



U.S. Citizenship
and Immigration
Services

B4

[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: SEP 14 2004

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:

[REDACTED]

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

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

DISCUSSION: The director denied the employment-based preference visa petition 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 of marketing. 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 because: (1) no qualifying relationship exists between the petitioner and the claimed foreign entity; and (2) the proffered position in the United States is not in an executive or managerial capacity.

On appeal, counsel submits a brief and additional evidence.

Section 203(b) of the Act, 8 U.S.C. § 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.

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, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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 an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is a subsidiary of Global Maritime Finance Co. Ltd., of the British Virgin Islands (GMF BVI); (2) markets computer displays; and (3) employs 10 persons, including the beneficiary who is occupying the proffered position as an intracompany transferee (L-1A). The petitioner is offering to employ the beneficiary permanently at an annual salary of \$72,000.

The first issue to be discussed is whether the evidence establishes that the petitioner and the beneficiary's foreign employer share a common relationship pursuant to 8 C.F.R. § 204.5(j)(3)(i)(C). Prior to his transfer

to the United States, Associated [REDACTED] (AIC) of Taiwan employed the beneficiary. The petitioner claims that AIC is the parent company of GMF BVI. GMF BVI claims to own the petitioner.

The director found that the petitioner was not a subsidiary of AIC because a copy of a "Unanimous Written Consent of the Board of Directors" indicated that the 100,000 shares of the petitioner's stock that AIC allegedly purchased had a par value of \$1.00 per share, but the petitioner's 2002 income tax return showed that it had \$2,258,000 in capital stock. The director concluded: "As such, it appears that someone other than the foreign company owns more than 50% of the capital stock."

On appeal, counsel states that the director failed to fully consider the evidence. According to counsel, the petitioner submitted a copy of a second "Unanimous Written Consent," which indicated that the price per share of the 100,000 shares was \$22.45 instead of \$1.00. Counsel states that the minutes reflect a loan that AIC had made to GMF BVI. Counsel also calls Citizenship and Immigration Service's (CIS) attention to an auditor's report that the petitioner submitted with the initial filing and copies of wire transfers.

The regulations at 8 C.F.R. § 204.5(j)(2) define a subsidiary, in pertinent part, as a firm, corporation, or other legal entity of which a parent owns directly or indirectly, half of the entity and controls the entity. The regulation and case law confirm that 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 visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). 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 Scientology International* at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The evidence contained in the record supports counsel's statements regarding the amount of \$2,258,000 that is listed as common stock on the petitioner's corporate income tax returns. Accordingly, there is sufficient evidence that the beneficiary's foreign employer and the petitioner share a parent/subsidiary relationship. The director's comments on this issue shall be withdrawn; the petitioner has met the requirements of the regulation at 8 C.F.R. § 204.5(j)(3)(i)(C).

The second issue to be discussed in this proceeding is whether the proffered position is 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.

When filing the petition, the petitioner stated that as the vice president of marketing, the beneficiary would "participate in overall management of [the petitioner's] business operation. . . ." The petitioner listed the beneficiary's specific duties as follows:

1. Identifies market potential, establishes pricing and market strategies, estimates potential sales, defines promotional activities;
2. Plans, organizes, and coordinates assigned programs to ensure accomplishment of financial/budgetary goals;
3. Conduct pre-contract liaison with customer and may participate in contract negotiation activities;
4. Coordinates details of program within the organization with a wide range of functions and individuals;
5. Coordinates product introduction and market exploitation with marketing and sales organizations to ensure maximum penetration of market segment; and
6. Provides continuing product surveillance and management of established product to obtain financial objectives.

The petitioner also submitted an organizational chart. According to the chart, a West Coast vice president and an East Coast vice president were directly subordinate to the president. The beneficiary was listed as the West Coast vice president, who supervised five persons: accounting; sales director; shipping and warehousing; in-house sales; and marketing and promotions. The chart also listed a position of sales manager, which was vacant.

In a March 2003 request for evidence (RFE), the director asked the petitioner to submit evidence relating to the beneficiary's proposed duties, including a more detailed description of his actual job responsibilities. The director also asked for an organizational chart that listed each employee's name, title and job responsibilities.

In response, counsel stated the following about the beneficiary's proposed position:

[The beneficiary] will plan, direct, [and] coordinate the sales and marketing of the products manufactured by the Parent Company by performing the following duties:

- Formulate company's policies and long range goals, establish pricing and market strategies, and estimate potential sales. 15%
- Plan advertising and promotion activities and direct the marketing team to carry out such marketing programs. 30%
- Direct and oversee the company's sales team to accomplish the company's sales goal. 50%
- Make employment decision[s] including hiring, salary and termination of employment. 5%

The petitioner also submitted an organizational chart. According to counsel, the chart showed the beneficiary's "future job with the U.S. entity." The chart showed the beneficiary as the vice president of sales and marketing. His position was listed directly under the president, and the positions of accounting, West Coast sales office manager and East Coast sales office manager were listed as the beneficiary's direct subordinates. The chart showed that each sales office manager had subordinate employees.

The director denied the position, in part, because the proffered position is not in a managerial or executive capacity. The director noted that the beneficiary's job description was too broad to convey any understanding

of his daily activities. The director noted further that the organizational chart listed four managers, and that the petitioner's business would not require such a large number of managerial employees.

On appeal, counsel states that the beneficiary's primary activities involve the management of work rather than the performance of work. According to counsel, the beneficiary spends 50 percent of his time directing and overseeing the sales teams. Counsel asserts that the beneficiary does not contact retailers, take orders, "follow with customers," or prepare marketing materials, as he directs, oversees, and manages persons who perform such activities. Counsel asserts further that the beneficiary spends another 45 percent of his time planning promotion activities, formulating the company's policies, and establishing the prices of products. Counsel maintains that the beneficiary manages the petitioner's essential function, which is the sales and marketing of LCD monitors in the United States.

The evidence in the record fails to establish that the proffered position is in a managerial or executive capacity. As counsel maintains that the proposed position is one of a functional manager, the AAO will not address the definition of executive capacity.

The petitioner's evidence of the proffered position contains inconsistencies that have not been resolved. When filing the petition, the petitioner indicated in an accompanying organizational chart that the beneficiary would be the West Coast vice president, with Rico Hua as the East Coast vice president. At the time of initial filing, the beneficiary's duties included liaising with customers, defining promotional activities, and estimating sales. In response to the director's RFE, however, the proffered position changed in material ways. First, instead of being one of two vice presidents who reported to the president, the beneficiary's job became the vice president of the entire operations, with one sales office manager for each coast reporting directly to him. Counsel even referred to this second organizational chart as one that showed the beneficiary's "future job with the U.S. entity." Second, the duties of the proffered position changed. The proffered position would now be responsible for establishing long-range goals and policies, and directing and overseeing the company's sales teams.

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Citizenship and Immigration Services (CIS) requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's RFE did not clarify or provide more specificity to the original duties of the position or to the petitioner's staffing levels. Instead, the evidence submitted added new responsibilities to the position and outlined an entirely new organizational structure. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

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), 8 U.S.C. § 1101(a)(44)(C). It is appropriate, however, for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Although counsel states that the beneficiary will not contact customers himself, the petitioner's initial description of the beneficiary's job has him doing just that. In its initial description of the beneficiary's job, the petitioner stated that the beneficiary will "conduct pre-contract liaison with customer." Although the beneficiary may have some managerial responsibilities, the evidence fails to establish that these responsibilities comprise the beneficiary's primary functions.

On appeal, counsel claims that the beneficiary is a "functional manager" because he manages two essential functions for the petitioner, its marketing and sales. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. 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). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. Counsel's assertions about the beneficiary's management of both marketing and sales is related to the organizational chart that the petitioner submitted in response to the director's RFE, not to the beneficiary's job duties at the time of the petition's initial filing. Again, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, *supra*.

Based upon the above discussion, the position offered to the beneficiary is not in an executive or managerial capacity, and the director's decision to deny the petition on this basis shall 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, 8 U.S.C. § 1361. The petitioner has not met that burden.

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