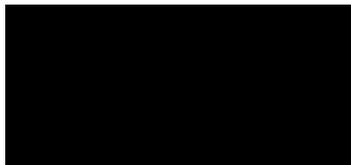




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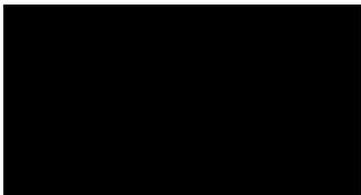
BY

FILE: WAC 03 117 53382 Office: CALIFORNIA SERVICE CENTER Date: AUG 17 2005

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 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

DISCUSSION: The Director, California Service Center, denied the employment-based 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 January 2000 under the name JooHong America, Inc. The petitioner amended its Articles of Incorporation in March 2001 changing its name to Broad & Wide, Inc. It is engaged in internet hardware design, manufacture and sales. 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: (1) the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity or (2) a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner asserts that the duties of the beneficiary's position meet the criteria of managerial capacity and that the petitioner has established a qualifying relationship with the beneficiary's foreign employer. Counsel submits a brief and documents on appeal.

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 a qualifying relationship with the beneficiary's foreign 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 record contains: (1) the petitioner's Articles of Incorporation filed January 12, 2000, authorizing it to issue 10,000,000 shares; (2) a Certificate of Amendment of Articles of Incorporation filed March 22, 2001 changing the petitioner's corporate name; (3) the petitioner's stock certificate #1 issuing 2,000,000 shares to the beneficiary's foreign employer, dated May 30, 2000; (3) the petitioner's stock certificates ##1 – 6 issued to the beneficiary's foreign employer in October 2001, January, 2002, February 2002, March 2002, and April 2002 in varying amounts totaling 20,000,000; (4) the petitioner's stock certificate #7 issuing 2,000,000 shares to an individual, dated May 2002; and, (5) wire transfers showing the beneficiary's foreign employer had transferred funds to the petitioner and bank statements showing the funds had been deposited to the petitioner's account.

The director noted that the petitioner had cancelled the first stock certificate issued to the beneficiary's foreign employer and had re-issued stock certificates ##1 – 6 but had failed to explain this change in stock issuance. The director also determined that the wire transfers details of payment reflected "ordering customer." The director questioned the use of the terminology, "ordering customer" and determined that the petitioner had not established that the beneficiary's foreign employer had paid for the shares issued to it.

On appeal, counsel for the petitioner explains that when the petitioner changed its corporate name, it cancelled the original stock certificate #1 and re-issued the company shares identifying the petitioner by its new corporate name. Counsel notes that to fully support the petitioner's research and development activities, the foreign entity transferred funds to the petitioner and the petitioner issued its shares in return. Counsel notes that these transfers were all made prior to the director's request for further evidence as supported by the petitioner's bank statements. Counsel contends that the director's comments regarding the wording on the wire transfers distorts the significance of the wire transfers.

Counsel's assertions are persuasive. The AAO acknowledges that the wire transfers submitted by the petitioner show that the beneficiary's foreign employer transferred funds to the petitioner's account. The AAO also observes that the petitioner's Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Returns show the increase in the petitioner's capital. Although the record¹ does not contain evidence that the petitioner was authorized to increase the number of shares it could issue, upon review of the totality of the evidence submitted, the AAO will not draw a negative inference from this apparent administrative oversight. The director's decision on the issue of qualifying relationship will be withdrawn.

The next issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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

¹ The record contains minutes of a corporate meeting in March 2003 that in a preamble indicates that the petitioner is authorized to issue 50,000,000 shares. However, the record does not contain a copy of a Certificate of Amendment formalizing the increase in the number of authorized shares.

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 initially provided a letter submitted in support of the beneficiary's classification as an L-1A intracompany transferee with the Form I-140 petition. The petitioner stated in the February 24, 2003 letter that the beneficiary would temporarily require the beneficiary's services to oversee several essential functions and supervise department heads. The petitioner also indicated that: the beneficiary would coordinate functions and operations between the business development department, sales and marketing department, and technical support department; a manager would manage each department and report directly to the chief financial officer/chief operating officer; and each department would be responsible for managing the respective essential function of the company.

The petitioner also provided its organizational chart showing the beneficiary as president and a chief financial officer/chief operations officer directly subordinate to the beneficiary's position. The chart also depicted an individual employed as the technical support director, an individual employed as a business development director with one subordinate employee, and an individual employed as a sales/marketing manager with two subordinate employees.

On April 27, 2004, the director requested a copy of the petitioner's organizational chart describing its managerial hierarchy and staffing levels, as of the date of filing the petition, February 28, 2003. The director requested that the chart include the names of all executives, managers, supervisors, and number of employees within each department or subdivision. The director also requested a brief description of job duties, educational levels, salaries/wages for all employees under the beneficiary's supervision, including the source of each employees' remuneration. The director further requested the petitioner's California Forms DE-6, Quarterly Wage Report for the first and second quarter of 2003. Finally, the director requested a more detailed description of the beneficiary's duties, including a description of one of the beneficiary's typical days.

In a July 19, 2004 response, counsel for the petitioner noted that the petitioner's primary purpose "is the sale and marketing of the [parent company's] full line of hardware products." Counsel indicated that the beneficiary would focus on directing the development of the sales function noting that the beneficiary would spend 40 percent of his time directing his team in identifying and analyzing developing trends and new markets and coordinating with the parent company to ensure that technical requirements of U.S. buyers are correctly interpreted and integrated in the manufacturing process. Counsel noted that the beneficiary would spend 30 percent of his time developing delivery systems to target territories through his team members, including preparing and coordinating commercial documents such as letters of credit, purchase orders, and export licenses and developing an overall strategic business plan. Counsel stated that the beneficiary would spend 20 percent of his time implementing an overall business strategy, encompassing the activities of overseas production and production distribution and directing the set up of distribution channels and support distributors in the areas of pricing and delivery, as well as coordinating post-sales support, advertisement and warranties. Finally, counsel noted that the beneficiary would spend 10 percent of his time supervising the vice-president of North America Regional Sales and his two account managers, managing the technical support director, and conferring with the chief financial officer/chief operation officer who manages and coordinates the overall administrative and finance operations of the company.

The petitioner in a July 16, 2004 letter appended to the response to the director's request for further evidence, repeated portions of the description of the beneficiary's duties initially set forth in its February 24, 2003 letter submitted in support of the beneficiary's classification as an L-1A intracompany transferee. The petitioner also stated that in the position offered, that the beneficiary currently:

- a) manages the organization – [the beneficiary] oversees and directs the management personnel that directly manages the essential functions of the company;
- b) supervises and controls the work of other professionals – [the beneficiary] manages and controls the work of a CFO/COO and 3 (three) department heads;
- c) has the authority to hire and fire or institute other personnel actions – [the beneficiary] has full authority to hire or terminate all employees of the company; and
- d) exercises discretion over the day to day operations of his team of management professionals – he develops the overall business direction and strategies of the company, oversees the implementation by his CFO/COO and department managers and monitors and evaluates business performance on a daily basis.

The petitioner also provided an organizational chart for the first quarter of 2003 showing the beneficiary in the position of chief executive officer directly supervising the chief financial officer/chief operations officer, the technical support director, and the business development/sales/marketing director. The organizational chart also depicted an individual in the position of engineer under the supervision of the technical support director, and two account managers under the supervision of the business development/sales/marketing director. The petitioner's California Form DE-6 for the first quarter of 2003 showed that the petitioner employed four individuals in February and one individual in March.

The petitioner provided brief job descriptions for its employees. The petitioner indicated that: (1) the chief financial officer/chief operating officer managed the company operations and finances, including planning,

general administration, human resources, accounting, office environment and daily operation support; (2) the technical support director provided technology analysis, product development, and production control and made decisions regarding technology and product design; (3) the business development/sales and marketing director directed overall sales and marketing development and managed company operation including planning, human resources, office environment and daily operation support; (4) the engineer tested the products and provided technical support for sales; (5) one of the account managers performed feasibility studies, conducted market research, provided online and offline product announcements, press releases, trade shows, marketing event planning and execution, and assisted west coast regional sales activity; and (6) the second account manager managed sales and customer support for east coast cable operators, controlled forwarding products to customer, visited customers, shipped products, and handled samples.

The director determined that: (1) the petitioner's payroll records for the first quarter of 2003 did not establish that the petitioner employed the individuals noted on the petitioner's organizational chart; (2) the nature of the petitioner's business would not require the number of managers or executives [as noted on the organizational chart] to operate the business; (3) it was reasonable to believe that with the petitioner's organizational structure, the beneficiary would assist with the day-to-day non-supervisory duties; (4) the beneficiary would not be supervising professional employees; and, (5) that the beneficiary did not qualify as a functional manager as he would be involved in performing routine operational activities rather than managing a function.

On appeal, counsel contends that the petitioner provided additional detail regarding the beneficiary's duties that was ignored by the director. Counsel also explains that the petitioner was originally established for research and development and employed seven H-1B classified software engineers who were terminated in December 2002. Counsel asserts that the petitioner transitioned from a research and development company to a sales and marketing company in the fourth quarter of 2002. Counsel notes that the petitioner has signed several agreements, one in October 22, 2002, a second in October 2003, and a third in August 2004 and had received a series of purchase offers in 2003 and 2004. Counsel asserts the agreements and purchase orders are evidence of its sales and marketing activity. Counsel contends that the petitioner's number of employees and business activity demonstrates that the beneficiary qualifies as an executive or in the alternative, that the job duties and responsibilities involved demonstrates that the beneficiary is a manager of a function and qualifies as a manager.

Counsel also attempts to clarify the number of the petitioner's employees when the petition was filed, noting that the petitioner employed five individuals in February and March 2003 and that the individuals held the positions of chief executive officer, (the beneficiary's position) technical support director, director of business development and two account managers. Counsel provides an amended California Form DE-6, showing the petitioner employed four individuals in February and two individuals in March. Counsel states that three of the individuals employed by the petitioner are classified as L-1A intracompany transferees and were paid by the foreign entity.² Counsel provides copies of checks issued to the individuals already listed on the

² The AAO notes that two of the three individuals identified as paid by the foreign entity are also designated on the California Form DE-6 for the first quarter of 2003. The third L-1A transferee is identified as an account manager on the petitioner's second quarter organizational chart. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or

California Form DE-6. Counsel also provides evidence that shortly after the petition was filed, the petitioner entered into a consulting agreement with an individual to provide sales consulting services.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner initially seemed to indicate that the beneficiary would be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act. On appeal, counsel for the petitioner claims that the beneficiary is either an executive based on the petitioner's employees and business activity or a manager based on managing an essential function. However, a petitioner may not claim a beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. The petitioner has not provided sufficient evidence to establish that the beneficiary will be primarily a manager or an executive.

In this matter, the petitioner initially provided a general description of the beneficiary's duties. The petitioner indicated that the beneficiary conferred with the chief financial officer/chief operations officer but on appeal, acknowledges that the petitioner did not employ an individual in this position when the petition was filed. The petitioner indicated that the beneficiary would oversee several functions but did not identify the functions with specificity. 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). The petitioner also noted that the beneficiary would supervise department heads and would coordinate functions and operations between the business development department, sales and marketing department, and technical support department, indicating generally that each department would be responsible for managing its respective essential function of the company. Again, the petitioner did not further delineate the specifics of each department's function.

Counsel's description of the beneficiary's duties, in response to the director's request for evidence also generally states the beneficiary's duties. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. Despite the director's specific request, the petitioner failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Counsel does indicate that the beneficiary directs other employees in carrying out the sales, marketing, and technical aspects of the petitioner's provision of goods and services and the AAO acknowledges that the petitioner has ascribed duties to the beneficiary's subordinates that demonstrate these individuals may contribute to carrying out the operational tasks associated with the petitioner's business. However, both the

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).

petitioner and counsel have indicated that two of the individuals (the technical support director and one of the account managers) subordinate to the beneficiary are classified as L-1A managerial or executive intracompany transferees. Thus when the petition was filed, the petitioner's organizational structure was made up of three managerial or executive positions and had only two employees to actually carry out the specific tasks associated with operating the petitioner's business.³ The petitioner has not adequately explained the role each of the petitioner's employees play in the petitioner's operation of its business, nor has the petitioner justified three managerial or executive positions with only two employee positions to perform the petitioner's operational and administrative tasks. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

The AAO observes that the petitioner's July 16, 2004 letter, in response to the director's request for evidence seemed to contend that the beneficiary managed professionals and personnel who were responsible for managing essential functions of the company. However, again the petitioner does not provide sufficient evidence to establish that the beneficiary's subordinates hold professional positions or manage essential functions.

First, the petitioner does not identify which of its positions are professional positions. Second, the petitioner does not establish that any of its listed positions require the services of an individual with a bachelor's degree. Third, the term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Finally, the possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. The petitioner has not established that the beneficiary primarily manages individuals employed in professional positions.

When considering whether the beneficiary's subordinates manage essential functions, the AAO observes that if a petitioner claims that an employee is managing an essential function, the petitioner must clearly describe the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the employees' daily duties attributed to managing the essential function. In addition, the petitioner's description of the employees' daily duties must demonstrate that the

³ The AAO notes that shortly after the petition was filed, the petitioner entered into a consulting arrangement with an individual identified as vice-president of sales/marketing. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katighak*, 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 Service's requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

employee *manages* the function rather than *performs* the duties related 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner does not specify whom carries out the operational tasks related to the petitioner's business other than the beneficiary's immediate subordinates. The petitioner has not established that the beneficiary primarily manages individuals employed as function managers.

The record in this matter does not support counsel's contention that the petitioner's number of employees and business activity demonstrate that the beneficiary qualifies as an executive. The petitioner has failed to provide a comprehensive description of the beneficiary's duties demonstrating that the beneficiary's tasks are primarily executive tasks. The petitioner has failed to articulate how the petitioner's number of employees or business activity elevates the beneficiary to a position that is primarily executive. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of the petitioning enterprise's overall purpose and stage of development. In this matter, the petitioner has failed to adequately support the claim that the beneficiary is relieved from performing primarily operational tasks and the duties of a supervisor of non-professional, non-managerial, and non-supervisory employees. The petitioner has failed to adequately distinguish the beneficiary's position from those of other of the petitioner's employees.

The record in this matter also does not establish that the beneficiary's job duties or those of the beneficiary's subordinate employees demonstrate that the beneficiary manages a function. Again, the petitioner does not identify the petitioner's function or functions with specificity and does not adequately explain the beneficiary's role in managing or performing the function.

On review, the record is not sufficient to establish that the beneficiary's duties for the petitioner comprise primarily executive or managerial duties.

Beyond the decision of the director, the AAO appreciates counsel's candor when explaining the petitioner's transition from a research and development company to a sales and marketing company. However, the AAO notes that the petitioner had entered into only one non-disclosure agreement and had received only one purchase order prior to filing the petition. The AAO questions whether the petitioner was sufficiently established in its sales and marketing endeavor when the petition was filed, such that the record could demonstrate that the petitioner continued to operate as a viable company. However, this issue will not be examined further and the appeal will be dismissed for the reason stated above.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.