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U.S. Department of Justice

Immigration and Naturalization Service

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



File: WAC 99 070 52495

Office: CALIFORNIA SERVICE CENTER

Date: 12 APR 2002

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

for Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a California limited partnership that is engaged in the travel and tour business. It seeks to employ the beneficiary as its managing director (partner) 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 denied the petition because the evidence did not establish that (1) the petitioner currently employs and would continue to employ the beneficiary in a primarily executive or managerial capacity, and (2) the petitioner has the ability to pay the beneficiary's proffered wage.

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.

I. EXECUTIVE AND MANAGERIAL CAPACITY

One basis of the director's denial of the petition rested on the petitioner's failure to establish that the beneficiary supervised managerial, supervisory or professional employees.

On appeal, counsel states that the supervision of employees is not the main job duty of the beneficiary. According to counsel, the beneficiary spends approximately 80% of his time executing

executive and managerial level duties, which include managing the sales and business operations of the petitioner, developing travel programs, and overseeing the booking operations. Counsel contends that the director did not allege in the denial letter that the beneficiary was not primarily executing managerial duties or was not acting as a functional manager.

Regarding the director's allegation that the beneficiary did not supervise managerial, supervisory or professional employees, counsel maintains that the position of sales manager, which is subordinate to the beneficiary, is a professional position as outlined in the Department of Labor's (DOL) *Occupational Outlook Handbook* ("Handbook").

Counsel does not present a persuasive argument on appeal. As the record is presently constituted, the evidence does not support a conclusion 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 January 7, 1999. For immigrant visa petitions, the Commissioner has held that, to establish a priority date, a petitioner must establish eligibility at the time of filing the immigrant petition; an immigrant 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 it filed the petition, the petitioner claimed that it employed four individuals in addition to the beneficiary. These individuals held the titles of sales manager, operations manager, reservations clerk, and general clerk. The petitioner also listed the beneficiary's job responsibilities as:

- Manages and oversees the operation in North America.
- Coordinate[s] [s]ales activities with offices worldwide.
- Coordinates operations with offices in Asia.
- Attends trade shows worldwide.

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.

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

The petitioner fails to establish that the beneficiary works in a primarily executive role because it has not provided sufficient evidence of the beneficiary's actual job duties, which would provide insight into whether the beneficiary primarily directs the management of the organization or a major component or function of the organization.

Here, the petitioner does not provide any detail about the actual job duties that the beneficiary performs in order to execute the generalized job duties that it ascribes to the beneficiary. For example, the petitioner states that the beneficiary "manages and oversees the operation in North America," but does not describe the types of duties that are associated with executing this rather broad job responsibility. "Specifics are clearly an important indication of whether an applicant's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations." Fedin Bros. Co., Ltd. v. Sava, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), aff'd, 905 F. 2d 41 (2d. Cir. 1990).¹ In this particular case, the petitioner has not stipulated the beneficiary's actual job duties but, rather, has chosen to present a generalized job description of the beneficiary's overall duties.

While the Service notes that an individual who works in an executive capacity may occasionally perform duties that would not generally be classified as executive-level tasks, the petitioner bears the burden of establishing that the beneficiary *primarily* executes executive duties and any non-executive duties are merely incidental to the position. In this case, the petitioner has not met its burden because the beneficiary's daily activities are unknown. Thus, the Service cannot conclude that the beneficiary is working in an executive capacity as that term is defined in the regulation. (Emphasis added.) Accordingly, the petitioner does not sufficiently establish that the proffered position involves primarily executive duties.

In order to be found eligible for this immigrant visa

¹ The court in Fedin Bros. Co., Ltd. v. Sava also noted that "[t]he actual duties themselves reveal the true nature of the employment." See id. at 1108.

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).

The petitioner also fails to show that the proffered position involves primarily managerial functions. While it appears that the beneficiary has the authority to hire and fire personnel, the evidence is not sufficient to establish that the beneficiary manages the organization. More importantly, the petitioner presents discrepant information about its employees which calls into question the veracity of the documentary evidence that has been submitted in support of the petition.

Here again, the petitioner's submission of a broad job description for the beneficiary is not adequate evidence of the beneficiary's employment in a primarily managerial capacity. In IKEA US, Inc., v. U.S. Dept. of Justice I.N.S., 48 F. Supp. 2d 22 (D.D.C. 1999), the court upheld the Service's denial of a nonimmigrant L-1A petition because the petitioner failed to document the percentage of time the beneficiary devoted to managerial duties versus his non-managerial duties. Like the petitioner in IKEA, the petitioner in this case does not provide any indication of the types of managerial-level duties that the beneficiary executes. One stated duty, which is attending trade shows, is not an example of a managerial job function.

The more important issue in this petition, however, is the petitioner's claim that the beneficiary supervises subordinate

employees, who are a sales manager, an operations manager, a reservations clerk and a general clerk.

As previously stated, it is the petitioner's organizational structure at the time of filing the petition that is relevant to whether the beneficiary merits classification as a multinational executive or manager. In this case, because the petitioner filed the petition in January of 1999, its organizational structure during the 1998 calendar year is relevant to the adjudication of the petition. Although the petitioner has maintained throughout the processing of this petition that it employs four individuals in addition to the beneficiary, a copy of the petitioner's 1998 corporate income tax return indicates that the petitioner paid only \$3,186 in salaries and wages in the 1998 calendar year. Certainly, such a meager amount cannot sustain the employment of four individuals.

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). Here, the petitioner does not explain how it could have employed four individuals, two of who were in alleged managerial roles, and pay less than \$4,000 in salaries and wages. The Service notes that the petitioner did submit copies of its W-2, Wage and Tax Statements, for the 1999 calendar year, which shows that it did pay wages to the four employees in 1999. However, since this evidence relates to events that occurred after the petition was filed, the Service cannot consider it on appeal. Moreover, even if the Service could take this evidence into consideration, only one of the four employees (Rachel A. Tobias - operations manager) was employed on a full-time basis. Accordingly, the petitioner has failed to establish that the beneficiary supervises managerial, supervisory or professional employees who could relieve the beneficiary from performing nonqualifying duties; the beneficiary does not merit immigrant visa classification as a multinational manager.

II. ABILITY TO PAY

The second and final basis of the director's decision to deny the petition was based upon the petitioner's inability to pay the proffered wage of \$1,150.00 per week to the beneficiary.

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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

On appeal, counsel states that the beneficiary has "regular[ly] been paid his full salary since commencing L-1A status in the U.S. in 1997" Counsel notes that the petitioner had previously submitted copies of its 1999 bank statements, which show an average monthly deposit of \$150,000, and further contends that the director did not cite this evidence in the denial letter.

Counsel's statements on appeal are also not persuasive on this issue. Regarding counsel's statement that the petitioner has been paying the beneficiary salary since 1997, neither counsel nor the petitioner has presented any documentary evidence in support of this claim such as payroll records or copies of the beneficiary's personal income tax returns that he has filed with the Internal Revenue Service. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

Regarding counsel's assertion that the director failed to note that the petitioner submitted evidence to show that it has an average monthly deposit of \$150,000, counsel's reliance on this evidence is misguided. Although the bank statement copies do show large deposits by the petitioner, the statements also show large withdrawals from the same account, which, during some months, has left as little as \$10,000 in the petitioner's bank account. Accordingly, this evidence, by itself, does not establish the petitioner's ability to pay the proffered wage. The director's decision to deny the petition on this basis has not been overcome on appeal.

III. OTHER ISSUES

Counsel suggests on appeal that the Service must approve the petition because the beneficiary is the recipient of an approval L-1A petition that was based upon the same facts in the instant petition. 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). Based upon the evidence in this petition, the director's prior approval of an L-1A petition for the beneficiary would constitute gross error if

the facts in that petition mirrored the facts in this petition. 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.

Finally, while the director did not raise this issue in her denial letter, the evidence does not establish that the beneficiary was employed in a primarily managerial or executive capacity with the foreign entity for at least one year in the three years preceding the beneficiary's entry into the United States in L-1A status. The petitioner has not presented a sufficiently detailed job description for the beneficiary's overseas position in order for the Service to find that the beneficiary's role was either primarily executive or managerial. However, inasmuch as the petition is being denied on other grounds, this issue shall not be examined further.

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.