



U.S. Department of Justice

Immigration and Naturalization Service

B4

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC 02 058 53781 Office: CALIFORNIA SERVICE CENTER

Date:

FEB 25 2003

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)

IN BEHALF OF PETITIONER:



**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

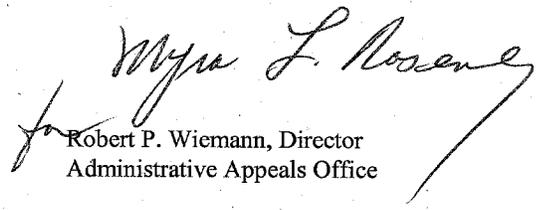
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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 that 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 that 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 Director of the California Service Center denied the employment-based preference visa and the matter is now before the Administrative Appeals Office ("AAO") on appeal. The appeal will be dismissed.

The petitioner is a California corporation that sells LCD modules. It seeks to employ the beneficiary as its vice president of marketing and finance and, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C).

The director denied the petition on the basis that the proffered position is neither executive nor managerial in nature.

On appeal, counsel submits a brief and additional evidence. Counsel states, in part, that all of the duties of the proffered position are at the executive or managerial level.

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.

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. 8 C.F.R. § 204.5(j)(1). No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner describes itself as a subsidiary of Powertip Technology Corporation (PTC) of Taiwan that markets and sells LCD modules at wholesale. It claims to employ seven persons and have a

gross annual income of \$3,417,653. According to the petitioner, it currently employs the beneficiary as its vice president in L-1A nonimmigrant status. It is offering to employ the beneficiary in the same position on a permanent basis at an annual salary of \$40,000.

The petitioner states that the proffered position entails the following duties:

- Supervise marketing and finance department
- Set-up company policy
- Draft regulations
- Supervise and control budget
- Evaluate performance and hire/discharge manager
- Report to the president about the company's operations
- Act in the president's absence to supervise the company's operations
- Communicate with the parent company about the petitioner's progress

According to the petitioner, its president resides in Taiwan for approximately 11 months out of the year; therefore, the proffered position entails taking over the president's executive duties when the president is absent from the United States. The petitioner also states that 40% of the proffered position's time is spent designating projects to the sales manager and the accountant, and evaluating and hiring/firing the sales manager and the accountant.

Regarding its staffing levels, the petitioner claimed at the time of filing the petition that it employed seven persons; however, it only submitted job descriptions for five employees, who were the vice president (beneficiary), an accountant, a sales manager, a customer service representative, and a warehouse clerk. The petitioner also claimed to have entered into contracts with 16 to 21 sales representatives.

The director found that the proffered position was neither executive nor managerial in nature, and he denied the petition. The director noted that the petitioner's type of business did not require or have a reasonable need for an executive. The director further concluded that the job descriptions of the employees revealed that both the proffered position and the other positions within the company were responsible for all of the nonexecutive and nonmanagerial duties that are involved in the business of selling LCD modules.

On appeal, counsel states that the proffered position is a "functional executive" position that entails formulating company strategies and policies and making major decisions in behalf of the petitioner. Counsel states that the petitioner is expanding its staffing levels to a total of 15 employees. Counsel submits

evidence to show that the petitioner hired another individual in August of 2002 who allegedly holds the position of general manager. Counsel also claims that the petitioner seeks to hire a quality manager. According to counsel, the petitioner's future organizational structure will consist of two managers who will supervise two customer service representatives, one warehouse clerk, 20 sales representatives, and five distribution companies. As stated by counsel, this organizational structure indicates that the proffered position will not be involved in the routine operational duties of the company. The petitioner also submits a letter in support of the appeal. The petitioner reiterates many of the assertions made by counsel regarding its proposed staffing levels.

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.

Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), provides that if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Service shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function.

It is important to emphasize that the Service is limited to looking at the petitioner's staffing levels as they existed at the time of filing the petition on December 5, 2001. A petitioner must establish eligibility at the time of filing the immigrant petition; an immigrant petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, while counsel submits evidence that the petitioner hired one new employee in August of 2002 and the petitioner presents a new organizational chart to show its planned expansion of staff to a total of 15 individuals, the Service will not take this new information into consideration when determining whether the petitioner has a reasonable need for the proffered position in light of its staffing levels, overall purpose, and stage of development. It is the petitioner's organizational structure at the time of filing the petition that is relevant in the adjudication of this petition.

The petitioner's staffing levels at the time the petition was filed included a president, a vice president (beneficiary), an accountant, a sales manager, a customer service representative, and a warehouse clerk. The petitioner also claimed to have entered into contractual agreements with 16 to 21 sales representatives.

The petitioner's staffing levels do not indicate a need for a primarily executive or managerial position such as the proffered position. It is apparent from evidence in the record that at the time of filing the petition, the petitioner's stage of development was in its infancy. On appeal, both counsel and the petitioner detail the petitioner's plans to expand its staff and

its operations. Such detailed plans to expand the company's operations and staffing levels in the future indicate that the petitioner's organizational structure was not sufficiently developed in December of 2001 to support a reasonable need for a primarily executive or managerial employee. However, the petitioner's staffing levels are not the only factors that the Service uses to determine whether the proffered position is an executive or managerial position. The Service also looks at the duties of the proffered position as well as the duties of the petitioner's other employees. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. Instead, an executive's or manager's duties must be the critical factor. *Systronics Corp. v. I.N.S.*, 153 F. Supp. 2d 7 (D.D.C. 2001). Here, the description of the proffered position is both vague and inconsistent with its claimed organizational structure.

For example, the petitioner claims that the proffered position supervises the marketing and finance departments. However, the petitioner fails to submit evidence that its organizational structure contains either of these two alleged departments. The petitioner only establishes that it employs one accountant, who does not have any subordinate employees. In addition, the petitioner does not employ any individual(s) in a marketing position. Thus, the petitioner's claim that the proffered position is involved in the supervision of two departments is an exaggeration of the fact that it employs one accountant and one sales manager.

Furthermore, the petitioner describes the proffered position in broad terms and fails to show that it primarily entails the responsibilities that are specified in the definitions of managerial and executive capacity. Both counsel and the petitioner assert that the proffered position is in an executive capacity because it is responsible for overseeing the petitioner's operations when the president is in Taiwan. However, the definition of executive capacity has two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary primarily performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. I.N.S.*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir.(Wash.) July 30, 1991) (emphasis in original). Here, the petitioner has not shown that the beneficiary primarily performs the specified responsibilities in either definition even when the president is not working within the petitioner's operations.

For the reasons stated above, the Service does not find that the proffered position merits classification as a multinational executive or managerial position. The director's decision will

not be disturbed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.

