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

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



File: WAC 01 245 56302 Office: CALIFORNIA SERVICE CENTER Date: **MAR 12 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:



**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 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 ground that the proffered position is neither executive nor managerial.

On appeal, counsel submits a brief and evidence of the petitioner's current organizational structure and staffing levels. Counsel states, in part, that the beneficiary serves as the titular president because he functions as the petitioner's general manager.

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 Cho Kwang Light Bulbs, Ind. Co. of Korea. According to the petitioner, it markets and sells lighting and other products that are produced by the overseas entity. A review of the record reveals that the petitioner currently employs the beneficiary in L-1A nonimmigrant status and it is offering the beneficiary a permanent position at an annual salary of \$35,000 per year.

At the time of filing the petition on June 4, 2001, the petitioner stated that it employed four permanent persons and two contracted salespersons, and had a gross annual income of \$340,000. In the initial I-140 petition filing, the petitioner described the proffered position as follows:

- Create business strategies and implement them quickly against changing markets, consumer behavior and buying preferences;
- Set policies to achieve an image for the company as a reliable supplier;
- Develop wholesale markets in the [United States] for the sale of various products produced or traded by the parent and its sister companies;
- Implement business strategies;
- Introduce new products to the U.S. wholesale market;
- Assume full responsibility for the success or failure of the subsidiary;
- Direct and coordinate all business activities of the daughter company;
- Have ultimate authority over financial procedures, budgets and all other activities;
- Continue training a manager and oversee her hiring of other personnel;
- Determine market competitiveness and order price points;
- Lead negotiations with chain stores like Home Depot and sign contracts;
- Identify U.S. sources interested in exporting their products to Korea and to Asia and negotiate contracts with them;
- Inform the parent company weekly about the activities of the subsidiary.

On December 31, 2001, the director requested additional evidence from the petitioner regarding a number of issues. In particular, the director requested an organizational chart for the petitioner's operations that contained, among other items, the job duties, educational levels, and annual salaries/wages for all

employees under the beneficiary's supervision. The director also requested a more detailed description of the proffered position.

In response, the petitioner submitted an organizational chart that listed the beneficiary as the president who supervised one general manager, one import person, one accounting person, and two independent sales representatives. The petitioner did not describe the job duties of these employees as requested by the director. The petitioner also submitted a document called "Beneficiary's Workload in Branch Office in America," which indicated:

Work Type	Workroad [sic] (%)
❖ Establishment of Company	90%
❖ Office and Warehouse Set up	90%
❖ Edit of Catalog	70%
❖ Computer and S/W Set up	100%
❖ Purchase of Auto and Office supply	100%
❖ Prepare all of Office Form [sic]	100%
❖ Management of Employees	100%
❖ Accounting	50% (CPA ---50%)
❖ Running Daily Operation of Company	30%
❖ Purchasing	100%
❖ Warehouse Management	30%
❖ Sales	30%

The director denied the petition on April 5, 2002, concluding that the proffered position was neither executive nor managerial. The director stated that the petitioner did not have a reasonable need for an executive because the petitioner only distributes products and has a small staff of employees. The director found that the petitioner's organizational structure would require the beneficiary to perform low level tasks. Furthermore, the director did not find that the beneficiary would supervise managerial, supervisory or professional employees, or that he would manage an essential function.

On appeal, counsel states that the director misconstrued the evidence. According to counsel, the beneficiary would supervise two managers who, in turn, manage other workers. Counsel further states that the director focused too much on the "Beneficiary's Workload in Branch Office in America" document when determining whether the proffered position was in an executive or managerial capacity, as these duties only comprised the beneficiary's workload during his first year in L-1A status in 1999. According to counsel, the beneficiary has executed only managerial duties during the last two years and the petitioner currently employs a sufficient staff to alleviate the beneficiary from performing nonqualifying duties. Counsel submits evidence on appeal relating

to the petitioner's current organizational structure, which includes the beneficiary, one marketing manager, one operations manager and two independent salespersons.

The issue to discuss is whether the proffered position is executive or managerial. Regarding the definition of executive capacity, the beneficiary's job description contains both generalized and specific job duties. The generalized job duties merely reiterate the definition of executive capacity, as they include activities such as creating business strategies, setting policies, and assuming responsibility for the success or failure of the petitioner. The petitioner does not explain, with any degree of detail, how the beneficiary will direct the management of the petitioner on a daily business or exercise wide latitude in discretionary decision-making. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive; otherwise, meeting the definition would simply be a matter of reiterating the regulations. *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). The generalized job duties merely restate the responsibilities outlined in the definition of executive capacity; there is no evidence that the beneficiary primarily performs these duties. 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).

The specific job duties that the petitioner associates with the proffered position include developing wholesale markets, introducing products into the markets, and negotiating with retailers. These job duties represent a person who is performing the marketing and sales functions of the petitioner's operations. 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). Accordingly, the proffered position is not in an executive capacity.

Regarding the managerial nature of the proffered position, the petitioner claims that the beneficiary functions as a manager because he supervises two managerial level employees who, in turn, supervise two salespersons. This organizational structure represents the petitioner's current staffing levels, which have changed since the initial filing of the petition.

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. See *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). At the time of filing the petition on June 4, 2001, the petitioner employed one general

manager, one accounting person, one import person and two independent salespersons. The petitioner's current organizational structure and staffing levels cannot be considered on appeal, as they did not exist at the time of filing the petition. The Bureau cannot consider facts that come into being only subsequent to the filing of a petition. See *Matter of Bardouille*, 18 I & N Dec. 114 (BIA 1981).

The proffered position is not in a managerial capacity based upon the beneficiary's supervision of subordinate employees. The petitioner has never presented these employees' job descriptions or listed their job duties. The Bureau, therefore, cannot determine whether these individuals are managerial, supervisory or professional employees by virtue of their job duties, not by their job titles. Again, 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, supra*. Furthermore, the petitioner has not established that the beneficiary either manages an activity or an essential function because the petitioner has failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be nonmanagerial. *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). Based upon the evidence available to the Bureau at this time, the petitioner has not satisfied its burden of showing that the proffered position is in a managerial capacity 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, *id.* § 1361. Here, the petitioner has not met that burden.

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