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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



MAR 12 2003

File: WAC 02 023 56592 Office: CALIFORNIA 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:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

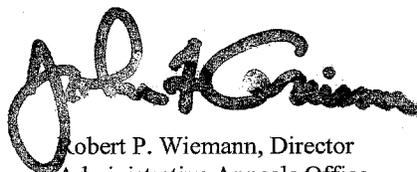
INSTRUCTIONS:

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 Director of the California Service Center denied the employment-based preference visa and the matter is now before the Administrative Appeals Office (AAO) 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 vice 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 ground that the proffered position is not in an executive or managerial capacity.

On appeal, the petitioner submits a statement.

Section 203(b) of the Act, *id.* § 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.

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. 8 C.F.R. § 204.5(j)(5).

Section 101(a)(44)(A) of the Act, *id.* § 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, *id.* § 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.

The petitioner describes itself as a subsidiary of Beijing Antique City Inc. of the People's Republic of China (China) that retails Asian home furnishings and decorations with an emphasis on antique goods from Korea, China and Japan. The petitioner states that it currently employs the beneficiary in L-1A nonimmigrant status in the same position as the proffered position and it is offering the beneficiary a permanent position at a salary of \$750 per week.

At the time of filing the petition on October 1, 2001, the petitioner stated that it employed five persons and had a gross annual income in excess of \$535,000. Initially, the petitioner described the proffered position as follows:

- General responsibility for the overall operations of the company;
- Specific authority to engage in purchasing goods on behalf of the company;
- Formulate necessary policies and see they are implemented;
- Build the company's customer base;
- Hire and fire personnel as needed;
- Coordinate activities between the parent company and its US subsidiary;
- Report to the board of directors of Beijing Antique City, the parent company.

Regarding its staffing levels, the petitioner indicated in an accompanying organizational chart that, in addition to the position of vice president, it employed a president, a store manager, a wholesale manager, and four salespersons.

In a February 2, 2002 request for evidence, the director asked the petitioner to submit, among other items, a more detailed description of the proffered position and a list of all employees under the beneficiary's direction. In response, the petitioner submitted a second organizational chart that contained new titles for its employees. In this second chart: the former president was listed as the chairman/president; the former vice president (the beneficiary) was listed as the vice president/treasurer; the former store manager was listed as the vice president/designer; the former wholesale manager was listed as the vice president/C.O.O., and two former salespersons were listed as a store manager and a sales manager. Additionally, the organizational chart included the new positions of warehouse manager and office assistant.

Regarding a more detailed description of the proffered position, the petitioner provided the following information:

- In charge of daily bookkeeping (20%)
- Handles A/R, A/P, payroll and accounting paperwork (10%)

- Supervises the development of new products with factories, while looking for new facilities in which to outsource (15%)
- Works between company's CPA and legal representative (10%)
- Assistant for chairman [REDACTED] in case of translation of documents and interpret for meetings (5%)
- Directly communicates with parent company office in Beijing as to production and other related matters (10%)
- Handles the tracking, order status with factories (15%)
- Coordinates with buyer, regarding reorders and discontinuation of items (20%)

The director denied the petition for several reasons. First, the director noted the discrepancy in staffing levels and job titles between the two organizational charts. Second, the director found that a company of eight employees did not need seven managers to run its operations. Finally, the director concluded that the beneficiary would necessarily be a first-line supervisor to nonprofessional employees.

On appeal, the petitioner submits a brief statement. The petitioner claims that the beneficiary is not engaged in selling products because it has other employees to sell antiques. According to the petitioner, "it seems clear the beneficiary has no need to perform non-qualifying duties." Regarding the discrepancy in job titles between the two organizational charts, the petitioner asserts that the changes to the titles were not meant to mislead the Bureau, but were designed to show that the managers had responsibility for their designated areas. The petitioner states that it did "shuffle" some of its employees, but that such an action is simply a common business practice.

The issue to discuss in this proceeding is whether the proffered position is in an executive or managerial capacity. The Bureau notes that the petitioner has submitted two entirely different job descriptions for the proffered position. In the initial petition filing, the petitioner stated that the beneficiary would be responsible for the overall operations of the company, which included formulating policies and coordinating activities between the petitioner and the foreign entity. In response to the director's request for evidence, however, the petitioner stated that the beneficiary would perform bookkeeping activities, assist the president in translating and interpreting, track orders, and consult with clients on orders.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Although the petitioner states on appeal that the beneficiary does not sell the petitioner's products and does not perform nonqualifying duties, both assertions are unsupported by credible evidence. The petitioner fails to explain why it has submitted two vastly different job descriptions for the proffered position. Without a

clear and consistent listing of the duties associated with the proffered position, the Bureau cannot determine whether the beneficiary would perform the high level responsibilities specified in the definition of executive capacity or managerial capacity. As the record is presently constituted, it appears that the beneficiary would act as the petitioner's bookkeeper/accountant and administrative assistant because the beneficiary would perform interpretation and translation duties, track orders, and be in charge of the bookkeeping. 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).

Furthermore, the petitioner's submission of two different organizational charts does not clarify its staffing levels. Section 101(a)(44)(C) of the Act, *id.* § 1101(a)(44)(C), provides that, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Bureau shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function.

The petitioner states that it changed its employees' titles to reflect that the managers have sole responsibilities for their designated areas; nevertheless, this explanation does not fully appear to account for the discrepancy between the position titles on the two charts. For example, in the first organizational chart, an employee was given the title of "store manager;" in the second organizational chart, he was given the title of "vice president/designer." This change in title is more meaningful than a simple clarification of the individual's area of responsibility. The employee went from being a retail store manager to a vice president of the company who also develops products. Again, without further explanation of the discrepancies between the two organizational charts, the petitioner fails to establish that the proffered position is in an executive or managerial capacity. Accordingly, the director's decision on this issue shall not be disturbed.

Beyond the decision of the director, the record contains insufficient evidence of a qualifying relationship between the petitioner and the overseas entity. At the time of filing the petition, the petitioner claimed to be a subsidiary of Beijing Antique City Inc. of China.

Pursuant to 8 C.F.R. § 204.5(j)(2), *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.

According to the petitioner, Beijing Antique City Inc. of China own 65 percent of its outstanding shares of stock and Lead Source Technology Inc. owns the remaining 35 percent of its outstanding shares. In support of its claim of majority ownership by Beijing Antique City Inc. of China, the petitioner submits its Articles of Incorporation and one stock certificate. The Articles of Incorporation indicate that the petitioner is authorized to issue 1,000,000 shares of common stock. The stock certificate reveals that Beijing Antique City Inc. of China was issued 80,000 shares of stock.

Ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this immigrant visa classification. *Matter of Church of Scientology International*, 19 I&N Dec. 593 (Comm. 1988); *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant visa proceedings). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church of Scientology International*, at 595.

The petitioner's evidence regarding its majority ownership by Beijing Antique City Inc. of China lacks sufficient documentary proof. The record does not contain any information about Lead Source Technology Inc., including its location and organizational structure. The petitioner fails to submit any stock certificates or a stock ledger to show that Lead Source Technology Inc. owns 35 percent of the petitioner's outstanding shares of stock. Furthermore, the petitioner fails to submit evidence that Beijing Antique City Inc. of China paid for the 80,000 shares of common stock that it was allegedly issued. 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). As the appeal is dismissed on another ground, this issue will not be examined further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, *id.* § 1361. Here, the petitioner has not

met that burden. The beneficiary does not merit classification for an employment-based preference visa as a multinational executive or manager.

ORDER: The appeal is dismissed. The petition is denied.

APR 19 2003