



U.S. Department of Justice

Immigration and Naturalization Service

B4

OFFICE OF ADMINISTRATIVE APPEALS
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File: EAC 99 175 50655

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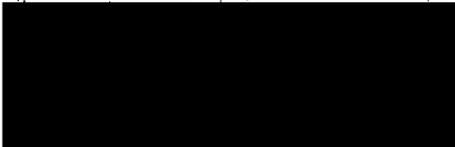
Date: JAN 18 2001

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:



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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Mar. C. Mulrean, Acting Director
Administrative Appeals Office

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

The petitioner, [REDACTED], is a New Jersey corporation that claims to engage in the import of tropical produce from its affiliate, ATA, which is located in the Dominican Republic. The petitioner seeks to employ the beneficiary as its vice president 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 of the Vermont Service Center denied the petition because the petitioner failed to establish that the employment of the beneficiary is currently and will be in a primarily executive or managerial capacity with the U.S. entity.

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.

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 director denied the petition because the petitioner merely restated sections of the definitions of executive capacity and managerial capacity in its job description, and because the size of the petitioner (three employees) could not support a multinational executive or manager position.

On appeal, counsel claims that the beneficiary's job description was not merely a restatement of the definitions of executive capacity and managerial capacity. According to counsel, the beneficiary spends the majority of his time carrying out managerial and executive duties, and the beneficiary functions at a senior level within the organization. Counsel also contends that because the Service approved an L-1A nonimmigrant visa on the beneficiary's behalf, it is incumbent upon the Service to explain why such an approval was erroneous since it is now denying an immigrant petition that is based upon the same corporate structure and job

duties that were presented in the L-1A nonimmigrant visa application.

Counsel's arguments are not persuasive. The evidence in the record does not reflect that the beneficiary's duties for the U.S. entity are primarily executive or managerial.

First, the petitioner is engaged in selling tropical produce to U.S. businesses. In describing the beneficiary's job duties, the petitioner stated that the beneficiary is responsible for "formulating, directing and supervising sales and marketing strategies" for 20 hours out of a 40 hour workweek. The petitioner's corporate structure, however, does not contain any sales and/or marketing positions, and the petitioner did not present any evidence that it hires outside contractors to perform these functions. It is unclear what types of sales and marketing strategies the beneficiary allegedly supervises, if the petitioner did not employ any sales or marketing personnel. Absent evidence that the petitioner employs individuals to market and sell its products to U.S. companies, the Service must conclude that the beneficiary primarily performs these functions. An individual who provides the goods and/or services of a company does not work in a primarily managerial or executive capacity.

Second, the petitioner also attributed similar job duties to both the president and the beneficiary. In response to a September 20, 1999 request for evidence, the petitioner stated that the president is responsible for "planning, developing, and establishing policies and objectives of [REDACTED]". In a letter accompanying the initial I-140 petition, the petitioner stated that beneficiary is responsible for "making and effecting corporate policy decisions and developing future goals and objectives." These two job duties are virtually identical, which contradicts the petitioner's claim that the beneficiary and the president have distinct functions within the organization.

Pursuant to 8 C.F.R. 204.5(j)(5), a petitioner must submit a job offer in the form of a statement, which clearly describes the duties to be performed by the alien. Although the petitioner clearly described the beneficiary's job duties, the activities the beneficiary performs on behalf of the petitioner are neither primarily managerial nor primarily executive. Absent evidence to the contrary, it appears that the beneficiary primarily performs sales, marketing and bookkeeping functions, all of which are neither managerial nor executive duties. Therefore, the director's denial of the petition on the basis that the petitioner failed to establish that the beneficiary will be employed in a primarily executive capacity is affirmed.

Finally, counsel suggests on appeal that this petition must be approved because the beneficiary was previously granted nonimmigrant classification as an L-1 executive/manager. 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).

Beyond the decision of the director, the record does not indicate that a qualifying relationship exists between the U.S. and foreign entities.

According to 8 C.F.R. 204.5(j)(2), *Affiliate* means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity; * * *

The petitioner presented the following distribution of ownership for the U.S. and foreign entities:

U.S. Entity:

[REDACTED] 50% ownership
[REDACTED] 50% ownership

Foreign Entity:

[REDACTED] 50% ownership
[REDACTED] 47.8% ownership
[REDACTED] 0.8% ownership
[REDACTED] 0.6% ownership
[REDACTED] 0.2% ownership
[REDACTED] 0.2% ownership
[REDACTED] 0.2% ownership
[REDACTED] 0.2% ownership

The U.S. and foreign entities do not fit the definition of an affiliate for two reasons:

First, the petitioner did not present any documentary evidence, such as agreements over the voting of shares and proxy votes, that Mr. Fernando Taveras controls the U.S. entity and the foreign entity.

Second, it is clear from the alleged ownership of each entity that the same group of people do not own and control both the foreign and U.S. entities. As the ownership structure of each entity illustrates, the U.S entity has two owners; the foreign entity has eight owners.

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.