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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE

CIS, AAO, 20 Mass., 3/F

425 I Street N.W.

Washington, D.C. 20536



File: WAC 01 126 53907

Office: CALIFORNIA SERVICE CENTER Date:

DEC 23 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:



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 Citizenship and Immigration Services (CIS) 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in 1995 in the State of California and is claimed to be a subsidiary of [REDACTED] Industry & Commerce Co., Ltd. and [REDACTED] Trade & Godown Co., Ltd., both located in the People's Republic of China. The petitioner is engaged in the business of international trade. 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.

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 that 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 managerial position, [the beneficiary] had both managerial and executive responsibilities. To start this business, he was [sic] been given the authority to exercises a wide latitude in discretionary decision-making in order to establish the goals and policies for this division. He also exercised discretion over the day-to-day operations of the metals business division. As the business grows, he will supervise and directly control the work of all employees and subcontractors in this specific division. [The beneficiary] has the authority to hire, fire or promote employees of this division, as well as recommend the same for all subcontractors.

On August 17, 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. Specifically, the petitioner was asked to provide the director with the specific goals and policies the beneficiary had established over the last six months, a list specific discretionary decisions he has made over the last six months, and provide a specific description of the beneficiary's day-to-day duties over the last six months. Further, the petitioner was asked to provide a list of people whom the beneficiary supervises, including their job titles and position descriptions.

In response to the above, dated October 26, 2001, counsel provided a statement with the following description of the beneficiary's position in the United States:

In his executive position, [the beneficiary] has both executive and managerial responsibilities. [The beneficiary] has been given the authority to exercise wide latitude in discretionary decision-making in order to establish the goals and policies for this company. . . . Within this framework, Mr. Zhang's main goal has been to expand [the petitioner's] operations and overall growth of the company. . . .

* * *

Additionally, in order to extend [the petitioner's] presence on the market and further increase the company's profitability, [the beneficiary] plans to expand the company into other Asian markets and into different trading areas . .

. . . In February 2001, [the beneficiary] successfully expanded [the petitioner's] operations into trading with chemical components when he signed a \$2,520,000 contract with China Export Bases Development [REDACTED] Company Most notably, [the beneficiary] is in the process of establishing a joint venture with a Shanghai Wei Bang Chemical Company, Ltd. . . .

* * *

Further, in all day-to-day operations, [the beneficiary] is the ultimate decision maker. He exercises complete discretion in managing the daily operations of the company. He oversees the two divisions of [the petitioner]: China Business Division and U.S. Purchasing Division. There are four employees under his direct supervision Mr. [REDACTED] serves as Vice President and is in charge of our company's China Business Division. He holds a Bachelor of Arts Degree in Literature. Mr. [REDACTED] also serves as Vice President and is in charge of our U.S. Purchasing Division. He holds a Bachelor of Arts Degree in International Trade. Mr. [REDACTED] and Ms. [REDACTED] are Mr. [REDACTED] and [REDACTED] assistants, respectively. . . .

[The beneficiary] has complete authority to fire, hire or promote all employees One of [the beneficiary's] primary duties . . . is the development of new business relations with Chinese companies, as well as the expansion of business contacts and relations with U.S. and European companies. For example, in September 2001, [the beneficiary] acted as the crucial liaison and intermediary in the successful negotiations of a \$570,000 contract

[The beneficiary] is in charge of and responsible for enlisting new business opportunities for [the petitioner] as well [sic] procuring new sale contracts. . . . He is most intimately involved in the negotiations of all contracts, and has the highest executive authority in the U.S. for finalizing all terms of these contracts.

As President, [the beneficiary] is also responsible for the financial operations He is in charge of overseeing financial and fiscal projections; and, according to those projections, he is responsible for the strategy and long-term planning for the company's spending, future investments, and overall allocation of resources. He also ensures that budget moneys are utilized efficiently

While the above description clearly illustrates the beneficiary's general responsibilities with the petitioning organization, it does not contain a specific description of the beneficiary's day-to-day duties, information that was specifically requested in the director's request for additional information.

The petitioner also submitted its organizational chart, reiterating the hierarchy described above, and its state wage and withholding report which indicates that for the quarter that ended in September 2001, one of the petitioner's vice presidents earned \$3000 for a yearly total of \$12,000, and that the other vice president earned \$2400 for a yearly total of \$9600. Both of these figures are also reflected in the petitioner's organization chart.

In addition, the petitioner submitted copies of three of the contracts discussed, all signed by the beneficiary in his apparent authority as president of the company.

Although the petitioner also submitted copies of prior decisions of the AAO where the appeals had been sustained, counsel readily acknowledges that such decisions are not precedent. Thus, as 8 C.F.R. § 103.3(c) provides that CIS employees are only bound by precedent decisions, the non-precedent decisions provided by counsel cannot serve to legally guide the outcome in the instant case.

On December 20, 2001, the director denied the immigrant visa petition, concluding that the petitioner failed to establish that the beneficiary has been and will be primarily performing tasks that are managerial or executive.

On appeal, counsel submits a brief, focusing on the beneficiary's success in raising the petitioner's earnings and bringing in more business. Although counsel repeats verbatim portions of the beneficiary's job description that was provided in response to the request for additional information, a new, more specific description of the beneficiary's day-to-day activities is not provided. Instead, counsel asserts that the beneficiary's duties "are those of a multinational executive or manager" and again looks to non-precedent decisions to support her claim. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Although the AAO may treat non-precedent decisions as guidance when the facts are analogous to a pending matter, as previously stated, there is no law that instructs the AAO to treat non-precedent decisions as legally binding precedent. Here, counsel has not demonstrated that the facts in the current case are analogous to those in the cited non-precedent decisions.

Counsel further argues that CIS may not look to the size of the petitioner's staffing level of organization. However, if counsel is making the claim that the beneficiary manages an essential function within the petitioning organization, the petitioner must

nevertheless establish that the beneficiary himself is not actually performing the essential function, but rather that it is performed by other employees. In the instant case, the petitioner claims to employ two vice presidents, each of whom has his own assistant. However, according to the wage and withholding report submitted by the petitioner, neither of the claimed vice presidents is receiving a salary that is commensurate with a full-time employee. In fact, even if either of these individuals were to be employed on a full-time basis, they would be making salaries that are considered at or below the current standards for poverty level. 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). As the organization chart indicates that the vice presidents' claimed assistants are on the payroll of the China-based organizations, they cannot be considered to be employees of the petitioner, leaving the petitioner with two part-time employees and the beneficiary.

Counsel further asserts that the petitioner has contract employees who relieve the beneficiary of having to perform non-qualifying tasks, but are not on the petitioner's payroll. However, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Additionally, the petitioner has not submitted sufficient evidence to support this claim. 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).

Overall, counsel's arguments are not persuasive. In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the instant case, the description of job duties provided by the petitioner is 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 actual day-to-day international trade functions of the petitioner's business or the beneficiary's duties. Based upon the evidence on the record, the AAO can only conclude that the beneficiary is performing many of the marketing and public relations tasks on behalf of the petitioning organization. However, 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).

Beyond the decision of the director, the petitioner's tax returns

raise questions as to the corporation's ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[a]ny petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage." The petitioner must show the ability to pay as of the date of filing the petition. In the current matter, the petitioner submitted an incomplete copy of a 2000 IRS Form 1120 tax return that indicates the company had a net profit of \$2,976 for the year. It is further noted that the petitioner indicates that it paid out \$8,364 in wages and salaries and no compensation of officers during the year, far below the beneficiary's proffered wage of \$24,000 per year. As the appeal will be dismissed for the reasons previously stated, this AAO will not address this issue 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 sustained that burden.

ORDER: The appeal is dismissed.