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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536

PUBLIC COPY



MAY 16 2003

FILE: WAC 01 284 50366 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:



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

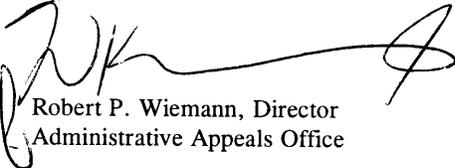
INSTRUCTIONS:

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 preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in 1999 in the State of California and is claimed to be a wholly-owned subsidiary of [REDACTED] located in Korea. The petitioner is engaged in the business of manufacturing and distributing knit garments. It seeks to employ the beneficiary as its president and Chief Executive Officer (CEO). Accordingly, the petitioner 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 the beneficiary had been or would be employed in a managerial or executive capacity. The director also concluded that the petitioner failed to establish its ability to remunerate the beneficiary his proffered wage of \$66,300 per annum.

On appeal, counsel submits a brief and additional evidence refuting the director's findings.

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.

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.

The first issue in this proceeding is whether the beneficiary has been and will be performing managerial or executive duties.

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.

In the initial filing, the petitioner described the beneficiary's prospective duties as follows:

[The beneficiary's] principal responsibilities include devising, controlling, and overseeing all activities of the corporation. He establishes general goals and policies through collaboration with secondary directors and ordains strategies to ensure the company's directives are met. He also oversees all employees and activities of [REDACTED] Inc. [REDACTED] and its subsidiaries

In addition to overseeing and supervising the activities of the U.S. operation and reporting the results of the corporation's efforts to the parent company, [the beneficiary] possesses the authority to approve and disapprove of the preparation of reports that summarize and predict business movement. He establishes economic objectives of the U.S. company and maintains its adherence to goals of the parent organization. The CEO is responsible for the continued growth of [REDACTED] by expanding its sales and marketing capabilities by applying new, innovative managerial techniques to a mature industry segment. By creating compelling visions that break new ground, [the beneficiary] constantly communicates the strategic vision and is a role model for energizing others to work towards that vision.

On January 18, 2002 the director instructed the petitioner to submit additional evidence, including its organizational chart identifying the beneficiary's position, a more detailed description of the beneficiary's job duties indicating the percentage of time spent performing each duty, and a list of all of the employees under the beneficiary's supervision. The petitioner was asked to provide brief job descriptions, educational levels, and salaries/wages of all of the beneficiary's subordinates, as well as state quarterly wage reports for all employees for the last six quarters.

In response to the above request, the petitioner provided the following "comprehensive" description of the beneficiary's duties in the United States:

1. **Management & Review (50%):** 50% of the duty encompasses the beneficiary to review market reports composed by managers and publishers. The beneficiary must be able to determine current market trends, competition, strategic sales techniques by researching data available through media, internet, market sales, publications, internal sales statistics to determine target objective in sale categories and price setting The beneficiary decides on hiring additional staff The beneficiary oversees quality and maintains employee control in departmental activities of U.S. enterprise.

2. **Marketing (30%):** The beneficiary must analyze the collected and given data[,] decipher the information into useful categories such as region, product feasibility, target age group, market response, projected sales, revenue and requires staffs to compile a systematic reporting system for analysis. The beneficiary must reflect the given information to sales strategies and to expand target sales. The beneficiary is involved in each guideline process and final decision making of marketing including but not limited to advertising, customer care, price setting, inventory management, promotion, sales staff management, and overall sales coordination. The beneficiary negotiates with executive/senior personnel of vendors, manufacturers, wholesalers for distribution, manufacturing contracts. Beneficiary decides upon managerial review and demands posted by vendors to enter into a formal contract or exclusive contract within continental U.S. and abroad.
3. **Conference (10%):** The beneficiary confers with other managerial/sales staff to determine appropriate target and sale information. Beneficiary requires information critical and useful in the application of sales strategies and product distribution methods. The beneficiary must give identifying direction of each marketing action of promotional methods applied by the company versus non-application. The beneficiary reviews routine, daily, weekly, quarterly, annual conference of assessment reports
4. **Goal & Policy (10%):** The sales & marketing compiles directives to the managerial staff and keeps track of positive and negative approaches to the market trends The beneficiary requires in reports; sources of information and data gathering to summarize into charts, graphs, numbers for comprehension by the managerial staff and to decides various avenues of marketing approaches and business venture to expand the company's sales volume and to increase average

revenue in global trade. The beneficiary must also review comparison reports . . . to make a descriptive guideline of goal and policy setting in reducing inefficiency and to recommend solutions for improvements. The beneficiary reports final plans and goals for implementation for review by the President.

The petitioner also submitted its organizational chart showing the beneficiary at the top of the hierarchy in the position of president and CEO. The chart also indicates that the beneficiary's two immediate subordinates include a director and human resources manager as well as a managing director. The petitioner provided no job descriptions for either of the beneficiary's subordinates despite the director's specific request for such information. The petitioner, however, complied with the director's request for its state wage and tax statements.

The director denied the petition, basing her decision, in part, on the following conclusion:

[T]he petitioning entity does not have a reasonable need for an executive because they are merely [a] sales and installation business. This type of business does not require or have a reasonable need for an executive because all they do is sell products. Additionally, it is contrary to common business practice and defies standard business logic for such a small company to have an executive

Although the appeal will be dismissed, it must be noted that the director based her decision, in part, on an improper standard. The director's above comments are inappropriate. The director should not hold a petitioner to her undefined and unsupported view of "common business practice" or "standard business logic." 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. See section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in sales or services will not preclude the petitioner from

qualifying the classification under section 203(b)(1)(C) of the Act. For this reason, the director's decision will be withdrawn, in part, as it relates to the reasonable needs of the petitioning business.

The director also concluded that the employees under the beneficiary's supervision cannot be deemed professionals "because they are not managing professional employees." (Emphasis in original.) However, the definition of managerial capacity contained in section 101(a)(44)(A) of the Act applies to the beneficiary of the present petition and not to his subordinate employees. Based on the director's reasoning, no beneficiary would qualify as a manager if the organization's ultimate, lowest tier subordinate was not a professional employee, regardless of how many layers of management lay between the beneficiary and the non-professional employee. According to the director, each tier of management would be disqualified as the first-line supervisor of non-professional staff. The beneficiary may not be disqualified based on the conclusion that he does not manage professional employees where the sole basis for such reasoning is that the second tier of managers supervises the petitioner's non-professional employees. Consequently, the portion of the director's decision that pertains to the erroneous analysis described above will also be withdrawn.

Despite the director's erroneous comments, she properly noted that the beneficiary could not be deemed a function manager because the petitioner has not clearly demonstrated that the beneficiary refrains from directly performing the non-managerial, day-to-day tasks.

On appeal, counsel emphasizes the beneficiary's significant role in "coordinat[ing] major projects" and "set[ting] policies to managerial staffs" for all of the affiliates located throughout the world. However, neither the beneficiary's significant role within the organization nor his discretionary authority are disputed. The director merely stated that the record indicates that rather than limiting the beneficiary's duties to those that involve managing a function, the beneficiary appears to be directly involved in performing some of those non-qualifying duties.

In examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's

description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the instant case, the comprehensive description of duties indicates that 50 percent of the beneficiary's time is devoted to conducting research for the purpose of setting prices for the petitioner's products and determining sales objectives. While this task is clearly crucial to the petitioner's financial success, it is one that would typically be performed by sales or marketing personnel, not by the chief executive officer of an organization. The description of duties also indicates that the beneficiary uses the data he has researched to create sales strategies, a task that is also attributed to sales and/or marketing personnel. Thus, based on the organization chart, which indicates that there is no marketing department, and this portion of the description of duties, which comprises 80% of the beneficiary's time, the beneficiary solely assumes all of the petitioning organization's marketing-related tasks. It is noted that 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).

Furthermore, the description of the beneficiary's duties indicates that the beneficiary submits final plans and goals to the president for review, thereby indicating that the CEO and the president are two separate individuals. However, in the organizational chart, the petitioner indicated that the beneficiary acts both as CEO and its president. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner in the instant case did not acknowledge the existence of this factual inconsistency, much less provided objective evidence of the actual facts. Overall, the description of the beneficiary's job duties leads the Bureau to conclude that the beneficiary is performing as a professional or "staff officer," not as a manager or executive.

On review, the record contains insufficient evidence to demonstrate that the beneficiary has been and will be employed in a primarily managerial or executive capacity. Further, the summary of the beneficiary's duties does not include a description of any subordinate positions that would perform the essential functions of the petitioner's business or the beneficiary's

duties. Since the petitioner has failed to provide descriptions of either of the beneficiary's subordinate employees, there is no evidence that would establish that the beneficiary would manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Bureau is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

The other issue in this proceeding is whether the petitioner has established its ability to remunerate the beneficiary his proffered wage. In pertinent part, 8 C.F.R. § 204.5(g)(2) states:

Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining the petitioner's ability to pay the proffered wage, the Bureau will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D.Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Bureau had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. The court

specifically rejected the argument that the Bureau should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

In the instant case, the petitioner submitted its tax return for the year 2000. The director noted that this document indicates that the petitioner experienced a net operating loss of over \$4 million. The director further noted that, based on the quarterly state wage statements submitted by the petitioner, the beneficiary was receiving a salary that was approximately 10 percent less than the proffered wage indicated by the petitioner on the initial petition. The petitioner explains on appeal that the beneficiary receives compensation from the U.S. company and the foreign parent entity. Even though the petitioner provides additional evidence in support of this claim, 8 C.F.R. § 204.5(g)(2) requires that the prospective United States employer, not its foreign parent, have the ability to pay the proffered wage. The petitioner has failed to establish this ability. For this additional reason the petition cannot be approved.

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 sustained that burden.

ORDER: The appeal is dismissed.