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U.S. Department of Justice

Immigration and Naturalization Service

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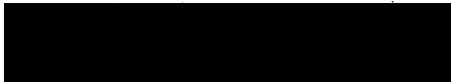
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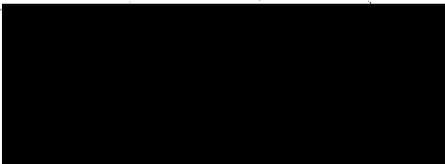
DEC 17 2002

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

Robert P. Wiemann, 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 engaged in the purchase and rehabilitation of real estate properties. The petitioner seeks to employ the beneficiary in the United States as its president. Accordingly, it seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director stated that the petitioner had failed to explain how the foreign entity would continue to operate in the absence of the beneficiary. The director also determined that the evidence of record was insufficient to establish that the beneficiary would primarily perform executive duties.

On appeal, counsel for the petitioner asserts that the director disregarded evidence establishing the ongoing operations of the foreign entity. Counsel also asserts that the director failed to take into account the nature of the beneficiary's duties and instead relied solely on the number of its employees when making her decision.

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.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

- (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;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

The first issue in this proceeding is whether the petitioner has established that it meets the definition of multinational and that the beneficiary's previous overseas employer is still doing business.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

8 C.F.R. 214.2(l)(1)(ii)(H) states:

Doing Business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner provided numerous invoices from the petitioner's claimed affiliate in response to the director's request for evidence. The petitioner's claimed foreign affiliate is conducting business. The director's statement that the petitioner had failed to explain how the foreign entity would continue to operate in the absence of the beneficiary is directly contradicted by the numerous documents showing that even after the departure of the beneficiary, the claimed foreign affiliate continued to do business. The director's statement and the implication that the overseas entity is not doing business are hereby withdrawn.

However in a related issue, the petitioner has not established that a qualifying relationship exists between the petitioner and the claimed affiliated company.

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

Affiliate means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Counsel and the petitioner state that the beneficiary and his wife are the majority shareholders of the petitioner. The director requested proof that the foreign company had in fact paid for the stock issued by the petitioner. In response, the petitioner presented three share certificates depicting interest in the petitioner held as follows:

Share certificate # 1 - 6,900 shares issued to Mariese Elises- Heitkamp,
Share certificate # 2 - 16,100 shares issued to Norbert Heitkamp, and,
Share certificate # 3 - 80 shares issued to Marian Ronquillo

The petitioner also provided a certificate of increase of capital stock for the claimed affiliated company. The certificate revealed the subscribed shares of overseas company were held as follows:

Norbert Heitkamp - 2,700 shares
Mariese Elises Heitkamp - 2,700 shares
Tomas De Los Santos - 1,800 shares
Debbie Lee - 900 shares
Athena E. Agustin - 900 shares

The petitioner explained that it and the beneficiary's overseas

employer were affiliates and that the officers and directors of both companies were identical. The petitioner also provided evidence of a transfer of funds from the overseas entity to the petitioner, as well as a transfer of funds from the overseas entity to the beneficiary's wife and incorporator of the petitioner. Although it is clear that funds were transferred to the petitioner from the foreign entity, the foreign entity is not the ultimate shareholder of the petitioner, instead as noted above, three individuals own the petitioner. It is not clear that the majority shareholders of the petitioner paid for the shares issued to them. 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 (BIA 1988).

It is also noted that the two companies do not qualify as affiliates, as the two companies are not owned by the same group of individuals.

The petitioner has not established a qualifying relationship with the beneficiary's overseas employer.

The next issue to be examined in this proceeding is whether the petitioner has established that the beneficiary has been and will be performing managerial or executive duties.

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

The term "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:

The term "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.

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

Develop organizational management plans; develop marketing strategies; develop business and market entry plans; direct the preparation of necessary feasibility studies, including site analysis, competition analysis, rental pricing and market acceptance; identify and coordinate materials and equipment suppliers to meet with health and building code standards; coordinate with realtors and developers to acquire prime properties; manage and oversee building construction, remodelling, [sic] refurbishing, interact with local authorities to meet and maintain compliance with California and municipal laws, rules, regulations and codes; formulates policies and objectives pursuant to the business purposes of the company; venture into other business projects for the company.

The petitioner also provided a property improvement contract entered into between the petitioner and a construction company. The contract is dated October 19, 1998 and was to be completed within four months of start of construction.

The director requested additional information regarding the beneficiary's proposed managerial or executive duties with the United States entity including the petitioner's organizational chart, a list of the petitioner's employees, California DE-6,

Quarterly Wage Reports, and Internal Revenue Service (IRS) Form W-2s, Wage and Tax Statements.

In response the petitioner provided its organizational chart depicting the beneficiary as president, his wife as vice-president, a third individual involved with administration and sales, and a fourth individual as an accountant/bookkeeper. The chart also revealed two vacant positions for a marketing director and a financial director. The petitioner also provided its California DE-6 Form for the quarter ending March 31, 2000. The DE-6 Form revealed two employees, the beneficiary and the administration/salesperson.

The director determined that the petitioner had not provided sufficient evidence of a subordinate staff to conclude that the beneficiary would be performing executive or managerial duties rather than performing the day-to-day operational duties necessary to run the company.

On appeal, counsel for the petitioner asserts that the Service erred when looking only at the number of employees being supervised by the beneficiary. Counsel asserts that the beneficiary's duties are highly sensitive and that the beneficiary has exercised his executive judgment in employing the services of various contractors and subcontractors.

Upon review of the record, we agree that the director provided an inadequate explanation of the evidence reviewed. We also note that the director's request for evidence did not ask for a comprehensive description of the beneficiary's duties. However, 8 C.F.R. 204.5(j)(5) requires that the petitioner's job offer contain a clear description of the duties to be performed by the beneficiary. The overly broad description of the beneficiary's duties initially submitted is not sufficient to sustain this appeal. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). In the instant case, the description provided is indicative of an individual providing marketing services to the petitioner as well as negotiating for and purchasing real estate properties. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner has not detailed how much time the beneficiary spends on these tasks but as the nature of the petitioner's business is real estate investment, it would appear to be a significant amount of time. The petitioner has not provided evidence that other individuals perform the tasks necessary to operate the company thereby relieving the beneficiary from performing non-qualifying duties. Moreover, the vacancy of the marketing director's position and the lack of other employees to engage in the research, negotiation, and purchase of real estate investments confirms that the beneficiary is primarily performing

these tasks for the petitioner.

Counsel's assertion that the beneficiary also makes executive decisions regarding the hiring of contractors to refurbish its properties is not supported in the record. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). We note that the petitioner entered into a property improvement agreement in October of 1998 that was to be completed within four months of the construction start up date. There is no evidence of the start up date but likewise there is no evidence that the agreement was still ongoing at the time the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45,49 (Comm. 1971). The petitioner has not provided further evidence of the outside contractors it has hired. The petitioner has not provided evidence that the beneficiary spends the majority of his time supervising outside contractors.

It is not possible to determine from the information provided that the beneficiary was primarily employed as an executive as defined by the statute in his position with the United States entity.

It appears the director based her decision on the number of staff of the enterprise but did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Service must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner had been incorporated and engaged in the purchase of real estate properties for over three years. The firm employed the beneficiary as president and an administration and sales person. The petitioner did not provide adequate supporting evidence that independent contractors were hired on a continuous and full-time basis. Based on the petitioner's lack of information on this issue, it is not possible to determine if the reasonable needs of the company could plausibly be met by the services of the staff on hand at the time the petition was filed. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial or executive capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily executive or managerial capacity. As discussed above, the petitioner has not established this essential element of eligibility.

In visa petition proceedings, the burden of proving eligibility for the benefit sought 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.