evidence to satisfy the regulatory requirement by showing that it had been engaged in the regular, systematic and continuous provision of goods and/or services as early as August 1999. The director's denial of the petition, in part, because the petitioner did not show that it had been doing business since its date of incorporation in 1996 was improper. Therefore, the petitioner has overcome this basis of the director's denial. The director's decision regarding this issue shall be withdrawn.

The second issue to be discussed is whether the proffered position of president 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 I-140 petition with the California Service Center on August 1, 2000, the petitioner described the job of president as follows:

As President, [the beneficiary] is responsible for the overall management of the company including planning, developing and establishing policies and objectives of the company's business in international trade

activities. He is also in charge of the daily operation of the company['s] business, coordinating functions and operations between different departments of the company.

In addition, he reviews activity reports and authorizes all transaction and financial statements to determine company business progress so that the company will enjoy a gradual yet steady development. [The beneficiary] also directs the work of market research, participates in major business negotiations and signs contracts. He meets with local business leaders to seek cooperators and more potential investors for the parent company and [to] build up [a] business network for [the petitioner].

Furthermore, he evaluates performance of executives for compliance with established policies and objectives of the company, [and] hires and fires employees.

The director did not find the description of the beneficiary's U.S. position sufficient. Therefore, on December 11, 2000, the director requested additional evidence from the petitioner, to include the following:

- U.S. Business Organizational Chart: Submit a copy of the U.S. company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current name of all executives, managers, supervisors and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties, educational level, annual salaries/wages . . . and immigration status . . . for all employees under the beneficiary's supervision. Finally, explain the source of remuneration of all employees and explain if the employees are on salary, wage, or paid by commission. (Emphasis in original.)
- Duties in the U.S.: Submit a more detailed description of the beneficiary's duties in the United States. Be specific; list the education and employment qualifications for the position in the United States company. Include evidence that the beneficiary meets the petitioner's qualifications and if required, that the beneficiary has the ability to speak, read and write English. Indicate exactly whom the beneficiary directs including their job title[s] and position description[s]. List all employees under the beneficiary's direction. Also, indicate [the] percentage of time spent in each of the listed duties.

In response, the petitioner submitted an organizational chart, which showed that the beneficiary, as the president, was at the highest level of the organizational hierarchy. The chart also indicated that the beneficiary would supervise one manager who, in turn, would supervise the trading and administration divisions. One purchasing agent and one sales agent staffed the trading division; one industrial engineer and one secretary/bookkeeper staffed the administration division.

Regarding job descriptions for the beneficiary and the employees who were subordinate to the beneficiary, counsel reiterated the petitioner's initial job description and added that the beneficiary would liaise with attorneys, accountants and other professionals. Counsel provided the names and educational levels of the individuals under the beneficiary's supervision, but he did not provide any job descriptions for these employees, except to state that the manager was in charge of the petitioner's daily operations.

The director denied the petition, in part, because, although the beneficiary supervised managers, the beneficiary also supervised nonmanagerial, nonsupervisory and nonprofessional employees. The director concluded, therefore, that the beneficiary would not be employed in an executive or managerial capacity.

On appeal, counsel states that the director conceded that the beneficiary's job was managerial but incorrectly denied the petition because the beneficiary would supervise some nonmanagerial and nonprofessional employees. Counsel states that the director was prejudiced against the petitioner based upon its size and maintained that, as the employee at the highest level of the organizational hierarchy, the beneficiary would spend the majority of his time managing the petitioner. Counsel discusses several unpublished decisions from the Administrative Appeals Office regarding the L-1A nonimmigrant classification and states that the Bureau is unreasonable in its determination that the beneficiary's position is not in a managerial capacity.

Counsel correctly asserts on appeal that the size of the petitioner 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 beneficiary's job description indicates that the beneficiary would manage and oversee certain functions; however, it also indicates that the beneficiary would perform certain sales and marketing activities. For example, the beneficiary would plan, develop and establish policies, as well as negotiate contracts,

conduct customer visits and business negotiations, and obtain new business. The petitioner's description of the proffered position contains both executive/managerial duties such as planing, developing and establishing policies, as well as sales and marketing duties such as generating business and negotiating contracts. The petitioner fails to quantify the amount of time that the beneficiary would spend on the alleged executive/managerial duties versus the amount of time he would spend on sales and marketing duties. This failure of documentation is important because not all of the beneficiary's responsibilities fall directly under traditional executive or managerial responsibilities. *IKEA US, Inc., v. U.S. Dept. of Justice I.N.S.*, 48 F.Supp. 2d 22 (D.D.C. 1999), *aff'd*, 1999 WL 825420 (D.C. Cir. 1999). Without more specific information regarding how and at what frequency the stated duties are performed, the petitioner's job description does not establish that the position offered to the beneficiary involves primarily managerial or executive duties.

Furthermore, one element of the beneficiary's job description does not comport with information on the organizational chart. According to the petitioner, the beneficiary would be responsible for evaluating the performance of executives. However, a review of the petitioner's staffing levels reveals that none of the positions subordinate to the beneficiary carries an executive title. The petitioner's failure to support its assertion that the beneficiary would evaluate the performance of executives calls into question the reliability and sufficiency of the beneficiary's overall job description, and whether it realistically depicts the beneficiary's proposed job responsibilities within the United States entity. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Additionally, the evidence regarding the petitioner's staffing levels fails to establish that the beneficiary would be employed as more than a first-line supervisor. 8 C.F.R. § 204.5(j)(4)(i). The Administrative Appeals Office disagrees with the director that the beneficiary would supervise one manager and one professional employee. The director requested the petitioner to submit an organizational chart that listed the names, titles, and job responsibilities of the individuals whom the beneficiary would supervise. The petitioner indicated that the beneficiary would supervise one manager who, in turn, would supervise four employees. The petitioner did not provide these individuals' job descriptions or specify how they perform the import and export services that the petitioner provides. Absent a listing of the specific duties of persons supervised by the beneficiary, the petitioner has not shown that the beneficiary would act as more than a first-line supervisor. See *Republic of Transkei*, 923 F. 2d 175, 177 (D.C. Cir. 1991).

Counsel refers to several unpublished decisions of the Administrative Appeals Office regarding the L-1A nonimmigrant

classification to support his claims that the beneficiary would be employed in an executive or managerial capacity. Although 8 C.F.R. § 103.3(c) provides that precedent decisions of the Immigration and Naturalization Service, now the Bureau of Citizenship and Immigration Services (Bureau), are binding on all Bureau employees in the administration of the Act, unpublished decisions are not similarly binding.

Based upon the above discussion, the petitioner has not demonstrated that the position offered to the beneficiary is in an executive or managerial capacity. Therefore, the director's decision to deny the petition on this basis shall not be disturbed.

The third and final issue in this proceeding is whether the beneficiary was employed in an executive or managerial capacity for at least one year in the three years immediately preceding his entry into the United States as a nonimmigrant.

At the time of filing the petition, the petitioner stated that the beneficiary had the following responsibilities as the vice president of the overseas entity from 1991 until 1996:

As Vice President, [the beneficiary] assisted the President [sic] of the company [in] planning, developing and establishing policies and objectives of the company.

He reviewed financial reports and other activity data of the company to assist the President in determining the progress of the company's business and deciding further business goals and plans. In addition, he also assisted the President in coordinating the operation of different business departments. He met with local business leaders to build up the network for the company. [The beneficiary] negotiated with business companies, manufactures and supplies [sic] and signs [sic] contracts of imports and exports. He allocated funds and staff for special projects. Finally, [the beneficiary] hired and fired managers and employees to implement the company's goals and objectives.

The director did not find the description of the beneficiary's overseas position sufficient. On December 11, 2000, the director requested additional evidence from the petitioner, to include the following:

- Foreign Company's Organizational Chart: Submit a copy of the foreign company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current name of all executives, managers, supervisors and number of employees within each department or subdivision. Clearly identify

the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties, educational level, annual salaries/wages . . . and immigration status . . . for all employees under the beneficiary's supervision. (Emphasis in original.)

In response, the petitioner submitted an organizational chart, which showed that the beneficiary, as the vice president, was one of four vice presidents under the supervision of the overseas entity's chairman/president/general manager. The chart also indicated that the beneficiary supervised four departments, each of which was headed by at least one manager and staffed by three to five employees.

Regarding job descriptions for the beneficiary and the employees who were subordinate to the beneficiary, counsel stated that the petitioner had previously provided the beneficiary's job description for the record. Counsel provided the names and educational levels of the individuals under the beneficiary's supervision, but he did not provide any job descriptions for these employees.

The director denied the petition, in part, on the basis that the overseas entity did not employ the beneficiary in an executive or managerial capacity for the requisite period of time because, although the beneficiary supervised managers, the beneficiary also supervised nonmanagerial, nonsupervisory and nonprofessional employees.

On appeal, counsel states that the director incorrectly denied the petition because the beneficiary supervised some nonmanagerial and nonprofessional employees. Counsel states that the beneficiary supervised 20 employees through seven managers and was in charge of four departments. Counsel asserts that the director again misapplied the law by stating that the beneficiary was not a manager because he supervised some nonmanagerial, nonsupervisory and nonprofessional employees.

The beneficiary's overseas position was not in an executive or managerial capacity. There is no evidence that the beneficiary actually directed a department or subdivision. The beneficiary's job description indicates that he assisted the president with these types of duties, among others. In addition, the beneficiary performed sales and marketing duties such as visiting customers and negotiating contracts. The evidence indicates that the beneficiary acted as the president's assistant and performed tasks that were necessary for the overseas entity to provide its services. 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 (Comm. 1988).

Additionally, evidence regarding the petitioner's staffing levels fails to establish that the beneficiary was employed as more than a first-line supervisor. As stated in the previous section, the petitioner bears the burden of establishing that the beneficiary would serve as more than a first-line supervisor. 8 C.F.R. § 204.5(j)(4)(i). 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 supervised or directed. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C).

The petitioner indicated on the organizational chart that the beneficiary supervised six managers who, in turn, supervised 16 employees. The petitioner did not provide these individuals' job descriptions or specify how they performed services that the overseas entity provides. Absent a listing of the specific duties of persons supervised by the beneficiary, the petitioner has not shown that the beneficiary was more than a first-line supervisor. See *Republic of Transkei, supra*. 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). Accordingly, the director's decision to deny the petition on this basis shall also not be disturbed.

Although the petitioner overcame the director's denial of the petition on the basis that it had not been doing business, the petitioner failed to show that it would employ the beneficiary in an executive or managerial capacity and that the overseas entity employed the beneficiary in an executive or managerial capacity for the requisite period of time.

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.