

**PUBLIC COPY**

U.S. Department of Homeland Security

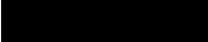
Citizenship and Immigration Service

**B4**

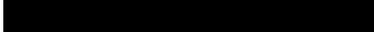
*Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy*

ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 I Street, N.W.  
Washington, DC 20536



File:  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)

ON BEHALF OF PETITIONER:



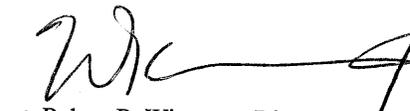
**INSTRUCTIONS:**

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 the Bureau 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 Director, California Service Center initially approved the employment-based visa petition. Upon review of the record, the director properly issued a notice of intent to revoke, and ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in November 1995. It imports and supplies its claimed parent company's products for distribution. It seeks to employ the beneficiary as its general 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 a qualifying relationship with the beneficiary's overseas employer. The director also determined that the petitioner had not established that the beneficiary's assignment would be primarily managerial or executive.

On appeal, counsel for the petitioner contends that the director's interpretation of the facts and the law was erroneous.

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. See 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's overseas employer.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

*Affiliate* means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

The director requested documentary evidence to substantiate the petitioner's claimed ownership and control of the petitioner. In response, the petitioner provided its stock certificate number one showing 20,000 shares issued to the beneficiary's overseas employer in April 1995. The petitioner also provided copies of two wire transfers. The first wire transfer dated May 9, 1995 showed the originator of the wire as the beneficiary's overseas

employer and showed the amount deposited to the petitioner's account as \$19,985. The second wire transfer dated May 18, 1995 showed the originator as [REDACTED] Co. and the amount deposited to the petitioner's account as \$33,385. In a letter dated July 25, 2002, the claimed parent company certified that the \$19,985 and \$33,385 were deposited to the petitioner's account for the petitioner's opening and initial investment. The claimed parent company also stated that it owned 100 percent of the petitioner.

In the notice of intent to revoke, the director implied that [REDACTED] Co. may have obtained an interest in the petitioner. The director also observed that the petitioner's Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return for the years 1997 through 2000 on Schedule K, Line 4 indicated that the petitioner was not a subsidiary in an affiliated group or parent-subsidary controlled group.

In rebuttal, counsel for the petitioner observed that the petitioner is authorized to issue only 20,000 shares and that those shares have been issued to the beneficiary's overseas employer. Counsel also provided a translated copy of the parent company's activity report dated April 1996 indicating that \$33,400 owed to it by a third company was being given to the petitioner to assist the petitioner in its beginning stages. Counsel also points out that its IRS Forms 1120 on Schedule K Line 7 shows the petitioner is in a parent/subsidiary relationship with a foreign entity. Counsel also includes a statement from its accountant that the accountant answers Line 4 of Schedule K in the affirmative only when a domestic corporation is involved in a parent/subsidiary relationship with the IRS Form 1120 filer.

The director found that the petitioner's explanations for the deposit of \$33,385 and the information on its IRS Forms 1120 unpersuasive. The director determined that the petitioner had not submitted sufficient evidence to establish a "true" parent/subsidiary relationship.

On appeal, counsel for the petitioner reiterates the response provided in the rebuttal on this issue. Counsel further observes that the petitioner imports and sells products manufactured by the foreign entity, enjoys credits on continuing inventory, and uses a trademark that is the property of the foreign entity. Counsel asserts this is further evidence on this issue.

Counsel's assertions are not persuasive. The assertions of counsel do 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). Moreover, the record does not contain the petitioner's IRS Form 1120 for the year 1995. As such, CIS cannot examine whether the petitioner properly reflected the additional paid in capital of \$33,385 on its initial Form 1120. The AAO notes that the petitioner initially was authorized to issue only

20,000 shares and that the foreign entity provided \$20,000 for the shares. This information ordinarily would be sufficient to establish the qualifying relationship. However, absent the petitioner's 1995 IRS Form 1120, coupled with the parent company's confusing language in its July 25, 2002 letter regarding the \$33,385 being used for its initial investment in the petitioner, the record remains unclear. 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 (BIA 1988). The record does not contain sufficient evidence to overcome the director's decision on this issue.

The second issue in this proceeding is whether the beneficiary has been and will be performing primarily managerial or executive duties for the petitioner.

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.

When 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). The petitioner originally indicated on its Form I-140, Immigrant Petition for Alien Worker, that it employed four individuals.

In a response to a request for additional evidence, the petitioner provided the following description of the beneficiary's duties:

[A]s general manager, overseeing and managing operation of entire company including setting up operational guidelines, review[ing] business performance, approv[ing] major transactions and contracts, hiring and dismissing supervisory staff, and other related duties; as chief financial officer, authorizing credit extension to customers, approving commissions, setting policies for resolution of merchandise disputes, review[ing] and report[ing] to parent directly on the financial performance of the company.

The petitioner also indicated that the president of the company oversaw the company's policy matters, the sales manager set up the sales network and selected sale's supervisors and promoted marketing strategies, and the clerk handled import documents, coordinated account activities, and performed general office duties. The petitioner also provided IRS Forms W-2 for the year 1999 for four employees, the president of the company, the beneficiary, the sales manager, and the clerk.

The petitioner also listed several individuals in the positions of "sales supervisors" who worked on a commission basis and supervised sale activities and hired sales representatives. The petitioner indicated on its organizational chart that the

beneficiary supervised the "sale supervisors" through a separate company, identified as "KHK."

In the notice of intent to revoke, the director determined that the petitioner did not have a reasonable need for an executive because it was a small import business. The director noted that three of the petitioner's four employees held executive or managerial titles. The director also determined that the record showed only that the beneficiary would be a first-line supervisor over non-managerial and non-professional employees. Last, the director determined that the petitioner had not provided evidence that the beneficiary managed a function rather than performing the petitioner's operational tasks.

In rebuttal, counsel for the petitioner explained that the petitioner imported saws and accessories from its parent company and that "KHK" marketed and sold the saws and accessories. Counsel further explained that the petitioner had joined with another California company to create Hardrock Diamond Tools, Inc. in November 1995, which subsequently changed its name to KHK Diamond Products, Inc. in 1996. The petitioner also provided lists of marketing entities and their sales representatives that KHK Diamond Products, Inc. utilized to sell saws and accessories as well as summaries of commissions paid to the marketing entities.

Counsel also indicated that the petitioner had enlarged its operation since filing the petition and had acquired the entire ownership and control of KHK Diamond Products, Inc. Counsel provided a copy of a settlement agreement between the beneficiary and another individual, identified as [REDACTED] and dated August 27, 2002. The settlement agreement provided that [REDACTED] would transfer all interest in KHK Diamond Products, Inc. to the beneficiary. On the same date the beneficiary transferred his interest in KHK Diamond Products, Inc. to the petitioner.

Counsel further stated that the beneficiary was in actuality the *de facto* president of the petitioner because the president spent little time in the United States. Counsel conceded that the beneficiary may not qualify as an executive for immigration purposes but asserted the beneficiary qualified as a manager. Counsel indicated that when the petition was filed, the beneficiary supervised one manager who managed five sales supervisors who in turn managed nine "sales." Counsel asserted that although KHK Diamond Products, Inc. was a separate company it was owned and controlled by the petitioner and functioned as a division of the petitioner. Counsel contended that the beneficiary functioned as a manager.

The director determined that the beneficiary necessarily would be involved in non-managerial and non-executive duties. The director also determined even if the role of the independent sales

contractors was considered, the petitioner had not sufficiently established the relationship between the beneficiary and the sales representatives. The director concluded that the beneficiary, at most, was a first-line supervisor of non-professional employees. The director determined that the petitioner had not provided sufficient evidence to overcome the grounds of revocation.

On appeal, counsel for the petitioner states that the petitioner currently employs eight individuals on its payroll, including the beneficiary, two employees in Arizona, and eight groups of independent contractor "sales." However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). When the petition was filed the petitioner employed four individuals. Moreover, the petitioner has not adequately demonstrated the relationship between the petitioner and the sales staff employed by KHK Diamond Products as is discussed below.

On appeal counsel references previously provided descriptions of the beneficiary's duties. Counsel also includes the beneficiary's description of his duties. The beneficiary's statement indicates that the beneficiary determines operation policy, strategy, pricing, and promotions after careful review of the market surveys and research and conferences with sales staff. The beneficiary also indicates that he established KHK Diamond Products, Inc. and a sales network. The beneficiary references his engineering background and observes that his background assists him in reading analytical and quality control reports and working with engineers of the parent company to develop new products.

Regarding the beneficiary's involvement with KHK Diamond Products, Inc., counsel submits evidence that was included in a motion to reopen the director's denial of the petitioner's petition to classify the beneficiary as an L-1A intracompany transferee. Included in the documentation submitted is information that KHK Diamond Products was created as a limited liability company in December 1999 between Everbest Machinery Co. Ltd.<sup>1</sup> and the petitioner each owning a 50 percent interest. The letter in support of the motion divides the beneficiary's time between the petitioner and the joint venture KHK Diamond Products, LLC. The beneficiary reviews budgeting and expenditure reports, authorizes credit extensions, controls and disburses expenses, and reports to the parent company regarding cash flow and profit and loss on behalf of the petitioner. The beneficiary authorizes credit extensions to customers, settles financial aspects regarding the

---

<sup>1</sup> The AAO observes that Everbest Machinery Co. Ltd submitted a petition (A75 703 031) to classify Lian Sheng Lei as a manager or executive and counsel asserted that Mr [REDACTED] could be responsible for supervising KHK's sales supervisors and sales representatives. The AAO dismissed Everbest Machinery Co., Ltd's appeal on this issue in February 2002.

return of merchandise, sets up the commission structure, hires and dismisses managers jointly with the president (of KHK Diamond Products, LLC), evaluates inventory flow, and performs related duties on behalf of the joint venture.

Counsel asserts the descriptions sufficiently describe the beneficiary's assignment as a managerial assignment. Counsel's assertion is not persuasive. The petitioner's initial description of the beneficiary's duties for this petition and the petitioner's description for the L-1A motion to reopen are similar. However, it is not possible to discern from either description whether the beneficiary is performing executive or managerial tasks with respect to the tasks delineated or whether the beneficiary is actually performing the tasks. 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). Neither does the beneficiary's statement sufficiently delineate the managerial aspect of his duties and the operational aspect of his duties. Moreover, the descriptions of the beneficiary's duties are not supported in the record. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner indicates that its sales manager is responsible for sales and the clerk handles import documents. However, the daily activities associated with operating a company, such as market research, development of new products, evaluating the budget, disbursing expenditures are all part of the beneficiary's daily work. The petitioner confirms that its president does not contribute to its operational needs, thus requiring the beneficiary to accomplish many of the daily operational tasks. A review of the record including the description of the duties of the petitioner's employees demonstrates that the beneficiary may be an entrepreneur but does not demonstrate that the beneficiary engages primarily in managerial tasks.

In addition, the petitioner has presented a confusing record regarding its use of independent contractors and its relationship with KHK Diamond Products. The record contains conflicting evidence regarding KHK Diamond Product's legal status. The petitioner's ownership and control of this entity is questionable and casts doubt on the beneficiary's managerial supervision of the entity's employees and independent sales contractors. 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 (BIA 1988). The petitioner has not established that its organizational structure should include the employees and subcontractors of the separate entity.

Further, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial functions. This failure of documentation is important because the description of the beneficiary's daily tasks is not comprehensive and the petitioner's organizational structure is questionable. See *Ikea US, Inc. v. INS, supra*.

In sum, the record does not sufficiently establish that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive. The petitioner has not submitted sufficient evidence to overcome the director's determination on this issue.

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. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.