



U.S. Department of Justice
Immigration and Naturalization Service

B4

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

[Redacted]

JAN 8 2001

File: [Redacted] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
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)

IN BEHALF OF PETITIONER:

[Redacted]

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, [REDACTED] claims to be a provider of aeronautical services and an affiliate of [REDACTED] located in Russia. The petitioner seeks to employ the beneficiary as the company's president and chief executive officer (CEO), and therefore, endeavors to classify him 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 I-140 petition because the petitioner failed to establish that the beneficiary is currently and will continue to be employed in a primarily executive or managerial capacity. On appeal, counsel submits a brief.

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 director denied the petition because the petitioner only employed the beneficiary and one other individual. This organizational structure led the director to conclude that the beneficiary would perform nonqualifying duties, rather than primarily executive or managerial duties.

On appeal, counsel contends that the petitioner submitted ample evidence to show that even though the company employs only the beneficiary and an operations manager, the beneficiary, nevertheless, works in a primarily executive or managerial capacity. According to counsel, the beneficiary directs the operation manager's management of the company; sets the company's goals and policies; and negotiates contracts, with little to no supervision from higher level personnel. Counsel also argues that

the denial of the instant I-140 petition is inconsistent with the Service's decision to approve a prior L-1A nonimmigrant visa petition that the petitioner filed on the beneficiary's behalf.

Counsel's arguments are not persuasive. The overall evidence in the record does not reflect that the beneficiary operates in a primarily executive or managerial capacity.

On appeal, counsel claims that the petitioner submitted detailed job descriptions and organizational charts for the U.S. entity, which establish that a hierarchy exists with the company. Although the Service does not disagree that a hierarchy exists, it is not a hierarchy that supports a finding that the beneficiary is primarily an executive or manager.

The job descriptions detail duties that are neither executive nor managerial. In the initial I-140 petition, the petitioner claimed that the beneficiary executed the following tasks: continue supervising execution of existing contracts; continue expediting program for Russian communities; set up logistical requirements including facilities for training, housing, immigration and customs; and conduct flight training sessions for employees of Chukotka Air (foreign entity). The petitioner also claimed that the beneficiary negotiated terms and conditions of charter flights.

None of these job duties are executive or managerial because they are the day-to-day functions of the company's operations. If the beneficiary did not set-up logistics, negotiate terms for charter flights and conduct flight sessions, the petitioner's daily operations would essentially cease to exist. Even though counsel claims that the operations manager, not the beneficiary, performs all of the day-to-day functions, the operations manager works in a clerical position, not in a managerial position. For example, the petitioner claimed that the operations manager purchases parts and equipment, arranges for the pick-up and delivery of parts, and maintains records. These are functions of an individual in a clerical position, not in an operations management position.

In Fedin Bros. Co., Ltd. v. Sava, 905 F.2d 411 (2nd Cir. 1990) *aff'g* 724 F. Supp. 1103 (E.D.N.Y 1989), to which counsel cites in her appeal, the court held that even though the plaintiff was the president of the American subsidiary, the subsidiary had not grown to a size that would realistically support an executive or manager, as the subsidiary employed only one individual other than the president.

With only two employees, one of whom works in an apparent clerical capacity, the organizational structure of the petitioner does not support a primarily executive or managerial position.

It is noted that counsel suggests on appeal that this petition must

be approved because the beneficiary was previously granted nonimmigrant classification as an L-1 executive. The director's decision does not indicate whether the beneficiary's nonimmigrant file was reviewed. Copies of the initial L-1A nonimmigrant visa petition and supporting documentation are not contained in the record of proceeding. Therefore, it is not clear whether the beneficiary was eligible for L-1A classification at the time of the original approval, or if the approval of the L-1A nonimmigrant classification involved an error in adjudication. However, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in this immigrant petition, the approval would constitute clear and gross error on the part of the Service. As established in numerous decisions, the Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g., Sussex Engg. Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988); Matter of Church Scientology Int'l., 19 I&N Dec. 593, 597 (BIA 1988).

As the petitioner has not established that the beneficiary works in a primarily executive or managerial capacity, the decision of the director will be affirmed. Beyond the decision of the director, however, the record does not contain sufficient evidence of a qualifying relationship between the U.S. and foreign entities.

In the instant case, the petitioner presented evidence of ownership and control of the U.S. entity, but failed to present any evidence of ownership and control of the foreign entity other than an affidavit from the beneficiary and his wife, and a statement of Mr. S.I. Sosura, an employee of the foreign entity. Simply going on 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).

Although the petitioner claims that the U.S. and foreign entities are affiliates by virtue of ownership of both companies by the beneficiary, without documentary evidence in support of this claim, the Service cannot conclude that a qualifying relationship has been established.

The burden of proof in this proceedings rests solely 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.