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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

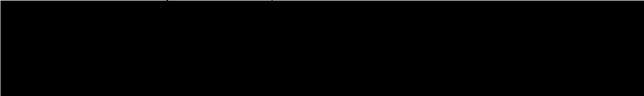
ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536



File: WAC 01 201 51651 Office: CALIFORNIA SERVICE CENTER

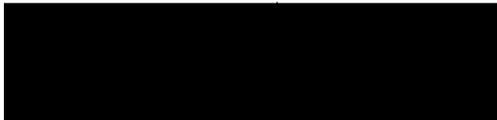
Date: **MAY 14 2003**

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:



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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a California corporation that seeks to employ the beneficiary as its general manager. The petitioner, 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 ground that the proffered position is not in an executive or managerial capacity.

On appeal, counsel submits a brief. Counsel states, in part, that the beneficiary performs numerous managerial and executive functions as the petitioner's general manager.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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, 8 U.S.C. § 1153(b)(1)(C), 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 avers that it: (1) is a subsidiary of E-Lead Electronic Co., Ltd. of the Republic of China (Taiwan); (2) engages in the wholesale distribution of products that are produced by the

parent company, and which include camcorder accessories, cellular accessories, and transformers; and (3) employs three persons, including the beneficiary, who is currently occupying the proffered position as a nonimmigrant intracompany transferee (L-1A). The petitioner is offering to employ the beneficiary permanently at a salary of \$45,000 per year.

The issue to be discussed in this proceeding is whether the proffered position of general manager is in an executive or managerial 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.

At the time of filing the petition with the California Service Center on April 10, 2001, the petitioner described the beneficiary's duties in the role of general manager, in part, as:

He is the person in charge of the day-to-day management of all essential functions of the company in the United States and North America. His management duties and responsibilities include making decisions and implementing policies regarding [the] subsidiary's marketing policies and programs, sales, and distribution activities in the U.S. market. In this capacity, [the beneficiary] develops and implements the company's intermediate and long-term plans and objectives for the company's business expansion projects in the United States. He is responsible for the oversight and management of the company's marketing and distribution of its products in the United States including serving as the technical liaison between the parent company in Taiwan, and U.S. distributors, and customers. . . . His authority requires that he apply his management experience and knowledge to direct research regarding market conditions, lead sales negotiations based on market circumstances, provide technical advice and assistance to North American customer[s] and distributors, and resolve any customer service or merchandise claims in the U.S. Additionally, he is responsible for hiring and supervising outside marketing and sales consultants and other professionals. . . .

[The beneficiary] represents the company at various conventions and trade shows to promote the presence of our company in the United States and the products we sell.

. . . .

[The beneficiary] establishes and promotes sales campaigns to accommodate [the] goals of the company. He does so by performing a Market Analysis Review with his sales staff. . . .

Although the petitioner stated on the I-140 petition that it employed three persons, the petitioner did not identify the names, job titles and job duties of the individuals it employed in addition to the beneficiary. Therefore, on November 12, 2001, the director requested additional evidence from the petitioner, to include:

- U.S. Business Organizational Chart: Submit a copy of the U.S. company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current name of all executives, managers, supervisors and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties, educational level, annual salaries/wages . . . and immigration status . . . for all employees under the beneficiary's supervision. Finally, explain the source of remuneration of all employees and explain if the employees are on salary, wage, or paid by commission.
- Federal Income Taxes: Provide signed and certified copies of the U.S. company's Federal income taxes, to include Forms 1120, 2220, 4526, and 5472, as appropriate, for 2001.
- Form DE-6, Quarterly Wage Report: Submit copies of the U.S. company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all the last 4 quarters that were accepted by the State of California.

In response, the petitioner submitted an organizational chart, which showed that the beneficiary was at the highest level of the organizational hierarchy. The chart also indicated that the beneficiary supervised two employees in sales and marketing, and one engineer. According to counsel, the two sales and marketing employees promote the petitioner's products, initiate contacts with potential buyers, and negotiate purchase contracts. Counsel further stated that the engineer provides technical advice and assistance to North American customers and distributors, resolves customer complaints, and works with the parent company's engineering department.

The petitioner also submitted a copy of its corporate income tax return (Form 1120) for the 2000 calendar year, which showed that the petitioner paid \$28,489 in wages during the year. The DE-6 forms that the director requested indicated that, during the quarter in which the petition was filed, the petitioner employed only the beneficiary and one sales and marketing employee.

The director denied the petition because the proffered position was not in a managerial capacity. The director noted that the evidence contained discrepancies regarding the number of the petitioner's employees. According to the director, although the petitioner claimed to employ four individuals on the organizational chart, the DE-6 forms showed that the petitioner employed only two persons. Additionally, the director noted that the petitioner's corporate income tax return showed that it paid only \$28,489 in wages during the 2000 calendar year. The director concluded from this evidence that the beneficiary would act only as a first-line supervisor to one nonprofessional employee, and that there was no evidence that the beneficiary managed an essential function of the petitioner's operations.

On appeal, counsel reiterates the job description that the petitioner initially submitted with the petition filing. Additionally, counsel states that the beneficiary spends the majority of his time planning and developing policies, and the rest of his time planning and supervising marketing activities. Counsel asserts that the beneficiary also has ancillary duties such as directing legal affairs and supervising financial matters. Counsel does not address the director's concerns regarding the petitioner's staffing levels.

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. See Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Instead, the duties of the proffered position must be the critical factor. See Sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B).

The beneficiary's job description indicates that he manages certain functions such as planning and development activities; however, it also indicates that he performs certain sales and marketing activities. Specifically, the beneficiary both establishes policies and, according to counsel, "promotes and markets the company in the United States." The petitioner fails to quantify the amount of time that the beneficiary spends on the alleged executive or managerial duties versus the amount of time he spends on sales and marketing duties. This failure of documentation is important because not all of the beneficiary's responsibilities fall directly under traditional executive or managerial responsibilities. *IKEA US, Inc., v. U.S. Dept. of Justice I.N.S.*, 48 F.Supp. 2d 22 (D.D.C. 1999), *aff'd*, 1999 WL 825420 (D.C. Cir. 1999).

Furthermore, evidence regarding the petitioner's staffing levels contains inconsistencies. At the time of filing the petition on April 10, 2001, the petitioner claimed on the I-140 petition to employ three persons. The organizational chart indicated that the petitioner employed four individuals, and the DE-6 form for the

quarter covering the period in which the petition was filed indicated that the petitioner had only two employees.

Bureau regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether the proffered position is in an executive or managerial capacity. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The organizational chart submitted in response to the director's request for evidence contained the names of two employees that were hired subsequent to the filing of the petition. The only employee other than the beneficiary was one sales and marketing employee.

The evidence of record fails to establish that the beneficiary is employed as more than a first-line supervisor. 8 C.F.R. § 204.5(j)(4)(i). The one sales and marketing employee does not have any supervisory or managerial responsibilities, and the individual is not a professional employee. Based upon the evidence in the record at the present time, the Bureau cannot determine whether the beneficiary primarily performs the tasks necessary for the petitioner to provide its services, or whether he manages the execution of those tasks through others. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988). Thus, the petitioner fails to establish that the position offered to the beneficiary involves primarily managerial or executive duties.

The Bureau notes that, on appeal, counsel declines to address the director's concerns regarding the reasonableness of the petitioner's need for a primarily executive or managerial position in light of its overall purpose and stage of development. Although both counsel and the petitioner claim that the beneficiary directs the work of outside contractors, no evidence regarding these alleged contractual employees has been submitted. Going on the record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Based upon the above discussion, the director's decision to deny the petition shall 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. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.