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Immigration and Naturalization Service

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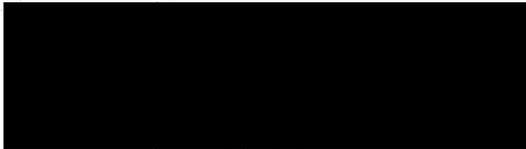


File: WAC 98 226 51991 Office: CALIFORNIA SERVICE CENTER Date: FEB 06 2003

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)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center on August 5, 1999. The petitioner submitted a notice of appeal dated August 28, 1999 that was received by the Service Center on September 8, 1999. The Form I-290B Notice of Appeal indicated that a brief and additional evidence would be submitted within 30 days. The Administrative Appeals Office summarily dismissed the appeal on December 8, 2000 on the basis that no brief or additional evidence had been submitted. Counsel for the petitioner on January 29, 2001 submitted a statement that the notice of the Associate Commissioner's December 8, 2000 decision had not been received until January 8, 2001. Counsel also submitted a return receipt indicating that the petitioner had submitted a brief and supporting evidence that was delivered to the Administrative Appeals Unit on August 31, 1999. The Associate Commissioner will reopen this matter for review of the brief and supporting evidence initially submitted on appeal and for the entry of a new decision. The decision of the director to deny the petition will be affirmed.

The petitioner is a company organized in the State of California in January of 1995. It is engaged in international trading. It seeks to employ the beneficiary as its vice-president.¹ Accordingly, it 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 it was "doing business" in the United States. The director also determined that the petitioner had not established that the beneficiary had been or would be functioning in an executive or managerial capacity. The director further determined that the petitioner had not established a qualifying relationship between itself and a foreign entity.

On appeal, counsel for the petitioner asserts that the Service erred in denying the petitioner's petition.

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)

¹ On appeal, the petitioner states that on October 28, 1998 nine weeks after the petition was filed, the beneficiary was appointed president of the petitioner. However, 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, 14 I&N Dec. 45,49 (Comm. 1971). As such, the Associate Commissioner will review the petition based upon the beneficiary's status at the time the petition was filed.

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.

Counsel for the petitioner submitted a letter with the petition indicating that the petitioner had previously applied for an L-1A non-immigrant visa classification on behalf of this beneficiary. Counsel noted that the L-1A petition had been denied but asserted that based on new evidence and the restructuring of its management, the petitioner required the beneficiary's permanent transfer.

The first issue in this proceeding is whether the petitioner has been doing business in a regular, systematic, and continuous manner.

8 C.F.R. 214.2(l)(1)(ii)(H) states:

Doing Business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The director noted that the petitioner used a second address when doing business and that the second address was for an employee of the petitioner. The director also questioned the size of the petitioner's office at its office address. The director determined from this information that the petitioner had not sufficiently established that it was doing business from its office address. The director concluded that the petitioner was merely maintaining the presence of an agent of an office of the foreign company in the United States.

On appeal, counsel for the petitioner states that the second address noted by the director is an address the petitioner used when it was initially established but that in 1996 its permanent offices were leased. Counsel also states that its office is large enough to conduct its business and explains that it does not warehouse goods but that goods are shipped directly to the buyer.

Upon review of the record, the petitioner has established that it has been doing business. In the original filing, the petitioner submitted sufficient documents to demonstrate that it was engaged in the regular, systematic, and continuous provision of goods or services at the time of filing. The petitioner submitted invoices, bills of lading, contracts, and air bills to substantiate that it was transacting business at the time the petition was filed. The director's decision will be withdrawn as it relates to the question of whether the petitioner was doing business in a regular, systematic, and continuous manner.

The second issue in this proceeding is whether the petitioner has established that the beneficiary had been and would be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave

authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner through its counsel initially stated that the beneficiary would act as vice-president for the company. The petitioner indicated that while the president was away, the beneficiary would be responsible for the following:

Plan[ning] the business operations and execute[ing] discretionary authority over general business management and development. She will have authority to approve purchases and sales, signing of contracts, business checks and legal documents, and have the sole responsibility for hiring outside consultants such as attorneys, tax advisors, banking services, and market researchers.

The petitioner also stated that when the president was present, the beneficiary would have responsibility for the petitioner's overall business management and development. The petitioner provided the details of her duties as follows:

[E]stablish goals and policies for its business operation, review and evaluate the performance of the

manager on a quarterly basis, and hold the authority to make personnel decisions; oversee the use of outside accounting and legal service by the company; to make decisions on all critical matters, including handling direct negotiations with U.S. sellers; and to report on the activities of Petitioner to the Board of Parent Company. [The beneficiary] will also have sole responsibility for planning business development and marketing strategies for the import of Asian grocery products into the U.S., a critical aspect of the petitioner's future development and expansion.

The petitioner also stated that the beneficiary would have the manager under her direction, but her primary duty was "not to supervise these employees, but to co-ordinate all business activities, including imports and exports, marketing and finances, and plan for the expansion of the Petitioner's import business."

The petitioner also submitted its organizational chart depicting a president, the beneficiary's position of vice-president, a manager and two additional employees. The petitioner also submitted its California Form DE-6, Quarterly Wage and Withholding Report for the first two quarters of 1998. Each Form DE-6 reflected four employees identified on the organizational chart as the president, the manager, and the two employees.

The director determined that the beneficiary would be performing many of the duties related to a first-line supervisory position. The director concluded that the record did not support a finding that the beneficiary had been or would be functioning in a managerial or executive capacity.

On appeal, counsel for the petitioner states that the petitioner appointed the beneficiary to the position of president a short time after the petition was filed. Counsel asserts that the beneficiary as president now is the sole individual in charge of the petitioner's day-to-day operations. Counsel submits checks and various agreements signed by the beneficiary in her capacity as president as evidence of her executive capacity. Counsel also asserts that the beneficiary qualifies as a managerial employee and an employee with specialized knowledge. Counsel cites to the definitions of executive capacity and managerial capacity and as an employee involved in a specialized knowledge position found in the regulations relating to the criteria for a non-immigrant visa classification.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). In the petition, the petitioner submitted a general position description that does not convey an understanding of the beneficiary's duties on a daily basis. The petitioner does not identify the amount of time the beneficiary

would be expected to assume the responsibilities of the president. The Service cannot conclude that the beneficiary was primarily acting as the petitioner's president at the time the petition was filed. The petitioner vaguely refers to duties such as "establish[ing] goals and policies for its business operation," and having "sole responsibility for planning business development and marketing strategies for the import of Asian grocery products," and "handling direct negotiations with U.S. sellers." The Service is unable to determine from these statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities.

Counsel's indication that the beneficiary became the president of the company a short time after the petition was filed is not relevant to the determination of the beneficiary's eligibility at the time the petition was filed. 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, 14 I&N Dec. 45,49 (Comm. 1971). Moreover, counsel's citation to the regulatory provisions relating to eligibility for classification as a non-immigrant point to a basic misunderstanding of the applicable law.²

Counsel also states that the beneficiary as president is the sole individual in charge of the day-to-day operations of the petitioner. However, even if the beneficiary was one of the individuals primarily responsible for the petitioner's day-to-day operations as vice-president, counsel does not explain how this responsibility translates to executive capacity. The examples given of signing checks, lease agreements, and contracts do not substantiate that the beneficiary is acting primarily as an executive. These duties also are indicative of an individual providing basic services to the petitioner. 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). Counsel also indicates that the beneficiary is a manager and provides the same examples of signing contracts, and the beneficiary's responsibility for the day-to-day operations of the petitioner adding the beneficiary's responsibility of hiring and staffing the petitioner. The criteria listed under the definition of managerial capacity differ significantly from the criteria listed under the definition of executive capacity. Neither counsel nor the petitioner has

² We note that the director also cited to the non-immigrant definition of an "executive" in her decision. However, the burden of proof in these proceedings rests with the petitioner and although the inappropriate citation may have been misleading, the petitioner is obligated to submit sufficient evidence to establish the beneficiary qualifies under the appropriate criteria.

adequately explained how the beneficiary meets the criteria of both managerial and executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

At the time of filing, the petitioner was a three-year-old trading company that claimed to have gross receipts in the amount of \$773,968. The firm employed a president, a manager and two employees. The petitioner proposed to add the beneficiary's position of vice-president at the time the petition was filed. The petitioner has not submitted adequate evidence to demonstrate that it employs sufficient subordinate staff members to perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's lack of information on this issue, it is not possible to determine if the reasonable needs of the company could plausibly be met by the services of the staff on hand at the time the petition was filed. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial or executive capacity of the beneficiary's position. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

The record contains insufficient evidence to demonstrate that the beneficiary had been or will be employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are vague and fail to describe the actual day-to-day duties of the beneficiary. In addition, a portion of the position description serves to merely paraphrase the statutory definitions of managerial and executive capacity. The description of the duties to be performed by the beneficiary does not sufficiently demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

The third issue in this proceeding is whether the petitioner has established a qualifying relationship exists between the petitioner and the claimed parent company.

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 overseas company.

The petitioner offered its share certificate number 2 issuing 102,500 shares to the claimed parent company with the petition. The petitioner also submitted its stock transfer ledger showing that the first share certificate was void. The petitioner also submitted a number of wire transfers made in and around February of 1995 from different individuals to the petitioner. The director determined that the record lacked evidence establishing that the claimed parent company owned a majority interest in the petitioner. On appeal, counsel for the petitioner asserts that at the time of filing the petition the claimed parent company was the sole owner of the petitioner. Counsel also notes that subsequent to the filing of the petition, the petitioner issued an additional number of shares to an individual but that the claimed parent company continued to hold a majority interest in the petitioner. Counsel indicates that the wire transfers were processed through an individual's account to avoid the restriction of outward transfers from corporations by the Chinese government.

Case law confirms that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and a foreign entity for purposes of an immigrant visa classification. Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988); see also Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant proceedings); Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant proceedings). In 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 of Scientology International, at 595. The petitioner has not submitted sufficient evidence to establish that the claimed parent company purchased the original shares issued to it. The petitioner has not provided evidence that the claimed parent company, a company registered in Japan, provided the capital necessary to purchase ownership and control of the petitioner. Counsel's assertions to the contrary are without merit. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980). Transfers of funds from an individual or individuals to purchase shares on behalf of a company do not evidence ownership and control by the company. The record is insufficient in establishing that the claimed parent company actually purchased any shares of the petitioner.

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, the petitioner has not sustained that burden.

ORDER: The prior decision of the Associate Commissioner is withdrawn. The decision of the director is affirmed.