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

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

JUL 03 2003

FILE: WAC 01 258 56383 OFFICE: CALIFORNIA SERVICE CENTER DATE:

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:

PUBLIC COPY

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

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 chief executive officer (CEO). 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 and additional evidence. Counsel states, in part, that the beneficiary functions as both a manager and executive.

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 York Funds, Ltd., located in Hong Kong; (2) is in the business of international trade and investment, with particular emphasis on the import and export of plush toys, textiles, machine parts, and furniture; and (3) employs approximately seven 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 \$39,600 per year.

The issue to be discussed in this proceeding is whether the proffered position of CEO is in a 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.

At the time of filing the petition with the California Service Center on July 9, 2001, the petitioner stated that the beneficiary "will manage and direct activities of the company." The petitioner failed to describe the beneficiary's activities any further. Although the petitioner also failed to state on the I-140 petition its number of employees, it did submit an organizational chart. According to this chart, the beneficiary supervised an accounting manager, a sales department manager, a customer service manager and a human resources manager. The chart also indicated that the sales department contained two employees and the customer service department contained one employee. In total, the organizational chart showed that the petitioner employed eight individuals, including the beneficiary.

The director found the petitioner's initial evidence lacking in substance regarding the beneficiary's proposed position and its staffing levels. Therefore, on January 8, 2002, the director requested additional evidence, which included, but was not limited to:

- Duties in the U.S.: Submit a more detailed description of the beneficiary's duties in the United States. Be specific. List the education and employment qualifications for the position in the U.S. [c]ompany. Include evidence that the beneficiary meets the petitioner's qualifications and if required, that the beneficiary has the ability to speak, read and write English. Indicate exactly whom the beneficiary directs including their job title[s] and **position description[s]**. List all employees under the beneficiary's direction. Also, indicate [the] percentage of time spent in each of the listed duties. (Emphasis in original.)
- 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 employees at the beneficiary's work site for the last two quarters that were accepted by the State of California.

The forms should include the names, social security numbers and number of weeks worked for all employees.

In response, counsel stated that the beneficiary's "primary duties" are in the areas of business development and expansion. Counsel also stated that the beneficiary is not involved in daily business activities, and he specified the beneficiary's duties as: (1) formulate and enforce general policies; (2) develop and implement operational, financial, and personnel management systems; (3) recruit, train, direct, and supervise employees; (4) set up company business objective and business plan; (5) direct and coordinate different departments' activities; and (6) report regularly to the parent company on the petitioner's progress and financial position. Counsel stated that the beneficiary possessed discretionary authority over the petitioner's financial and personnel matters, and would be accountable to the board of directors and the parent company for his decisions.

The petitioner also submitted a new organizational chart, brief job descriptions for the employees subordinate to the beneficiary, and the requested DE-6 forms. The new organizational chart showed that the petitioner employed seven employees instead of eight employees (one of the sales associates had departed). The information on the accompanying DE-6 forms verified the information on the new organizational chart. The petitioner stated that: the sales department manager was in charge of all sales of polyester and plush toys; the customer service manager was in charge of shipments and the delivery of fibers and toys; the sales department employee was responsible for the sale of plush toys; and the customer service employee was responsible for assisting with delivery and shipment of goods. The petitioner did not provide any job duties for the human resources or accounting managers.

The director denied the petition because the proffered position was not in an executive or managerial capacity, stating, in part:

[T]he petitioning entity does not have a reasonable need for an executive, as it is merely a small seven-employee import/export business. This type of business does not require or have a reasonable need for an executive. It is contrary to common business practice and defies standard business logic for such a company to have an executive, as such a business does not possess the organizational complexity to warrant have such an employee. At best, the highest-level [sic] employee for a business like this could be a General Manager. . . .

On appeal, counsel states that the director inappropriately focused on the size of the petitioner and its type of business when

determining that the petitioner did not need the beneficiary's services. According to counsel, the beneficiary works in an executive capacity because his primary role is to determine goals and establish policies. Counsel submits a copy of a business plan that the beneficiary developed and notes that, under the beneficiary's direction, the petitioner has grown from a two-employee operation to a seven-employee business. Counsel also submits a copy of contract that the beneficiary negotiated on behalf of the petitioner. Counsel maintains that this contract establishes that the beneficiary has "substantial discretionary authority" to implement his business plan.

Counsel further states that the beneficiary functions in a managerial capacity because he manages the organization, and supervises managerial and professional employees. Counsel states that the job descriptions of the petitioner's employees indicate that the managers under the beneficiary's supervision are professional employees. According to counsel, the managers are professionals because each individual possesses a baccalaureate degree, and only an individual with a baccalaureate degree can perform the complex duties associated with each position. In addition to his brief, counsel submits: a letter from the beneficiary describing his duties; a list of the job duties of the petitioner's other employees; a copy of the petitioner's business plan; a copy of a sales agreement between the petitioner and Shanghai Huaquan Textile Co., Ltd.; copies of invoices to show that the petitioner placed newspaper advertisements for one sales associate and one assistant manager; and copies of the petitioner's Form W-3, wage and tax statement, for its employees in the 2001 calendar year.

Counsel's statements on appeal do not merit a withdrawal of the director's decision to deny the petition. Although counsel correctly asserts on appeal that the size of the petitioner, by itself, may not be the determining factor, the evidence fails to establish that the beneficiary would primarily execute the high level responsibilities that are specified in the definition of managerial or executive capacity.

Before discussing the merits of this petition, the Administrative Appeals Office must address the director's denial of the petition, in part, because the petitioner's need for an executive was contrary to "common business practice" and defied "standard business logic." The director should not hold a petitioner to his undefined and unsupported views of "common business practices" and "sound business principles." The director should, instead, focus on applying the statute and regulations to the facts presented by the record of proceeding. Although the Bureau must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some reasonable basis for finding a petitioner's staff or structure to be unreasonable. The fact that the petitioner

engages in the import and export of products does not, by itself, preclude the beneficiary from qualifying for classification under section 203(b)(1)(C) of the Act as a manager or an executive. 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). For this reason, the director's decision will be withdrawn, in part, as it relates to the reasonable needs of the petitioning business.

As previously stated, the petitioner is required to furnish a job offer in the form of a statement that clearly describes the duties to be performed by the beneficiary. 8 C.F.R. § 204.5(j)(5). On appeal, the petitioner submits a letter that contains a breakdown of the percentages of time the beneficiary spends on certain activities. According to this letter, the beneficiary spends 20 percent of his time developing and adapting a business plan; 30 percent of his time developing marketing strategies and travelling to trade shows and client meetings; 40 percent of his time supervising managerial employees; and 10 percent of his time overseeing the petitioner's operations. This letter, like other letters that describe the beneficiary's role with the petitioner, presents a broad overview only of the types of responsibilities the beneficiary holds. For example, the record does not contain any specific activities that the beneficiary performs to develop business plans and marketing strategies.

From a review of its organizational chart and the accompanying job descriptions of its employees, it is apparent that the petitioner exaggerates its organizational structure in order to establish that the beneficiary is not involved in any operational duties. The petitioner states that it employs an accounting manager who manages the petitioner's financial activities. However, no other individual is identified as performing any financial tasks for the petitioner. Therefore, the accounting manager would necessarily perform financial analyses himself rather than managing the individual who performs those activities. Similarly, given that the petitioner's gross sales in the 2001 calendar year exceeded \$2 million, the Bureau questions the veracity of the petitioner's claim that the sales department manager only manages the sales activities of one sales associate and does not personally sell goods.

Counsel asserts that the beneficiary is not a first-line supervisor because all of the petitioner's managers are professionals. Counsel notes that each individual's job involves complex duties that require him or her to possess a baccalaureate degree. The Bureau, however, contends that a job, which involves arranging for the shipping and delivery of goods (customer service representative), is not complex. Similarly, a job that entails taking orders from customers (sales associate) is not sophisticated. When determining the professional nature of a

position, the Bureau looks at whether the position requires the attainment of a baccalaureate or higher degree, not the qualifications of the individual occupying the position. Although three of the petitioner's employees hold baccalaureate degrees, the job each individual occupies is not a professional position; furthermore, there is no evidence that the jobs are managerial or supervisory. Based upon a review of the beneficiary's various job descriptions and the petitioner's staffing levels, in light of the petitioner's overall purpose and stage of development, the petitioner has failed to show that the beneficiary manages or directs the provision of its services rather than performs the tasks necessary for the petitioner to provide its services in the import/export arena. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988). Therefore, the petitioner has not demonstrated that the position offered to the beneficiary is in an executive or managerial capacity. The director's decision to deny the petition shall not be disturbed.

Beyond the decision of the director, there is insufficient evidence that the beneficiary's position with the foreign entity was in a managerial or executive capacity. Pursuant to 8 C.F.R. § 204.5(j)(3)(i)(B), the beneficiary must have been employed by the qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States in a nonimmigrant status. In a March 27, 2002 letter to the director from counsel, counsel stated that, as the foreign entity's managing director, the beneficiary spent 40 percent of his time researching new products, and another 40 percent of his time attracting clients to the foreign entity's business. Nothing in the beneficiary's job description indicates that he primarily directed the management of a division, or managed a division or an essential function; instead, it appears he mainly spent his time marketing the foreign entity's products and services. Marketing duties, by definition, qualify as performing a task necessary to produce a product. Accordingly, the beneficiary's foreign employment does not make him eligible for this immigrant visa classification because he did not work in a managerial or executive capacity. *Matter of Church Scientology International*, *id.* As the appeal is being dismissed on another ground, however, this issue will not be examined further.

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.