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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

PUBLIC COPY

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

MAY 08 2003

[redacted]

File: WAC 02 034 52890 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
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)

ON BEHALF OF PETITIONER:

[redacted]

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 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 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 in Los Angeles, California as its senior vice president and 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 director misstated facts and erroneously concluded that the beneficiary would perform support tasks for the petitioner's operations.

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 [redacted] of Osaka, Japan; (2) operates three hotels and one shopping plaza in California; and (3) employs 285 persons throughout the State of California, including the beneficiary, who is currently occupying the proffered position as an E-2 treaty investor. The petitioner is offering to employ the beneficiary on a permanent basis at a salary of $110,000 per year.

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

The petitioner filed the I-140 petition with the California Service Center on November 2, 2001. At that time, the petitioner stated that it was seeking to employ the beneficiary as both a senior vice president of its overall operations and the general manager of the Miyako Inn and Spa [redacted]. The petitioner initially described these two positions as follows:

> As general manager [of [redacted], [the beneficiary] directs the operation and development of the hotel and spa; sets sales targets; supervises several (6) subordinate managers; has final authority to hire and fire employees; makes [an] annual budget and annual financial reports; and has wide discretion to make day-to-day decisions with minimal supervision.
>
> In his capacity as senior vice president[,] he is the project manager for the new hotel being planned to be constructed at Torrance, CA. . . .

The director was not persuaded that the proffered position was a managerial or executive position based upon the petitioner's initial evidence. Therefore, on February 27, 2002, the director asked the petitioner to submit additional evidence, to include:

- U.S. Business Organizational Chart: The submitted chart is deficient. 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. (Emphasis in original.)

- Duties in the U.S.: Submit a more detailed description of the beneficiary's duties in the United States. Be specific. Also, indicate [the] percentage of time spent in each of the listed duties.

- 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 four 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.

The petitioner submitted an organizational chart for the [redacted] organizational hierarchy. This chart showed that the beneficiary held the highest position in [redacted] hierarchy, and directed one vice president and deputy general manager, and one individual who held the positions of controller and human resources manager. The vice president and deputy general manager directed one front desk manager, one director of sales, one spa manager, one reservations manager, one head of housekeeping, and one engineer. The DE-6 forms indicated that the petitioner's overall organization employed approximately 85 persons.

Regarding a more detailed job description for the beneficiary, the petitioner stated the following about the general manager position at Miyako:

- Daily conference with deputy general manager, human resources manager and acting controller to review operations including bookings, cash, human resources issues, and plans to reduce costs. (10% of time)
- Direct the remodeling and refurbishing of all guest rooms and the common area (lobby) of hotel including executing contracts with general contractor. This work will involve daily conferences with deputy general manager and building engineer as well as daily site inspection. (10% of time)
- Daily conference with company (KEA) headquarters by telephone, fax and email. (5% of time)
- Prepare annual budget (and revisions); review and finalize sales and marketing plans; review employee evaluation reports; resolve employee grievances; promote, demote, hire and fire employees. (10% of time)
- Prepare monthly written report to headquarters; attend annual meeting of directors of parent company in Osaka, Japan. (5% of time)

- Plan and carry out layoffs in coordination with deputy general manager and human resources manager, necessitated by September 11, 2001. . . . (5% of time)
- Direct the sale of restaurant to a third party and negotiate terms of sale and lease. Also, renegotiate lease with other commercial tenants as necessary. (3% of time)
- Miscellaneous. Handling [sic] day[-]to[-]day unspecified problems as they occur including allocation of more time to duties listed above. (17% of time)

The petitioner also described in more detail the beneficiary's role as the senior vice president of the petitioner's operations. According to the petitioner, the beneficiary was the project manager of a new 150-room hotel that was being built in Torrance, California, with a construction budget of $15 million. The beneficiary's job duties as project manager included:

1. Negotiations [sic] with the architect and review plans and specifications[.]
2. Retain and confer with a land use attorney to resolve zoning problems as well as any construction permit[s][.]
3. Select a general contractor based on competitive bids[.]
4. Negotiate and execute construction contract[.]
5. Purchase furnishings and equipment within budget allowance[.]
6. Negotiate with financial institution for construction loan[.]

The petitioner also submitted job descriptions for the individuals whom the beneficiary directly and indirectly supervised. The position directly subordinate to the beneficiary (vice president and deputy general manager) entailed duties similar to the beneficiary's stated duties.

The director denied the petition because the evidence failed to establish that the beneficiary would be employed in an executive or managerial capacity. The director noted that it was "contrary to common business practice" and defied "standard business logic" for a company, such as the petitioner's, to need an executive given its lack of organizational complexity. According to the director, the petitioner employed only 10 persons and, therefore, nine of these 10 employees could not be functioning as managers or supervisors, although each was given a managerial title. The director also found the beneficiary's job description of little value in determining the beneficiary's daily activities.

On appeal, counsel states that the director erred when determining that the beneficiary would not be employed in a managerial or executive capacity. Counsel states, in part, that the beneficiary exercises substantial executive authority over 62 to 90 employees and millions of dollars worth of investments. Counsel asserts that

the beneficiary is eligible for this immigrant visa classification because he manages a department, subdivision or component of the petitioner. According to counsel, the beneficiary manages the operation of [redacted] as well as the construction of a new hotel. Counsel states that nothing in the evidence indicates that the beneficiary performed "menial tasks," as the director claimed in the denial letter, and that the petitioner has established the beneficiary's eligibility as a multinational executive or manager.

Counsel correctly states on appeal that the director based his decision on an improper standard by asserting that: "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 having such an employee." The director's comment was inappropriate, and he should not hold a petitioner to his undefined and unsupported views of "common business practices" or "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. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Thus, the director's comments as they related to the size and organizational complexity of the petitioner's operations shall be withdrawn.

Based upon the record before the Bureau at the present time, there is insufficient evidence to find that the beneficiary would primarily execute the high level responsibilities that are specified in the definition of managerial or executive capacity.

The beneficiary's job duties, while extensive, are quite similar to the job duties of the individual whom the beneficiary would supervise - vice president and deputy general manager. According to their job descriptions, both employees would direct the daily operations of [redacted] supervise employees, prepare budgets and reports, and supervise [redacted] remodeling efforts. The petitioner has not sufficiently distinguished the beneficiary's duties from the vice president's duties. The only apparent difference between the two positions is that the beneficiary would also act as a project manager for the building of a new hotel. Without more information, the Bureau cannot determine the beneficiary's level of authority within [redacted] organizational hierarchy.

Regarding the beneficiary's role as senior vice president of the petitioner's overall operations, which includes project manager responsibilities for the building of a new hotel, the petitioner failed to submit an organizational chart that relates to its overall operations. Although the petitioner submitted information regarding [redacted] organizational hierarchy and

staffing levels, the record is devoid of information regarding the beneficiary's position within the petitioner's overall organizational hierarchy and his job responsibilities as senior vice president beyond his project manager duties. As the beneficiary would assume the position of senior vice president of the petitioner's general operations and general manager of [redacted], a second organizational chart, which outlines the petitioner's general operations and the beneficiary's proposed role within those operations, is an essential item of evidence in establishing the beneficiary's place in the petitioner's overall organizational hierarchy and his level of authority.

Additionally, the beneficiary's duties as a project manager are not sufficiently detailed. The duties ascribed to the beneficiary as a project manager, which include negotiating contracts, reviewing plans, purchasing furnishings, and selecting contractors, are not at a managerial or executive level. Without more evidence, the Bureau cannot discern whether the beneficiary is performing the tasks necessary for the petitioner to provide services, or whether he is managing the provision of those services. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988). As the record is presently constituted, there is insufficient basis to find that the beneficiary would function in a managerial or executive capacity.

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 its burden of establishing that the beneficiary merits classification for an employment-based preference visa as a multinational manager or executive.

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