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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: FEB 28 2005

WAC 03 118 54790

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 August 2001. It operates a restaurant. 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: (1) that 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 submits a brief and documentation.

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 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.

In a March 3, 2003 letter appended to the petition, the petitioner stated that the beneficiary had been "managing and directing the establishment and operation of the U.S. subsidiary." The petitioner indicated that:

She has full authority to handle the local operations, hire/fire staff and establish local policies [sic] and procedures as she sees fit. She will continue to direct and manage the operations of the U.S. Business entity. She will continue to select, hire, train and supervise staff, as applicable. Further, she will confer with administrative personnel, review activity and operations, and sales reports to determine changes in programs or operations required, and promote our organization within the industry, Restaurant Association. As President of the U.S. subsidiary, [the beneficiary] will continue to regularly report to the Board of Directors of the Korean parent company by preparing financial status reports and status performance reports. In addition, she will be in charge of strategic planning, reviewing and market analysis to determine customer needs, keep up to date with the volume potentials of the products, set up a price schedule and other executive duties as assigned.

On May 21, 2003, the director requested evidence to establish that the beneficiary would be performing the duties of a manager or an executive with the United States entity. The director specifically requested: (1) a copy of the petitioner's organizational chart describing its managerial hierarchy and staffing levels, as of the date of filing the petition, March 5, 2003; (2) that the chart include the names of all executives, managers, supervisors, and number of employees within each department or subdivision; (3) a brief description of job duties, educational levels, salaries/wages for all employees under the beneficiary's supervision; and, (4) a more detailed description of the beneficiary's duties in the United States.

In an August 12, 2003 response, the petitioner stated that the beneficiary would be "responsible for overseeing the daily functions of the restaurant to ensure consistency in customer service, and prudent quality as well as overall management and marketing strategies." The petitioner noted that the beneficiary as president will be responsible for:

Directly and indirectly supervising the day-to-day activities of thirteen (13) employees; two (2) of whom possess a bachelor's degree or higher degree, including a vice managing director and, financial officer, and six part time employees (varies time to time: 6-20 employees). As to these employees, has the authority to make or recommend personnel actions, including promotion, training, hiring, termination, vacations and leave-of-absence authorizations (45%).

Exercising wide discretionary decision-making authority concerning all of the project activities involved in coordinating the menus, marketing programs and business propositions for third party suppliers (20%);

Managing the activities, including planning, organizing, and staffing of the restaurant, including supply management, service development and business management (10%);

Acting as a liaison between the suppliers and managers concerning ingredients and supplies (5%);

Exercising wide discretionary decision-making authority concerning an overall annual budget of \$750,000 (5%);

Preparing project reports concerning service development, budget and costs and scheduling (10%); and

Overseeing and ensuring the consistency of strategies and processes (5%)

The petitioner indicated that the beneficiary supervised a managing director. The managing director assisted in making daily strategic decisions, identified critical performance deficiencies and proposed solutions, managed resource planning and training, and assisted in directing expenditures to support the business operation and development projects. The beneficiary also supervised an assistant manager who managed and directed the day-to-day business operations of the specific branch/subsidiary and identified staffing needs and solved employee issues. The beneficiary also supervised a financial officer who was responsible for financial statements, payroll, expense and recording profit, and produced the financial reports to file with the government. The beneficiary also supervised the head cook/cook and part-time employees including waitresses, cashiers, maintenance, and other staff.

On September 20, 2003, the director again requested: (1) a copy of the petitioner's organizational chart describing its managerial hierarchy and staffing levels, as of the date of filing the petition, March 5, 2003; (2) that the chart include the names of all executives, managers, supervisors, and number of employees within each department or subdivision; (3) a brief description of job duties, educational levels, salaries/wages for all employees under the beneficiary's supervision; and, (4) a more detailed description of the beneficiary's duties in the United States. The director also requested the petitioner's California Form DE-6, Employer's Quarterly Wage Report for the first quarter of 2003.

In a December 12, 2003 response, the petitioner referenced its August 12, 2003 response to the director's request for evidence. The petitioner also provided its organizational chart showing the beneficiary directly supervising a vice president, who in turn supervised a manager, an accountant, and independent contractors including a certified public accountant, an attorney, and a broker. The organizational chart also showed that the manager supervised servers and cooks. The petitioner's first quarter 2003 California Form DE-6, confirmed the employment of the individuals in the positions identified on the petitioner's organizational chart.

The director determined that the petitioner's job description did not establish the beneficiary's executive capacity and that the petitioner had paraphrased elements of the definition of managerial capacity. The director considered the petitioner's organizational structure and its part-time employees as indicated by its 2003 first quarter California Form DE-6. The director concluded that the petitioner's business did not reasonably require managerial and executive staff and that it was reasonable to believe that the beneficiary

would be participating in day-to-day non-supervisory duties. The director then concluded that the beneficiary's position would be a first-line supervisory position of non-professional employees.

On appeal, counsel for the petitioner asserts that: the petitioner's description of the beneficiary's duties describes an executive position; the petitioner's organizational chart shows the beneficiary at the highest level; the petitioner provided descriptions for the beneficiary's immediate subordinate, the vice-president/managing director and the staff involved in operating the restaurant; and, the restaurant is not a small operation. Counsel submits a more detailed and expanded description of the beneficiary's duties and those of her subordinates. Counsel notes that the vice-president/general manager is a second level manager.

Counsel contends that the director did not support his determination that the restaurant did not require an executive and that the director improperly assumed, based on the size of the operation, that the beneficiary would be performing general daily restaurant activities. Counsel also observes that the petitioner did not request consideration of the beneficiary's duties as a manager, but that in fact, the beneficiary's duties also satisfy the criteria of a manager, as she has two levels of managers beneath her.

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 did not clarify whether the beneficiary would 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 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 initially provided a general description of the beneficiary's duties. For example, the petitioner states that the beneficiary's duties include "full authority to handle operations," and "select, hire, train and supervise staff." The petitioner did not, however, define the beneficiary's daily duties in handling the operations or describe the petitioner's organizational structure and the subordinates supervised. 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). 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).

Further, the petitioner's indication that the beneficiary would "review activity and operations, and sales reports to determine changes in programs or operations required," and "be in charge of strategic planning, reviewing and market analysis to determine customer needs, keep up to date with the volume potentials of the products, set up a price schedule" are duties more indicative of an individual performing the promotional, marketing, and operational tasks of the restaurant. 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's second iteration of the beneficiary's duties is also indicative of an individual actively involved in the petitioner's restaurant's daily operations. The petitioner stated that the beneficiary spends 45 percent of her time directly and indirectly supervising employees. In addition, she spends 20 percent of her time coordinating menus, marketing programs, and [reviewing] business propositions from third party suppliers and another 15 percent organizing the staffing, supply management, service development and business management and acting as a liaison between suppliers and managers. These are operational tasks associated with running a restaurant. Again, 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 at 604. The petitioner has not provided a description of the beneficiary's duties demonstrating that the beneficiary primarily performs in an executive capacity.

Counsel's expansion on the beneficiary's duties on appeal and the conclusion that the beneficiary's duties are executive is not persuasive. First, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Second, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). Third, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to provide a description of the beneficiary's typical day and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Counsel's assertion on appeal that the beneficiary's duties also satisfy the criteria in the managerial capacity definition is also not persuasive. Counsel references the petitioner's organizational chart and asserts that the petitioner employs a second level manager, (the vice-president/managing director), an accountant, and a first-line supervisor (the restaurant manager). The record does not establish that this is the beneficiary's primary task. The petitioner did note that the beneficiary spent 45 percent of her time directly and indirectly supervising 13 employees and that two of the employees supervised held bachelor degrees. However, the description of the duties performed by the vice-president/managing director and the financial officer are not sufficient to establish that these individuals are primarily managers or supervisors or hold professional positions. See section 101(a)(44)(A)(ii) of the Act. It appears that the vice-president/managing director assists the beneficiary in making business decisions, and the financial officer provides the petitioner's daily bookkeeping services. The record does not clearly establish that the petitioner's restaurant manager is a first-line supervisor rather than the only full-time operational employee. The petitioner has not shown that these employees primarily supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors.

The petitioner may not create artificial tiers of employees to suggest that an organization is sufficiently complex to support an executive or manager; instead the petitioner must substantiate that the duties of a beneficiary's subordinates correspond to their placement in an organization's structural hierarchy. Citizenship

and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business, when examining the managerial or executive capacity of a beneficiary. In this matter, upon review of the totality of the record, the petitioner has not established that the beneficiary performs primarily executive or managerial duties.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. 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 explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties, such as coordinating menus, marketing the program, organizing the staffing, and dealing with third party suppliers. 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 at 190.

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner will involve primarily executive or managerial duties.

The second issue in this proceeding is whether the petitioner has established a qualifying relationship between the petitioner and the foreign entity. 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 initially submitted its Articles of Incorporation authorizing it to issue 10,000 shares of stock and a November 12, 2002 amendment to the Articles of Incorporation authorizing the petitioner to issue 505,000 shares of stock. The sole shareholder, the beneficiary, consented to a special meeting of shareholders and to the amendment to the Articles of Incorporation on November 18, 2002. The petitioner also submitted copies of two stock certificates. The petitioner issued stock certificate number 1 to Bu Chun Co., Ltd in the amount of 10,000 shares on September 3, 2001. The petitioner issued stock certificate number 2 to Bu Chun Co., Ltd. in the amount of 495,500 shares on October 29, 2002.

The director requested evidence showing that the foreign entity had, in fact, paid for its interest in the petitioner. In response, the petitioner included copies of wire transfer receipts showing Rich Spring, Inc. as the originator. The petitioner also submitted copies of Applications For Remittance showing the Korean name of the applicant as Bucheon and the English name Rich Spring, Inc.

The director observed that the share certificates were issued to Bu Chun Co., Ltd. not to Bu Cheon or to Rich Spring, Inc. The director determined that the record did not contain sufficient consistent evidence to establish a qualifying relationship between the United States petitioner and the foreign entity.

On appeal, counsel for the petitioner explains that [REDACTED] and [REDACTED] Inc. all refer to the foreign parent company in this matter. Counsel submits a statement from an accredited Korean translator confirming that the three names are the same in Korean.

Counsel's explanation regarding the transliteration and translation of the foreign entity's name is persuasive. However, the AAO observes that the beneficiary also claims to be the petitioner's sole shareholder. The AAO further observes that the petitioner states that the beneficiary owns only 33 and 1/3 of the foreign entity. 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). The record raises concerns regarding the actual ownership of the petitioner. The petitioner has not submitted sufficient evidence to establish a qualifying relationship between the United States and foreign entities.

Beyond the decision of the director, the petitioner has not established that it was doing business for one year prior to filing the petition on March 4, 2003. The regulation at 8 C.F.R. 204.5(j)(3)(i)(D) requires that the petitioner demonstrate that it has been doing business of one year when filing the petition. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

In this matter, although the petitioner was incorporated on August 16, 2001 it did not purchase the restaurant, its only asset, until August 2002. Thus, the petitioner did not begin doing business regularly, systematically, or continuously until it purchased the restaurant, seven months prior to filing the petition.

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). For this additional reason, the petition will not be approved.

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.