BH

U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

File: [redacted] Office: VERMONT SERVICE CENTER Date: 11 APR 2002

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)

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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mark L. Rosenberg

for Robert P. Wiemann, Director
Administrative Appeals Office

 [redacted]

DISCUSSION: The Director of the Vermont Service Center initially approved the immigrant visa petition. Upon subsequent review, the director found that the petitioner was not eligible for the benefit sought and he properly served the petitioner with notice of his intent to revoke approval of the petition. The director ultimately revoked his approval of the petition on September 28, 2000 and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a New Jersey corporation that is engaged in shipping and cargo forwarding. It seeks to employ the beneficiary as its president and, therefore, endeavors to classify the beneficiary as a multinational manager or executive 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 revoked his approval of the petition because the evidence did not establish that the petitioner currently employs and would continue to employ the beneficiary in a primarily executive or managerial capacity.

On appeal, counsel submits a brief. Counsel argues, in part, that the approval of an L-1A petition in the beneficiary's behalf should be sufficient to approve the instant I-140 petition.

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 revoked his approval of the petition because the petitioner failed to show that the beneficiary functioned primarily as an executive, as a functional manager, or as the manager of other managerial, supervisory or professional employees. The director noted that the beneficiary's job description did not contain realistic estimates of the amount of

time the beneficiary allegedly devoted to certain tasks. The director also noted that even though it had bestowed managerial titles to two of its employees, the employees' job duties did not involve managerial duties. Finally, the director concluded that the evidence, as a whole, did not adequately establish who would perform the "preponderance of the mundane duties required to support and execute the business activities . . . ."

On appeal, counsel makes several statements in rebuttal to the director's reasons for revoking his approval of the petition.

First, counsel explains that the petitioner's business operations include chartering ships/vessels to deliver customer merchandise to the United States and other Asian countries, and offering brokerage services to owners of international ships/vessels for the rental of container space. Counsel states that the beneficiary is in charge of these business operations and that the beneficiary "directly oversees each department of the company and all employees and makes the final decisions in the relevant business matters."

Second, counsel stresses that the beneficiary's subordinate staff has always handled the day-to-day operational tasks, but notes that due to the petitioner's size and the nature of its business, the beneficiary has performed some non-managerial duties. Although counsel emphasizes that the bulk of the non-managerial and non-executive duties are executed by the petitioner's vice president and the sales/marketing associate, counsel also states that "in small companies such as [p]etitioner the reality is such that even the top executive will perform non-executive/managerial tasks if it means that more of the [p]etitioner's products or services are sold."

Third and finally, counsel states that the director's decision was in error because the revocation of the approval was not based upon substantial evidence and because the facts in the I-140 petition are the same facts in an L-1A petition that was previously approved in the beneficiary's behalf.

Counsel has not presented a persuasive argument on appeal. As the record is presently constituted, the evidence does not support a finding that the beneficiary is currently employed and will continue to be employed in a primarily executive or managerial capacity.

The merits of this case are being judged according to the organizational structure of the petitioner at the time the petition was filed on December 28, 1998. The Service is focusing solely on the petitioner's operations and staffing levels as they existed at that time because a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new

set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971).

At the time the petition was filed, the petitioner employed the beneficiary as its president and also employed a vice president, and a sales and marketing associate. The petitioner stated in subsequent correspondence with the Service that the beneficiary's job responsibilities fell into the following categories:

- Sets and implements the petitioner's operating goals and policies
- Runs the daily operations of the business and makes all routine discretionary decisions associated with operating the business
- Directly oversees the supervision of the entire staff
- Plans and develops public relations for the petitioner
- Acts as the direct liaison with the parent company
- Administers and directs the formation of the petitioner's fiscal planning activities
- Appoints, overseas and supervises company staff to work as marketing and service merchandising specialists

The petitioner also provided job descriptions for the vice president and the sales/marketing associate. The petitioner stated that in addition to helping the beneficiary administer the corporate policies, the vice president also handles customer relations, meets with potential clients, and responds to inquiries from trade officials. The petitioner stated that the sales/marketing associate is responsible for interacting with customers, keeping records inventory, and distributing information about the petitioner to customers.

In order to be found eligible for this immigrant visa classification as an executive, the record must clearly show that the beneficiary 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.

In order to be found eligible for this immigrant visa classification as a manager, the record must clearly show that the

beneficiary 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.

See. 8 C.F.R. 204.5(j)(2).

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. Instead, an executive's duties must be the critical factor. However, if the Attorney General fails to believe the facts stated in the petition are true, then he may reject it. Systronics Corp. v. I.N.S., 153 F.Supp.2d 7 (D.D.C. 2001).

The Service rejects the petitioner's statements regarding the nature of the beneficiary's duties. Both the petitioner and counsel have inflated the petitioner's organizational structure and the staff's positions in order to mask the fact that the beneficiary provides the services that comprise the petitioner's operations.

First, on more than one occasion, counsel has stated that the beneficiary oversees "each department of the company." However, the petitioner has never set forth an organizational structure which indicates that it is organized into departments; there are no departmental heads or managers who supervise a subordinate staff in a departmental setting. With only two employees in addition to the beneficiary, it is not plausible for counsel to claim that the beneficiary has authority over "departments" within the petitioner's operations.

Second and finally, the petitioner has stated that two of the beneficiary's duties are "overseeing the supervision of the entire staff of employees that work for the company by conducting brief staff meetings on a nearly daily basis," and "appoints and then oversees and supervises company staff to work as marketing and service merchandising specialists . . . " Again, the petitioner embellishes the beneficiary's job duties in order to mask the fact that he is a first-line supervisor to two employees, neither of whom works in a managerial, supervisory or professional role.

The record indicates that the petitioner employs two individuals in addition to the beneficiary, whose titles are vice president and sales and marketing representative. If the petitioner already employs one sales and marketing person, then there would be no need for the beneficiary to appoint this person to work in marketing and service merchandising. Additionally, although the petitioner identified one employee as a vice president, this individual's duties primarily consist of answering clients' complaints, assisting clients, and working with clients to track their orders and ensure delivery. None of these duties would normally be associated with an individual working in a managerial-level position.

The petitioner has stated that the beneficiary negotiates with customers to set prices and negotiates sales terms. Furthermore, counsel has conceded on appeal that the beneficiary has been involved in the execution of daily operational tasks in order for the business to stay operational. Although counsel emphasizes on appeal that the beneficiary is not involved in providing the services that comprise the petitioner's operations, the petitioner has failed to establish that the beneficiary either primarily directs the management of the petitioner or manages the petitioner. Rather, evidence indicates that the beneficiary, himself, provides the services that are necessary for the petitioner to operate. Accordingly, the petitioner has failed to present persuasive evidence to establish that the beneficiary merits this immigrant visa classification as a multinational executive or manager.

Finally, counsel states that this immigrant petition should be approved because the beneficiary was previously granted L-1A nonimmigrant classification. The Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S. Ct.51 (U.S. 2001).

If the director's decision to grant the L-1A petition that was filed in behalf of the beneficiary was based upon the same facts that are contained in this petition, then the approval of the nonimmigrant petition would constitute gross error on the part of

the director. In Sussex Engineering, Ltd. v. Montgomery, 825 F.2d 1084 (6th Cir. 1987), the Court of Appeals held that it is absurd to suggest that the Service must treat acknowledged errors as binding precedent.

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.