



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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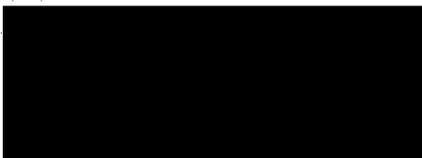
Date: JAN 30 2001

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:



identification 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 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

Mary C. Mulrean, Acting Director
Administrative Appeals Office

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

The petitioner is a California corporation that claims to supply software tools for management software. It seeks to employ the beneficiary as its sales manager (partner channel) and, therefore, endeavors to classify her 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 because the petitioner failed to establish that the beneficiary is currently and will continue to be employed in an executive or managerial capacity.

On appeal, counsel submits a brief. The petitioner submits a letter.

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 evidence in the record did not show that beneficiary plans, organizes, directs and controls her division through other professional, managerial or supervisory individuals. The director noted that the petitioner's organizational structure, which consists of four employees, could not support a primarily executive or managerial position. According to the director, the beneficiary is not the only employee who executes the duty of sales within the company, so the beneficiary does not manage the entire sales operations.

8 C.F.R. 204.5(j)(2) states, in pertinent part:

Executive capacity means an assignment within an organization

in which the employee primarily:

- (A) Directs the management of the organization or a major component or function of the organization;
- (B) Establishes the goals and policies of the organization, component, or function;
- (C) Exercises wide latitude in discretionary decision-making; and
- (D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Managerial capacity means an assignment within an organization in which the employee primarily:

- (A) Manages the organization, or a department, subdivision, function, or component of the organization;
- (B) 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;
- (C) 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
- (D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

On appeal, the petitioner claims that the beneficiary executes the job responsibilities outlined above because she is solely responsible for the sales division; however, the duties that the petitioner attributes to the beneficiary in its initial I-140 petition and on appeal, do not support the petitioner's claims.

The petitioner described the beneficiary's job duties as follows:

Develops and implements process and program for partner sales channel. Manages all activities related to the selling and promotion of company products within partner sales channel regionally, nationally, and internationally (excluding Europe). Manages all sales leads distribution

through partners and sales executives. Responsible for meeting sales forecast, key partner rapport, marketplace knowledge, and development of partner program roll-out.

In addition, the petitioner listed specific job responsibilities that the beneficiary is required to execute, which include analyzing sales, markets, and expenditures.

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. In the instant case, the petitioner's statement regarding the beneficiary's responsibilities is deficient because it does not disclose the beneficiary's day-to-day activities or provide a breakdown of her job duties.

The petitioner uses broad statements such as "manages all activities ..." to describe the tasks that the beneficiary is required to perform. Without a clearly defined job description that provides insight into the beneficiary's day-to-day job responsibilities, the Service cannot conclude that the beneficiary currently works and will continue to work in a primarily executive or managerial capacity.

Furthermore, as noted by the director in her denial, the lack of a staff subordinate to the beneficiary leads to a conclusion that the beneficiary performs all of the day-to-day functions of the sales operations. According to the organizational chart, the beneficiary is the only employee of the sales division, and the petitioner did not present any evidence that it employed any personnel on a contract basis to execute the daily administrative tasks. Therefore, the director's denial of the petition on the basis that the beneficiary's job duties are not primarily executive or managerial is affirmed.

While not addressed by the director in her denial, the record does not reflect that the petitioner had been doing business for at least one year at the time the petition was filed, or that it has the ability to pay the proffered annual wage of \$45,000 to the beneficiary.

8 C.F.R. 204.5(j)(3) states, in pertinent part:

(3) Initial evidence--

(i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

* * *

(D) The prospective United States employer has been doing business for at least one year.

According to 8 C.F.R. 204.5(j)(2), doing business means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

The record reflects that the petitioner was incorporated in California in October 1996. The beneficiary entered the U.S. in L-1A nonimmigrant status sometime in July of 1997, and she signed a lease for the petitioner's office space in August of 1997. These facts indicate that the earliest possible time the petitioner could have engaged in the provision of goods and/or services is August 1997, when the lease for the office space was signed. The initial I-140 petition was filed on March 23, 1998, approximately seven months after the petitioner's office space was leased.

As of August 1997 when the initial I-140 petition was filed, the petitioner had not met the requirements of 8 C.F.R. 204.5(j)(3)(i)(D) because only seven months had elapsed between the earliest possible time the petitioner could have engaged in business and the filing of the initial I-140 petition. Therefore, the Service cannot find that the petitioner had been doing business for at least one year at the time it filed the petition.

Furthermore, 8 C.F.R. 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. 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.

The petitioner did not submit copies of its federal income tax returns to show that it could pay the proffered wage of \$45,000 per year. The petitioner submitted compiled financial statements, not audited financial statements, as cited in the regulation. Without sufficient documentary evidence, the Service cannot find that the petitioner has the ability to pay the beneficiary the wage it offered on the initial I-140 petition.

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).

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.