

U.S. Department of Homeland Security

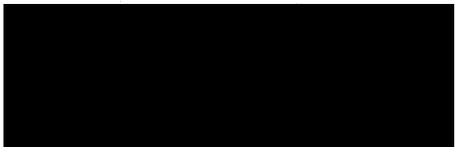
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
BCIS, AAO, 20 Mass. Ave., 3rd Floor
425 Eye Street N.W.
Washington, D.C. 20536



FILE: WAC 01 282 56903 Office: CALIFORNIA SERVICE CENTER Date: **NOV 18 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 (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, California Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in 2000 in the State of California and is claimed to be a subsidiary of [REDACTED] located in Korea. The petitioner is engaged in the business of importing and exporting bicycles and scooters. 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 would be employed in a managerial or executive capacity.

On appeal, counsel submits a statement refuting the director's conclusion and asserts that the beneficiary has been and would be employed in an executive capacity.

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 will be employed in a managerial or executive capacity.

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 petition, the petitioner stated that the beneficiary's job duties include being "in charge of decision making, develop, establish policies and objectives of business organization."

On January 22, 2002, the director instructed the petitioner to submit, in part, its organizational chart identifying the beneficiary's position, a more detailed description of the beneficiary's job duties indicating the percentage of time spent performing each duty, and a list of all employees under the

beneficiary's supervision. The petitioner was also asked to provide brief job descriptions, educational levels, and the salaries or wages of all of the beneficiary's subordinates.

The petitioner's response included an organizational chart naming the beneficiary as its president, Joyce Jang in the general affairs and accounting departments, and David Kim in the trading department. The petitioner did not provide the position titles, job descriptions, or educational levels of either of the beneficiary's subordinates. The petitioner also failed to provide a detailed description of the beneficiary's job duties with the percentage of time spent performing each duty. Although the petitioner provided various tax documents, which indicate that the petitioner employed Dong H. Kim, that name did not appear on the petitioner's organizational chart. Therefore, it is unclear where that individual fits in the petitioner's organizational hierarchy.

In the denial, the director discussed his uncertainty about whether the petitioner had a "structure or actual dwelling place for the business to operate from." However, based on the petitioner's lease agreement and photographs of the leased premises, the AAO finds that the director's concerns regarding this matter are unfounded. Therefore, comments pertaining to the petitioner's business premises are hereby withdrawn.

The director denied the petition basing his decision, in part, on the following conclusion:

[T]he petitioning entity does not have a reasonable need for an executive because they are a three to four employee import and export company. This type of business does not require or have a reasonable need for an executive because all they do [is] import and export products. Additionally, it is contrary to common business practice and defies standard business logic for such a small company to have an executive, as such a business does not possess the organizational complexity to warrant such an employee.

Although the appeal will be dismissed, it must be noted that the director based his decision, in part, on an improper standard; the above comments, therefore, are inappropriate. The director should not hold a petitioner to his undefined and unsupported view of "common business practice" or "standard business logic." The

director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. Although the Bureau must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some reasonable basis for finding a petitioner's staff or structure to be unreasonable. See Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in sales or services will not preclude the petitioner from qualifying the classification under section 203(b)(1)(C) of the Act. For this reason, the director's decision will be withdrawn, in part, as it relates to the reasonable needs of the petitioning business.

Nevertheless, the director properly concluded that the petitioner provided a job description of the beneficiary's duties that is vague and general and, therefore, fails to convey what the beneficiary will actually be doing on a daily basis and how he will execute his executive functions. The director also properly noted the petitioner's failure to provide job descriptions for any of the beneficiary's subordinates as requested in the request for evidence.

On appeal, counsel asserts that the sole basis for the director's denial is the size of the petitioning organization. Counsel further cites precedent case law, wherein the Bureau is prohibited from basing the denial of a petition on the size of the petitioning entity. While counsel is correct in stating that size cannot be the sole consideration in determining eligibility for multinational manager or executive status, the director can and should consider the size of the petitioner's personnel for the purpose of establishing whether the petitioner has a sufficient staff to relieve the beneficiary from performing non-qualifying duties. In the instant case, petitioner failed to provide the job titles or job descriptions of the beneficiary's subordinates, thereby making it impossible to determine whether the beneficiary is relieved from having to perform non-qualifying tasks.

Moreover, counsel's claim that the director's entire denial is based on the size of the petitioning organization is simply inaccurate. 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 director discussed, at length, the fact that the petitioner failed to provide a description of the

beneficiary's day-to-day duties and stated that the vague and general description that was provided is insufficient to determine whether the beneficiary will perform primarily managerial or executive duties. Furthermore, the director noted the petitioner's failure to provide job descriptions for any of the beneficiary's subordinates as requested in the request for evidence. The failure to provide requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2 (b)(14). Thus, the director clearly considered the beneficiary's job description and did not focus entirely on the size of the petitioning entity, as suggested by counsel on appeal.

On review, the record contains insufficient evidence to demonstrate that the beneficiary has been and will be employed in a primarily managerial or executive capacity. The record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel, or, in the alternative, that he will be relieved from performing non-qualifying duties so that he can manage an essential function or direct the management of that function. The Bureau is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial 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, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.