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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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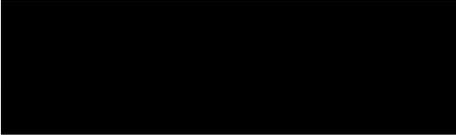
File: EAC 00 034 52399 Office: VERMONT SERVICE CENTER

Date: 19 DEC 2002

IN RE: Petitioner: [Redacted]
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:



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

Myra L. Rosenly
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center denied the employment-based preference visa and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a New York corporation that is engaged in the wholesale of diamonds. It seeks to employ the beneficiary as its president 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 on the bases that (1) the proffered position is not an executive or managerial position, (2) the petitioner has not been doing business, and (3) the petitioner does not have the ability to pay the beneficiary the proffered wage of \$2,500 per month (\$30,000 per year).

On appeal, counsel submits a brief and copies of the petitioner's sales invoices, import invoices, purchase invoices, bank statements, corporate income tax returns, and payroll records. Counsel also submits a copy of the petitioner's certificate of incorporation and its balance sheet.

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.

In the initial petition filing, the petitioner described itself as a diamond wholesaler that employed two individuals and had a gross annual income of approximately \$1,187,000. According to the petitioner, the beneficiary was employed with the overseas entity, not the petitioning entity at the time the petition was filed. The proffered position of president was described as follows:

Plan, develop, and establish policies and objectives of Corporation. Plan business objectives, review financial statements and activity reports to determine whether objectives are met and modify policies to increase profits. Hires, terminates, promotes, evaluates performance of professional staff to determine compliance with established policies.

In a subsequent letter to the director, the chief executive officer (CEO) of the overseas entity described the proffered position in more detail, and for the first time, described the jobs of the petitioning entity's two employees who are the account executive and the sales manager:

As President, [the beneficiary's] schedule is 40 hours per week. The breakdown of this time is as follows: 20 hours per week devoted to directing and coordinating all activities of staff, seeking contracts from private sources, and maintaining effective public relations activities and relations with public and private organizations. This time is reserved for meetings and functions to promote the organization. Another 10 hours/week is used for the President to initiate and develop objectives and policies, review financial statements to increase profits, and supervises the day-to-day business affairs of our organization. It is with this time that the President can review activity reports prepared by the Sales Manager and plan marketing strategies to increase profits. An additional 10 hours per week is spent when the president supervises key decisions for marketing strategies and develop[s] accounts in New York, U.S.A. and used for the President to recruit and hire additional professionals to implement his marketing strategies in order to facilitate future expansion in the United States.

The Sales Manager works 50 hours per week. The Sales Manager spends 15 hours per week directing the sales and marketing strategy, advertising, and promotion of our diamond sales. [The Sales Manager] spends 20 hours per week meeting with customers and sales of our accounts. The Sales Manager spends 15 hours per week preparing sales and activity reports for the President.

The Account Executive works 50 hours per week. The Account Executive Spends 30 hours per week engaging in sales of our product and maintains relations with our client base. This requires the Account Executive to make phone and personal contact with our clients. In the remainder of the account executive's schedule (20

hours per week), he reports to the Sales Manager who directs [him] to prepare routine business correspondences, filing, answer telephones, take messages, make copies and send facsimiles to customers.

The director found that the proffered position was neither executive nor managerial in nature and he denied the petition accordingly. The director noted that the \$22,850 that the petitioner paid to the sales manager and the account executive in 1999 indicated that the two individuals do not hold managerial positions. The director also found the petitioner's business operations to be minimal, which indicated to him that the beneficiary would be providing a service or producing a product rather than executing executive or managerial responsibilities. Additionally, the director found that the petitioner had not been doing business and could not pay the beneficiary's proffered wage. The director, however, did not elaborate on how he arrived at his conclusions on these two issues.

On appeal, counsel states the evidence in the record, which indicates that the beneficiary manages an essential function for the overseas entity, establishes his credentials as a multinational executive or manager. Counsel notes that the director placed undue emphasis on the petitioner's 1999 corporate income tax return in determining that the beneficiary would be performing the day-to-day tasks of the petitioning entity's operations. Regarding the ability of the petitioner to pay the proffered wage, counsel notes that the director failed to consider the more than \$1,376,000 in gross receipts and monthly bank deposits of \$185,000-\$204,000 when determining that the petitioner could not pay the proffered wage. Regarding whether the petitioner has been doing business, counsel does not address this issue on appeal.

I. ABILITY TO PAY THE PROFFERED WAGE

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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization

which establishes the prospective employer's ability to pay the proffered wage. 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.

The record contains a copy of the petitioner's corporate income tax return (Form 1120) for the 1998 and 1999 calendar years. The petitioner filed the petition on November 12, 1999; therefore, the petitioner's financial position (e.g., its assets, liabilities and salaries paid) during the 1999 calendar year is relevant.

The petitioner's 1999 Form 1120 shows that its net (taxable) income was \$39,639 (Line 30). The petitioner could pay a proffered wage of \$30,000 per year out of a net income of \$39,639. Therefore, the petitioner has established its ability to pay the proffered wage based upon its net income, and the director's objection to the approval of the petition has been overcome on this one issue.

II. BENEFICIARY'S PROPOSED POSITION AS A MULTINATIONAL EXECUTIVE OR MANAGER

Pursuant to 8 C.F.R. 204.5(j)(2):

Executive capacity means an assignment within an organization in which the employee 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.

Managerial capacity means an assignment within an organization in which the employee 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.

When determining whether the proffered position involves primarily executive or managerial duties, the Service looks at the petitioner's organizational structure at the time the petition was filed. 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 of filing the petition on November 12, 1999, the petitioner claimed to employ one account executive and one sales manager; the beneficiary was employed by the overseas entity. Although the CEO of the overseas entity stated that the petitioner had plans to hire additional personnel, at the time of filing the petition, only two individuals were employed by the petitioning entity.

If staffing levels are used as a factor in determining whether an individual is an executive or manager, section 101(a)(44)(C) of the Act requires the Service to consider the reasonable needs of the organization in light of its overall purpose and stage of development. 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. 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 Associate Commissioner doubts the veracity of the facts that the petitioner has provided to the Service about its staffing levels and the job responsibilities of its two employees. Accordingly, there is no reasonable basis to find that the beneficiary would be acting in a primarily executive or managerial capacity for the petitioning entity.

According to the CEO of the overseas entity, both the account executive and the sales manager are employed 50 hours per week. The petitioner's 1999 W-2 Wage and Tax Statement for its two employees, however, belies the CEO's claims. The account executive's W-2 statement indicates wages of \$2,500 in the 1999 calendar year. The sales manager's W-2 statement indicates wages of \$10,000 in the 1999 calendar year. Neither wage is indicative of an individual who works a 50 hour workweek as claimed by the overseas entity's CEO. This evidence also indicates that at the time of filing the petition, the reasonable needs of the petitioner in light of its overall stage of development did not require the services of an individual whose only responsibilities would be to execute primarily executive or managerial duties. Thus, the proffered position cannot be classified as a multinational executive or manager.

III. DOING BUSINESS

Pursuant to 8 C.F.R. 204.5(j)(3)(i)(D), the petitioner must establish that it has been doing business for at least one year. Doing business is defined at 8 C.F.R. 204.5(j)(2) as "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

Neither counsel nor the petitioner has addressed this issue on appeal. Therefore, the director's objections to the approval of the petition on this basis have not been overcome. It is noted that the petitioner was incorporated on September 24, 1998 and filed this immigrant petition less than 14 months after its incorporation. While the petitioner has submitted copies of its invoices, the earliest invoice is dated in November 27, 1998, less than 12 months prior to the filing of the petition on November 12, 1998. No evidence has been submitted to show that the petitioner had been engaged in the regular, systematic and continuous provision of goods and/or services for one full year (from November 12, 1998 through November 12, 1999) at the time the petition was filed.

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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.