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U.S. Citizenship
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Services



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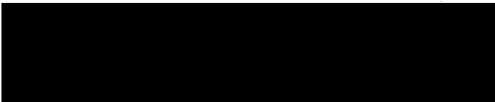
Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

Petitioner:

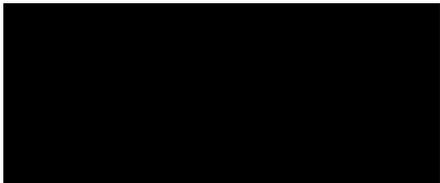
Beneficiary:



MAR 29 2004

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 of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

DISCUSSION: The Director, California Service Center denied the employment-based visa 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 1999. It exports network equipment and telecommunication systems to China. 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 for the United States entity. The director also determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer.

On appeal, counsel for the petitioner asserts that the director erred as the petitioner submitted sufficient evidence to establish that the beneficiary acts in a managerial or executive capacity and that the petitioner has a qualifying relationship with the beneficiary's overseas employer.

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 that 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.

The petitioner describes the beneficiary's duties as:

[The beneficiary] is in charge of the overall operation of the US subsidiary. She designs and develops business plans and policies, and exercises decision-making power over the operation and management of the company. She supervises, directs, and evaluates the managerial group (Export Department and Financial Department) in implementing various plans, rules and regulations of the company, and gives instructions. She determines the structures of administrative facilities, and personnel appointments, hires and discharges managers and employees. In addition, she participates in and directs business negotiations, and executes contracts. Furthermore, she also directs and supervises the arrangement of shipment details and wholesale operations. She coordinates with the Chairman of the Board of the parent company in international business operations, reports the decisions on business operations to the Board of Directors of the parent company, and receives instructions from the Board.

The petitioner also provided a job description for the export manager's position:

[The export manager] is under the supervision of the President. He is in charge of all activities of the Export Department of the company. He designs and devises export plans and policies, and directs the Export Department in implementing these plans. He supervises the performance of three employees, trains them in dealing with all export related details, including shipment and inventory storage, supervises their work, evaluates their performance, and has the right to hire, fire, and dismiss the employees under his supervision. He also contacts potential sellers and suppliers in the United States, reviews contracts and readjusts sales price, and assists the President in business negotiations.

The petitioner described the financial manager's position as:

[The financial manager] is under the supervision of the President. She is in charge of all financial matters of the company. She supervises the financial operation and plans budgets. She reviews and analyzes financial reports, income statements, and balance sheets prepared by the two financial clerks. In addition, she is responsible for business transactions, analyzes and evaluates business performance, summarizes and interprets current and projected financial position, and provides the managerial group with reliable financial consultation.

The petitioner indicated it employed two financial clerks to document business transactions, prepare financial reports, income statements, and balance sheets and perform routine office duties. The petitioner also indicated that it employed three export clerks to contact China and inform potential clients about "price, availability[,], quality and services, as well as, taking orders closing sales, and resolving complaints about the products." The petitioner added that the export clerks also collected information on price trends and conducted work regarding shipment and inventory storage.

The petitioner also submitted its California Forms DE-6, Employer's Quarterly Wage Report, for the three quarters prior to the filing date of the petition. The June 30, 2002 California Form DE-6 showed that eight individuals had been employed in June 2002. The names on the June 30, 2002 California Form DE-6 corresponded to the names in the eight positions described by the petitioner.

The director requested a more detailed description of the beneficiary's daily duties and the percentage of time the beneficiary spent performing the listed duties. The director also requested the petitioner's California Form DE-6 for the last four quarters including the quarter in which the petition was filed.

In response, the petitioner described the beneficiary's duties, in part, as deciding on business expansion and personnel appointments, inspecting the work of the export manager in terms of customs, shipment, inventory storage, availability, quality and services, and supervising the finance manager regarding financial transactions. The petitioner stated that the beneficiary participated in business negotiations and various trade shows, decided purchasing and selling prices, and reviewed and executed contracts. The petitioner further indicated that the beneficiary evaluated the performance of the department managers and employees and reported on business operations to the parent company's chairman of the board. The petitioner allocated the beneficiary's time between her various duties as: 20 percent participating in business negotiations and trade shows and executing contracts; 30 percent directing and inspecting the work of the export manager; 15 percent reviewing budgets, financial reports and supervising the finance manager; 10 percent designing and developing business plans and policies and establishing business goals; 15 percent reporting on business operations to the parent company's board chairman; and, 10 percent determining market needs and strategies, deciding purchasing and selling prices, and deciding on personnel appointments.

The petitioner's California Form DE-6 for the quarter in which the petition was filed showed seven employees. The employees' names corresponded to the positions of president, export manager, financial manager, financial clerk, and two export clerks. The position of one individual could not be identified.

The director determined that the petitioner's description of the beneficiary's duties was vague, paraphrased elements of the definition of executive and managerial capacity, and did not provide an explanation of the beneficiary's daily duties. The director determined, based on the petitioner's statements and its California Form DE-6, that the petitioner employed only five full-time personnel. The director questioned the reasonableness of an organization employing three managers/executives leaving only two full-time clerks to carry out the day-to-day operational tasks. The director concluded that the beneficiary would also be performing non-supervisory duties. The director further determined that the descriptions provided for the export manager and the finance manager did not demonstrate that either position was so complex as to require a bachelor's degree. The director concluded that neither position was a professional position. The director concluded that the beneficiary appeared to be in actuality a first-line supervisor and would not manage or direct a function of the petitioner but would primarily perform the petitioner's operational activities.

On appeal, counsel contends that the beneficiary qualifies as a manager as she supervises and controls the work of two managerial employees. Counsel contends that both of the managerial employees are professionals because they have university degrees. Counsel asserts that the director's determination that the beneficiary must be assisting with the day-to-day non-supervisory duties because the beneficiary has only

four full-time subordinate employees is flawed. Counsel asserts that most of the non-executive day-to-day business is performed by the export clerks and finance clerks. Counsel also claims that the beneficiary meets the criteria listed for an executive. Counsel cites unpublished decisions as well as a district court decision to support the claim that the beneficiary operates primarily as an executive and manager.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). As the director observed, the petitioner provided, in part, a general description of the beneficiary's duties borrowing liberally from the statutory definitions of executive and managerial capacity. See section 101(a)(44)(A)(i), (ii), and (iii) and section 101(a)(44)(B)(i), (ii), and (iii). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

When the petitioner provides a more exact description of the beneficiary's duties it is clear that the beneficiary spends some of her time on operational tasks. For example, the beneficiary spends 20 percent of her time participating in business negotiations and trade shows and executing contracts and an additional 10 percent of her time determining market needs and strategies, deciding purchasing and selling prices, and deciding on personnel appointments. 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).

The petitioner also indicates that the beneficiary spends 30 percent of her time directing and inspecting the work of the export manager and 15 percent of her time reviewing budgets, financial reports and supervising the finance manager. The description thus, indicates that the beneficiary is spending a significant portion of her time supervising. On appeal, counsel contends that the beneficiary's supervisory duties satisfy the definitional requirements of managerial capacity because the export manager and financial manager are professional and managerial employees. However, when examining the overall structure of the petitioner, its gross sales, its previously filed petition on behalf of this beneficiary, and the descriptions of the beneficiary's subordinates' duties, the AAO must question the managerial or professional capacity of both the export manager and the financial manager.

For example, excluding the paraphrasing of the statutory requirements found in the description of the export manager's duties, the petitioner claims the export manager supervises three employees and contacts potential sellers and suppliers, reviews contracts and readjusts sales prices, and assists in business negotiations. But the record only substantiates the employment of one full-time export clerk and one part-time export clerk. Counsel and the petitioner claim that the clerks perform all the operational tasks associated with the sale of products and shipping, storing, and exporting the products. However, a review of the petitioner's \$483,401 gross sales in 2002 undermines the reasonable need of the petitioner to employ a manager and even one clerk in the export department.

The AAO notes, as the director also observed, that the petitioner previously submitted an I-140 petition (WAC 01 243 60043) on behalf of this beneficiary that was denied, in part, because the petitioner had failed to establish the managerial or executive capacity of the beneficiary. The petitioner has added employees and reorganized its organizational chart while its gross sales decreased from \$1,024,611 in 2000 and \$2,975,752 in 2001 to \$483,401 in 2002. The increase in the number of employees while sales significantly decline has not been explained. The AAO is left to conclude that the petitioner's number of employees was increased only to provide an avenue to claim that the beneficiary's assignment was in a managerial capacity.

Likewise, when reviewing the information regarding the petitioner's financial department, the record contains an incomprehensible structure. The petitioner claims that the financial manager reviews and analyzes financial reports prepared by two financial clerks and is also responsible for business transactions and evaluating business performance. However, the record substantiates the employment of only one clerk in the department and the individual described as the financial clerk in this matter received a higher salary than the claimed financial manager in the quarter in which the petition was filed.

The descriptions of duties for both the export manager and the financial manager do not describe positions that are sufficiently complex to require an individual with an advanced degree. The duties described do not require advanced knowledge or learning gained by a prolonged course of specialized instruction. Rather the duties of the petitioner's export manager and financial manager positions suggest that basic knowledge of exporting goods and routine accounting functions are sufficient to qualify for these positions.

Further, the description of duties for both the export manager and the financial manager do not suggest that the individuals in these positions perform primarily supervisory or managerial tasks rather than performing the operational aspects of the department with the assistance of one or two other employees.

Finally and most importantly, the record when reviewed in its totality contains facts that do not support the petitioner's claim regarding the structure of the organization. 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. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). An executive or manager's duties must be the critical factor. However, if CIS fails to believe the facts stated in the petition are true, then the assertion that the beneficiary performs either executive or managerial duties may be rejected. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel's citation to unpublished decisions carries little probative value. Unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c). Furthermore, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

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

The petitioner acknowledged in its letter supporting the petition that mistakes had been made in the issuance of stock certificates and in its Internal Revenue Service (IRS) Forms 1120, U.S. Corporate Income Tax Returns.¹ The petitioner stated that its Articles of Incorporation authorized the issuance of 100,000 shares at \$1.00 par value. The petitioner indicated that the beneficiary's overseas employer purchased 51,000 shares or a 51 percent controlling interest in the petitioner. The petitioner explained that the beneficiary now held the remaining 49 percent interest.

The petitioner also explained that the beneficiary's overseas employer had purchased its 51 percent interest for \$100,000 and supplied copies of wire transfers and bank notifications showing that a Hong Kong company had actually wired the funds to the petitioner. The petitioner also explained that two individuals owned the Hong Kong company. The petitioner indicated that these same two individuals owned a majority interest in the beneficiary's overseas employer. Counsel asserts that this claimed ownership establishes a parent/subsidiary relationship between the beneficiary's overseas employer (the claimed parent company) and the Hong Kong company (the claimed subsidiary company). Counsel contends thus, that the petitioner and the Hong Kong company are affiliates. Counsel and the petitioner further explain that the beneficiary's overseas employer

¹ In the denial of a previously filed I-140, Immigrant Petition for Alien Worker, the director pointed out the errors and inconsistencies that the petitioner attempted to correct in its amended tax returns.

requested the Hong Kong company to wire its initial investment of \$100,000 to the petitioner. Counsel and the petitioner claim that the beneficiary's overseas employer later reimbursed the Hong Kong company in the form of goods. Counsel asserts that notarized documents attesting to the exchange are sufficient to establish a qualifying relationship between the petitioner and the beneficiary's overseas employer.

The director observed that it appeared the petitioner was attempting to avoid Chinese government regulations and questioned the veracity of the documentation the petitioner provided. The director determined that when considering the record in its entirety, the record did not demonstrate that the claimed investment originated from the claimed parent company for the purchase of the petitioner's stock.

Counsel contends that the petitioner submitted sufficient proof of the relationship between itself and its foreign parent company.

Counsel's contention is not persuasive. The record continues to contain inconsistencies. First, the petitioner indicates that it is authorized to issue 100,000 shares at a par value of \$1.00. The petitioner claims that its foreign parent company purchased 51 percent of the petitioner for \$100,000. The petitioner has not explained why the petitioner would invest \$100,000 for a 51 percent interest and does not explain why the record does not show how the beneficiary purchased her interest. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Second, counsel claims that the Hong Kong company is the petitioner's affiliate. However, the petitioner does not claim that the beneficiary's foreign employer owns and controls the Hong Kong company as it claims that the beneficiary's foreign employer owns and controls the petitioner. Instead the petitioner claims two individuals own the Hong Kong company and that the same two individuals also own a majority interest in the beneficiary's overseas employer. Such a structure would create, if believed, an affiliate relationship between the beneficiary's overseas employer and the Hong Kong company but would not create an affiliate relationship between the petitioner and the Hong Kong company. This distinction is important because it undercuts any established relationship between the petitioner and the Hong Kong company and continues to distort the record regarding the beneficiary's overseas employer's actual payment for its claimed purchase of the petitioner's stock.

Third, the petitioner claims that the beneficiary's overseas employer at some point reimbursed the Hong Kong company for its transfer of funds to the petitioner. However, the record contains no documentary evidence that the Hong Kong company received goods for their payment. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Finally, when reviewing the totality of the record, the AAO questions the legitimacy of the petitioner's corporate structure. The inconsistencies in the record and the ease with which the petitioner's stock is

manipulated suggests that the petitioner is a shell company set up for the beneficiary to transfer to the United States. In sum, the record does not establish that the petitioner and the beneficiary's overseas employer enjoy a legitimate qualifying relationship.

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.