

BH

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

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

PUBLIC COPY



File: WAC 02 071 51777 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)

IN 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 sales manager. 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 additional evidence. Counsel states, in part, that the proffered position involves managing an essential function of the petitioner's operations, which is its sales department.

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 an importer and wholesaler of sheep-skin car seat covers that are manufactured by its parent company, Henan Wancheng Animal By-Products Co., Ltd., of the People's Republic of China (China). At the time of filing the petition on December 20, 2001, the petitioner stated that it employed five persons and had a gross annual income in excess of \$947,000.

According to the petitioner, the overseas entity currently employs the beneficiary as the director of the president's office. The petitioner is offering the beneficiary the permanent position of sales manager at an annual salary of \$30,000 per year. The petitioner states that, if the petition is approved, the beneficiary will assume the duties of the sales manager position, which is currently occupied by [REDACTED] and [REDACTED] will be transferred back to the parent company in China. The petitioner describes [REDACTED] position, which is also the proffered position, as follows:

[REDACTED] is in charge of all activities of the Sales Department of the company. He designs and devises import/sales plans and policies, and directs the Sales Department in implementing these plans. He contacts the parent company in China regarding shipment, quality and quantity, and all import related matters. He supervises the performance of one professional sales representative, who has a Bachelor's Degree in Business Administration, and will seek more sales representatives (on commission basis) for further support. He trains the sales representative, supervises his work, and evaluates his performance. He contacts potential customers and establishes a sales network in the United States. In addition, he assists the President in business negotiations, reviews orders, and readjusts sales prices.

Regarding its staffing levels, the petitioner states that in addition to the sales manager position, it employs one president, one financial manager, one warehouse manager, one sales representative, and one warehouse worker. In an accompanying organizational chart, the petitioner indicates that the proffered position has direct supervisory authority over one sales representative.

The director denied the petition because it appeared that "the beneficiary is involved in the performance of routine operational activities of the corporation rather than in the management of a function of the business." Specifically, the director concluded that the petitioner's type of business "does not require or have a reasonable need for an executive at the beneficiary's position [sic]."

On appeal, counsel states that the petitioner relies heavily on its independent commission-based sales representatives to distribute and market its products. Counsel submits a copy of a marketing and sales representative agreement between the petitioner and Azzarito Enterprises, Inc. (Azzarito) to show that the petitioner's staffing levels include several sales representatives who are involved in the day-to-day nonsupervisory duties that are common in the sales industry. Counsel asserts that the proffered position qualifies as a multinational managerial position because the beneficiary will supervise and control the work of one professional employee, who is the sales representative, and he will manage an essential function, which is the sales department. According to counsel, if the petitioner did not sell products, it would cease to exist. Therefore, the management of sales is an essential function.

The issue to discuss is whether the proffered position is in a managerial capacity, as both counsel and the petitioner claim that the proffered position is not an executive position.

A review of the proffered position's job description and the supporting evidence reveals that the beneficiary would be involved in sales duties. According to his job description, the beneficiary would be involved in activities such as contacting the parent company about particular shipments, inspecting the quantity and quality of orders, and handling all matters relating to the import of products. In addition, the beneficiary would be required to contact customers, establish a sales network, review orders, and adjust prices. By executing these activities, the beneficiary would be performing sales services for the petitioner. 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, counsel states on appeal that the day-to-day sales duties of the petitioner's business would not be performed by the beneficiary because [REDACTED] commission-based sales representatives would perform the daily routine sales tasks. A review of the petitioner's agreement with [REDACTED] reveals, however, that [REDACTED] is only responsible for marketing and selling the petitioner's products over the Internet. As the petitioner not only markets and sells its products over the Internet, counsel's claim that [REDACTED] services are sufficient to handle all of the petitioner's sales activities is unpersuasive. Additionally, the petitioner does not establish that the beneficiary would have any supervisory control over the sales representatives from [REDACTED] control over the terms of the petitioner's contract with [REDACTED]. Without more persuasive evidence, the Bureau must conclude that the beneficiary would provide sales services to the petitioner in his role as sales manager.

Additionally, although the petitioner states that the beneficiary would also be "in charge of all activities of the Sales Department," which includes designing and implementing sales plans, the petitioner fails to indicate the amount of time that the beneficiary would devote to this activity. The definition of managerial capacity noted above requires a petitioner to establish that the beneficiary would primarily execute the high level responsibilities outlined in the definition. Section 101(a)(44)(A) of the Act, *id.* § 1101(a)(44)(A). Here, the petitioner has not sufficiently established that the proffered position primarily involves managerial duties.

On appeal, counsel states that the proffered position meets the definition of managerial capacity because the beneficiary would direct and control one professional employee and manage an essential function of the petitioner's operations. However, the petitioner must establish that the proffered position entails the high level responsibilities that are specified in all four criteria of the definition of managerial capacity, not simply the responsibilities outlined in just one criterion. Further, counsel mischaracterizes the term "professional." According to counsel, the beneficiary would control the work of one professional employee (sales representative) because the individual occupying the position possesses a bachelor's degree in business administration. Counsel incorrectly focuses on the nature of the sales representative's education, rather than on the nature of the duties of the sales representative's position. When determining whether a position is professional, the Bureau looks at whether the position requires the attainment of a baccalaureate or higher degree. The job of a sales representative does not require the attainment of a baccalaureate or higher degree. The mere fact that the petitioner's sales representative possesses a bachelor's degree does not raise the nature of the sales representative position to professional stature.

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. A company's size 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. Instead, a manager's duties must be the critical factor. *Systronics Corp. v. I.N.S.*, 153 F.Supp. 2d 7 (D.D.C. 2001).

The petitioner is a company that employs five persons and is engaged in the sale of sheep-skin car seat covers. It fails to persuasively establish that the beneficiary would be employed in a managerial capacity. There is insufficient evidence that the

beneficiary would primarily manage the sales department, supervise and control the work of professional, managerial or supervisory employees, maintain the authority to hire and fire personnel, and exercise discretion over the day-to-day operations of the sales department. Similarly, the petitioner fails to establish that the proffered position primarily entails the management of an essential function. For these reasons, the director's decision will not be disturbed.

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.