



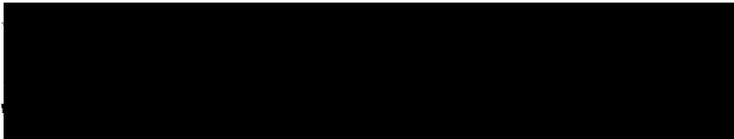
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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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File: EAC 00 082 50143

Office: VERMONT SERVICE CENTER

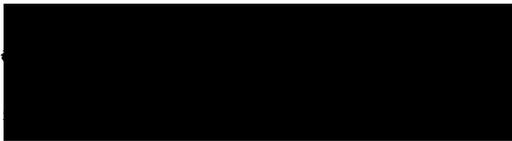
Date: 15 APR 2002

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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center denied the immigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The case will be remanded to the director for further action.

The petitioner is a New Jersey corporation that claims to be engaged in sourcing and purchasing of United States products and services for export. It seeks to employ the beneficiary as its manager and, therefore, endeavors to classify the beneficiary 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 (1) the beneficiary was employed by the overseas entity in a managerial or executive capacity, (2) the petitioner currently employs and will continue to employ the beneficiary in a primarily executive or managerial capacity, and (3) the petitioner has the ability to pay the proffered wage.

On appeal, counsel submits a brief.

The merits of the director's decision will not be addressed at the present time. The Associate Commissioner is withdrawing the decision that was previously entered into the record so that the director may enter a new decision consistent with the following discussion.

8 C.F.R. 204.5(j) 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:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least

one year in a managerial or executive capacity

The facts in the record indicate that the beneficiary did not meet the requirements of either 8 C.F.R. 204.5(j)(3)(i)(A) or § 204.5(j)(3)(i)(B) at the time the petition was filed. Therefore, whether the beneficiary was employed by the foreign or United States entities in an executive or managerial capacity and whether the petitioner has the ability to pay the proffered wage were irrelevant issues in the adjudication of the petition.

According to the petitioner, the beneficiary entered the United States as an L-1 nonimmigrant in March of 1999. The petitioner filed the instant I-140 petition with the Service on January 19, 2000.

At the time it filed the I-140 petition, the petitioner indicated that it still employed the beneficiary in L-1 nonimmigrant status; however, counsel notified the Service in a November 10, 2000 letter that "[t]he beneficiary has not been employed by the company since January 2000, at which time he applied for change of status to F-1." According to counsel, the beneficiary departed from the petitioner's employ to attend graduate school and, therefore, was seeking a change of his status from L-1 to F-1. Counsel's statements about the beneficiary's departure from the petitioner's employ was confirmed in a December 9, 1999 letter from an official in the parent company that was written to the beneficiary, which stated:

It is our [parent company's] understanding that you have received admission to Pace University to complete your Masters in Finance and International business, beginning in the Spring semester of 2000. . . . Since during the period of your studies, you will not be receiving a salary from the firm, we urge you to complete the requisite formalities for your student visa with the firm's attorney.

The beneficiary's departure from the petitioner was also confirmed in a February 16, 2001 letter from the petitioner's Certified Public Accountant, who states that the beneficiary was employed by the petitioner from November 1998 to December 1999.

It is clear from the facts in the record that at the time the petitioner filed the I-140 petition on January 19, 2000, the beneficiary did not meet the requirements of 8 C.F.R. 204.5(j)(3)(i)(A) because he was not outside of the United States. More importantly, however, although the beneficiary was already in the United States he did not meet the requirements of 8 C.F.R. 204.5(j)(3)(i)(B) because he was not working for the petitioner. As previously stated, by the filing date of the petition, the beneficiary and the parent company had mutually agreed to terminate the beneficiary's employment so that the beneficiary

could attend graduate school. Neither the petitioner nor the parent company paid the beneficiary's salary and the beneficiary sought to change his status to that of an F-1 nonimmigrant student from an L-1 nonimmigrant. 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. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). In this case, the beneficiary was not fully qualified for immigrant visa classification as a multinational executive or manager.

As the director did not raise this fundamental issue in his denial of the petition, this case shall be remanded to the director for entry of a new decision. The director may request any additional evidence deemed necessary to assist him with his determination. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

ORDER: The petition is remanded to the director for entry of a new decision which, if adverse to the petitioner, is to be certified to the Associate Commissioner for review.