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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: WAC 00 119 50471 Office: CALIFORNIA SERVICE CENTER

Date:

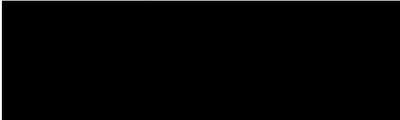
DEC 06 2002

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 that 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 that 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant 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 general contracting and engineering firm. It seeks to employ the beneficiary temporarily in the United States as vice president of its new office. The U.S. entity is described as a subsidiary that is owned as a joint venture. The director determined that the petitioner had not demonstrated that the beneficiary will be employed in a managerial or executive capacity. The director also determined that the petitioner failed to establish that a qualifying relationship exists between it and a foreign entity.

On appeal, counsel asserts that the director erred in denying the petition and submits additional documentation in support thereof.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The first issue in this proceeding is whether the beneficiary will be employed in a primarily managerial or executive capacity.

8 C.F.R. 214.2(1)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services performed.

8 C.F.R. 214.2(1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

A) Sufficient physical premises to house the new office have been secured;

B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

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:

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.

With the petition, the following statement was provided to describe the beneficiary's past and proposed duties:

Mr. [REDACTED] duties as our parent venture are to direct the company, to hire and fire employees, contractors, and subcontractors. Mr. [REDACTED] negotiates contracts for commercial and industrial projects to be requested by companies and/or the government. He has wide latitude of authority in discretionary decision making and directs the day to day, systematic operations of our parent venture.

Mr. [REDACTED] duties as Vice President of the U.S. venture will be essentially the same as in our parent venture. He directs our parent venture and we would like to bring him to the United States to perform these executive level duties for our U.S. venture.

On May 23, 2000, the Service sent the petitioner a notice requesting that additional evidence be submitted. The petitioner was instructed, in part, to provide the Service with a specific list of duties the beneficiary performed for the parent entity, the specific list of duties he would be performing for the U.S. petition, and an organizational chart for the foreign entity, including the number of employees, and their job titles and duties.

The petitioner's response contains organizational charts for the foreign entity and one for Southern Colorado Machinery. However, the petitioner is called G & P Enterprises, not Southern Colorado Machinery. The petitioner has not provided the Service with an explanation of the relationship, if any, Southern Colorado Machinery has with the petitioner. Furthermore, the organizational chart for the foreign entity does not contain any of the names of the employees who occupy the named positions, nor are there any position descriptions provided for either company. The petitioner provided none of the requested evidence regarding the beneficiary's managerial or executive duties for the foreign parent organization or for the U.S. petitioner.

It is noted that failure to submit requested evidence which precludes a material line of inquiry, as the petitioner did in the instant case, shall be grounds for denying the petition. 8 C.F.R. 103.2(b)(14).

Furthermore, where a petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, the Service will not consider evidence submitted on appeal for any purpose. Rather, the Service will adjudicate the appeal based on the record of proceedings before the director. See, Matter of Soriano, 19 I&N Dec. 764 (BIA 1988). If the petitioner desires further consideration of such evidence, the petitioner may file a new petition. As the petitioner in the instant case failed to submit evidence requested in the Service's notice, the additional evidence, submitted on appeal for the purpose of establishing the beneficiary's managerial or executive capacity, will not be considered.

The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. There is insufficient detail regarding the actual duties of the assignment in order to overcome the objections of the director. Reliance on the use of terms such as "executive capacity" or the position title of "manager" is not persuasive.

The record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy. Further, the petitioner's evidence is not persuasive in establishing that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. Based on the evidence submitted, it cannot

be found that the beneficiary has been employed in a primarily executive or managerial capacity, or that the petitioning organization will support an executive or managerial position within one year of the approval of the petition. For this reason, the petition may not be approved.

The other issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between it and a foreign entity.

8 C.F.R. 214.21(ii)(K) defines the term "subsidiary" as follows:

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity. (Emphasis added.)

Neither the Act nor regulation provides a definition of the phrase "joint venture." However, the Commissioner has applied a broad definition of joint venture in a prior decision. Matter of Hughes states that a joint venture is "a business enterprise in which two or more economic entities from different countries participate on a permanent basis." Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982) (quoting a definition from Endle J. Kolde, International Business Enterprise (Prentice Hall, 1973)).

In the Service's request for additional evidence, the petitioner was instructed to submit evidence establishing common ownership and control between the foreign and U.S. entities.

The petitioner's response to the above request included a stock certificate, indicating that 50 percent of its shares were issued to AEBA Consultores, C.A., and information about that company.

On appeal, the petitioner submitted a statement indicating that the remaining 50 percent of the petitioner's stock is equally divided between the beneficiary and his partner. Counsel insists that the existing 50-50 split of the petitioner's stock between the foreign entity and two individuals is a valid joint venture. However, it is noted that a 50-25-25 split does not equal a joint venture under the regulatory definition because there is no "equal control and veto power." Furthermore, the fact remains that the petitioning entity is not owned by "two or more economic entities from different countries." Id. This type of ownership does not fit under the precedent decision's definition of "joint venture." Consequently, the petitioner has failed to establish that a

qualifying relationship exists between it and a foreign entity. For this additional reason, the petition cannot be approved.

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.