



U.S. Citizenship
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FILE:



WAC 03 231 53819

Office: CALIFORNIA SERVICE CENTER

Date:

AUG 22 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 March 2000. It manufactures, distributes, and sells clothing. It seeks to employ the beneficiary as its vice-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 primarily managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner contends that the director's decision was based on an erroneous interpretation of the regulations and governing precedent decisions.

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 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 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.

On the Form I-140, Immigrant Petition for Alien Worker, the petitioner indicated that the beneficiary would direct the petitioner's financial growth and expansion. In an undated, unsigned letter titled Exhibit "B" Qualifications of the Alien For the Job Offer of Vice President, the beneficiary's qualifications for the proposed position were listed as his present classification as an L-1A intracompany transferee and his management experience as financial manager/director for the foreign entity.

On August 12, 2004, the director requested: (1) a more detailed description of the beneficiary's duties in the United States indicating the approximate time the beneficiary spent in each of the listed duties; (2) a copy of the petitioner's organizational chart describing its managerial hierarchy and staffing levels, as of the date of filing the petition, which should include the names of all executives, managers, supervisors, and number of employees within each department or subdivision, and a brief description of job duties, educational levels, salaries/wages for all employees under the beneficiary's supervision; and, (3) the petitioner's California Forms DE-6, Quarterly Wage Report, for the last four quarters.

In an October 11, 2004 response to the director's request for further evidence the petitioner listed the beneficiary's duties as:

1. General Management
 - a. Manage and oversee the production of all material of the company and supervise the personnel pursuant to the production goals of the company.
 - b. Oversee sales to buyers and wholesale companies in the U.S.
2. Manage all U.S. Sales and Public Relations
 - a. Oversee sales and relationships to local buyers and store owners
 - b. Manage and oversee sales to wholesalers
3. Production Control
 - a. Oversee orders and manage production schedules with vendors
 - b. Oversee quality control for contractors and subcontractors.
4. Design Selections
 - a. Manage the design of current and next season's product lines
 - b. Oversee the purchase of fabrics, textiles and other materials
5. Market Research
 - a. Manage the research for new product trends and emerging markets

The petitioner in a separate document listed the beneficiary's duties and time spent on those duties as:

Accounting Executive – 40 percent
Chief Fashion [sic] Designer – 30 percent
Public Relations Manager – 30 percent

The petitioner also provided its organizational chart showing the beneficiary in the position of vice-president reporting to the petitioner's president. The chart depicted an accounting, sales, and shipping department, each with one employee, subordinate to both the president and vice-president's positions. The petitioner's California Form DE-6 for the third quarter of 2003, the quarter in which the petition was filed, confirmed the

employment of the individuals in the positions of president, vice-president and in the departments of accounting and shipping.

The petitioner also provided brief job descriptions for the employees of the organization. The petitioner indicated that the president was the re-sourcing manager, marketing coordinator, and performed overseas marketing duties; an individual in the accounting department (also identified as a sales manager) provided marketing, visual merchandising, and customer support; and a shipping manager acted as shipping manager and also provided sales and customer support. The individual identified on the organizational chart as being in the sales department was identified as the inventory manager on the petitioner's descriptions of job duties and was not depicted on the petitioner's California Form DE-6 for the quarter in which the petition was filed.

On December 27, 2004, the director determined that: (1) the description of the beneficiary's job duties was general and did not provide sufficient detail regarding the beneficiary's actual duties and the percentage of time devoted to those duties; (2) some of the beneficiary's duties such as sales and marketing had not been shown to be managerial or executive responsibilities; (3) the petitioner did not possess the organizational complexity to warrant an executive position; and, (4) the record indicated that a preponderance of the beneficiary's duties would be directly providing the services of the business. The director also noted that if the beneficiary performed a function within the organization, Citizenship and Immigration Services (CIS) would view the position as a staff officer or specialist and not as an executive. The director denied the petition concluding that the record did not establish that the beneficiary had been or would be employed in a qualifying managerial or executive capacity.

On appeal, counsel for the petitioner contends that the director based his decision solely on the size of the petitioning organization, presuming that the manager of a small company could never be considered engaged in primarily performing managerial responsibilities. Counsel avers that the director's interpretation does not allow for the alternative basis of managing an essential function, because the director would require a showing that some other supervised employee(s), and not the beneficiary, directly perform(s) the function. Counsel also asserts that the director disregarded the beneficiary's managerial decision-making role in facilitating the rapid growth of the petitioner as evidenced by the petitioner's income statements.

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). First in this matter, the petitioner does not specify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

Second, the petitioner has provided a broadly based description of the beneficiary's duties. The petitioner indicated that the beneficiary would direct the petitioner's financial growth and expansion and seems to confirm that the beneficiary will spend 40 percent of his time on this endeavor. The petitioner also indicates that the beneficiary spends 30 percent of his time designing or managing the design of the next season's

products and 30 percent of his time on public relations with local buyers, storeowners, and wholesalers. The petitioner does not clarify or more specifically allocate the beneficiary's time spent on general management, production control, or market research. The duties as generally described are more indicative of an individual performing basic operational, administrative, sales, and possibly supervisory tasks for the company. As the director noted, 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).

On appeal, counsel for the petitioner does not explain or further clarify how performing the company's market research, designing new products, selling the petitioner's products, performing public relations, and supervisory tasks translate into primarily executive or managerial duties. Counsel does not attempt to define the petitioner's function(s), essential or otherwise. Counsel should note that 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. The petitioner has 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Moreover, to clearly describe the duties of a function manager, the petitioner should at least identify the function with specificity, articulate the essential nature of the function, and demonstrate that the beneficiary's duty is to primarily manage the function, and not to perform the tasks associated with the function. In this matter, the petitioner's broad description of the beneficiary's actual duties, suggest that he is the individual selling, marketing, designing, and promoting the petitioner's services. Neither counsel nor the petitioner has provided sufficient evidence of other employees who would relieve the beneficiary from performing primarily these non-qualifying duties. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Rather the petitioner has provided confusing information regarding the position(s) of the petitioner's employees, as well as indefinite descriptions of their job duties and roles within the petitioner's organizational structure. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Counsel seems to implicitly object to the director's reliance on *Matter of Church Scientology Int'l.* 19 I&N Dec. at 593. However, the *Matter of Church Scientology Int'l.* decision remains a valid precedent decision that is binding on all CIS officers in the enforcement of the Act. See 8 C.F.R. § 103.3(c). Specifically, in *Matter of Church Scientology*, the AAO examined the claimed managerial capacity of a member of the Church of Scientology. After citing to the regulations and noting that the beneficiary's duties must be "primarily at the managerial or executive level," the AAO stated: "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 Int'l.*, 19 I&N Dec. at 604. The AAO continued to examine the specific job duties and concluded that the beneficiary appeared to function as a staff officer or specialist and not as a manager or executive.

Counsel's contention that the director's interpretation of managerial capacity does not allow for the alternative basis of managing an essential function is not persuasive. 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) of the Act, 8 U.S.C. § 1101(a)(44)(A). In such a situation, the AAO recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. The addition of the concept of a "function manager" by IMMACT 90 simply eliminates the requirement that a beneficiary must directly supervise subordinate employees to establish managerial capacity. However, as in *Matter of Church Scientology Int'l*, the statutory requirement that a beneficiary "primarily" perform in a managerial or executive capacity continues to be a valid precedent. Moreover, federal courts continue to give deference to CIS's interpretation of IMMACT 90 and the concept of "function manager," especially when considering individuals who primarily conduct the business of an organization or when the petitioner fails to establish what proportion of an employee's duties might be managerial as opposed to operational. See *Boyang Ltd. v. INS*, 67 F.3d 305 (Table), 1995 WL 576839 at *5 (9th Cir. 1995 (unpublished))(citing to *Matter of Church Scientology Int'l* and finding an employee who primarily performs operational tasks is not a managerial or executive employee); see also, *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999); *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Counsel correctly observes that a company's size alone 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). However, it is appropriate 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). In this matter, the petitioner has not provided evidence that the beneficiary will be relieved from primarily performing the petitioner's promotion, sales, or marketing tasks as well as designing products and engaging in public relations duties. 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. at 165.

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. Moreover, 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 its overall purpose and stage of development. In the present matter, the petitioner has not established the basic eligibility requirement in this matter, that the beneficiary is primarily performing managerial or executive duties. Again, 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. at 165.

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the United States petitioner comprise primarily executive or managerial duties. For this reason, the petition will not be approved.

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed in a managerial or executive capacity for the foreign entity prior to entering the United States. The petitioner has provided the foreign entity's March 10, 2003 letter that includes a non-specific description of the beneficiary's duties indicating that the beneficiary's duties as "Financial Manager/Director" included:

Management and direction of all aspects of the company's financial, economic, and accounting functions; direction of control of North American business development; strategic planning of business plans and fiscal P & L budgets; development of potential business opportunities and acquisitions.

The petitioner also provided the foreign entity's organizational chart showing the beneficiary in the position of "Overseas Sales," supervising swimwear and knit teams. The petitioner does not make clear whether the beneficiary performed primarily supervisory duties, as depicted on the organizational chart, or performed the generally described duties in the foreign entity's March 10, 2003 letter. 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. at 591-92. Moreover, 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. at 1103.

The conflicting descriptions of the beneficiary's duties for the foreign entity coupled with the simplistic organizational chart is not sufficient to establish that the beneficiary performed primarily managerial or executive duties for the foreign entity. For this additional reason, the petition will not be approved.

Further beyond the decision of the director, the petitioner has presented confusing and incomplete evidence regarding its qualifying relationship with the beneficiary's foreign employer. The petitioner has submitted:

Its Articles of Organization showing it was organized in March 2000 and is authorized to issue 100,000 shares;

Its California Notice of Transaction indicating that the value of securities it had sold or proposed to sell was \$190,000 on March 10, 2003;

Its 2003 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, showing on Schedule L, Line 22(b) no value for its common stock;

Its stock certificate number 2 showing that 51,000 shares had been issued to the foreign entity on March 10, 2003;

Its stock certificate number 3 showing that 49,000 shares had been issued to Jae H. Kim, the petitioner's president, on March 10, 2003;

A March 10, 2003 letter purportedly signed by the president of the foreign entity claiming the foreign entity owns 51 percent of the petitioner;

A wire transfer document showing that the foreign entity sent \$150,000 to the petitioner's account on March 13, 2003; and,

Its Minutes of the Board of Directors and Shareholders dated March 10, 2003 that identifies the foreign entity as a new investor and approving its capital investment of \$150,000 for 51,000 shares.

The petitioner has not provided its stock certificate number 1 or its stock ledger. The petitioner has not identified the value of its stock on its IRS Forms 1120.

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.*, 19 I&N Dec. at 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The record does not establish the petitioner's subsidiary relationship with the beneficiary's foreign employer. For this additional reason, the petition will not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.