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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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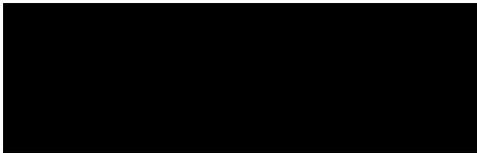
File: [Redacted] Office: CALIFORNIA SERVICE CENTER

Date: JUL 22 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

Robert P. Wiemann, Director
Administrative Appeals Office



DISCUSSION: The preference visa petition was approved by the Director, California Service Center. Upon subsequent review, the director properly issued a notice of intent to revoke, and ultimately revoked the approval of the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a sole proprietorship owned and operated by the beneficiary. The petitioner is engaged in the fashion retail business. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors 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 determined that the petitioner had not established a qualifying affiliation with a foreign entity, had not established its ability to pay the proffered wage, and had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, the petitioner contends that the beneficiary is eligible for the preference visa classification.

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.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the



alien.

The first issue in this proceeding is whether the petitioner has established a qualifying relationship between itself and an overseas entity.

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;

* * *

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.

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.

The visa classification that the petitioner seeks is intended for multinational executives and managers. 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. In order to qualify for this visa classification, the petitioner must establish that there is a qualifying relationship between the United States and foreign entities, in that the petitioning entity is the same employer or an affiliate or subsidiary of the overseas entity.

In the initial petition, the petitioner stated that the beneficiary and his wife are in the business of renting out commercial and private property in Korea. The petitioner attached copies of several lease agreements supporting this statement. In

September of 1997, the petitioner submitted a letter stating that it was not a corporation and that the beneficiary was the sole owner of the business, although the beneficiary's wife signed the letter as the co-owner.

The director initially approved the visa petition but on subsequent review issued a notice of intent to revoke the approval. The director stated that the petitioner was a sole proprietorship and that the beneficiary had closed his Korean businesses before coming to the United States. The director concluded that because the beneficiary had closed his Korean business, a qualifying affiliation with a foreign entity no longer existed.

On appeal, counsel for the petitioner provides evidence that the beneficiary continues to have real estate interests in Korea and is the lessor of numerous rental properties. Counsel asserts that the beneficiary has demonstrated ownership of both the United States business and its affiliate property rental business in Korea.

Counsel's assertion is not persuasive. The nature of the petitioner's business presents an obstacle to the petition's approval. As a matter of law, there is no prospective United States employer that could be considered the "same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas." 8 C.F.R. 204.5(j)(3)(i)(C). The petitioner is a sole proprietorship and is not a corporation, partnership, or other legal entity that has a separate legal identity separate and apart from the owner, since, in a sole proprietorship, "[t]he business and the proprietor are one." In re Drimmel, 108 Bankr. 284, 286-87 (Bankr. D. Kan. 1989). For immigration purposes, a sole proprietorship is not a legal entity separate and apart from its owner. Matter of United Investment Group, 19 I&N Dec. 248 (Comm. 1984). Thus the beneficiary is self-petitioning because there is no separate legal entity that can employ him. Furthermore, there is no United States entity, because the beneficiary who is self-petitioning is an alien. Finally, the mere ownership of property in South Korea does not constitute a qualifying entity in a foreign country. For these reasons, the petitioner cannot be defined as a multinational company.

The second issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered wage.

The petition was filed in April of 1996. The petitioner proffered the wage of \$30,000 per year to the beneficiary. The beneficiary's Internal Revenue Service (IRS) Form 1040, U.S. Individual Income Tax Return for 1995 reflected business income in the amount of \$14,005 and wages paid in the amount of \$10,179. The IRS Form 1040 for 1996 reflected business income in the amount of \$20,447 and wages paid in the amount of \$13,528.

The director determined that the petitioner did not generate enough business and income to pay the beneficiary the proffered wage.

On appeal counsel asserts that the petitioner's gross income and monthly deposits to a banking account are sufficient evidence to establish the petitioner's ability to pay the proffered wage.

Counsel's assertion is not persuasive. The petitioner must demonstrate the ability to pay the proffered wage at the time the priority date is established. In addition, the petitioner must continue to demonstrate the ability to pay the proffered wage until the beneficiary obtains lawful permanent resident status. Matter of Great Wall, 16 I&N Dec. 142 (act. Reg. Comm.), Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Further, it is not reasonable to consider gross income without also considering the expenses that were incurred to generate that income. See K.C.P. Food Co., Inc. v. Sava, 623 F. Supp. 1080 (S.D.N.Y. 1985).

The beneficiary's salary of \$30,000 for 1996 has not been established. Wages paid in 1995 were only \$10,179. Wages paid in the year 1996 were only \$13,528. The beneficiary's IRS Forms 1040 do not reveal that the beneficiary had net business income that was at least equal to the proffered wage. Further, the beneficiary's IRS Forms 1040 do not reflect net current assets that are sufficient to pay the proffered wage. The petitioner has not established the ability to pay the beneficiary the proffered wage.

The last issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

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:

[The beneficiary] was transferred to the United States to manage, develop and direct Fashion 2000's entire operation including the annual and quarterly financial/business planing [sic]; general management of production; policies on personnel, customer service and marketing.

The petitioner, in a letter dated September 2, 1997 states that the beneficiary's job duties included:

Planning, developing, and establishing company policies and business objectives. [The beneficiary] also confers with company officials to plan business objectives and to develop organizational policies, and reviews activity reports and financial statements to make accurate decisions regarding the business. [The

beneficiary] directs and coordinates financial programs for the company's benefits, and develops ideas to maximize sales and minimize costs.

The petitioner also provided the California Form DE-6, Quarterly Wages for the year 1995. The California DE-6 Forms reflected two employees for the first, third, and fourth quarters and four employees for the second quarter. As noted above, the total salaries paid by the petitioner for the year 1995 was \$10,179.

The director determined that the record was insufficient to establish that the beneficiary had been or would be primarily performing executive or managerial duties.

Counsel asserts that the beneficiary is both a manager and an executive. Counsel asserts that the length of time the petitioner has been in business is evidence that the beneficiary has successfully developed organizational policies and has managed an essential function of the United States entity. Counsel also asserts that the record establishes that the beneficiary has met the requirements to demonstrate executive capacity.

Counsel's assertions are not persuasive. 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). The petitioner's description of the job duties is not sufficient to warrant a finding that the beneficiary is a manager or an executive as defined by the statute. The description of job duties is vague and general in nature, essentially serving to paraphrase the elements of the statutory definition of managerial and executive capacity. No concrete description is provided to explain what the beneficiary will do in the day-to-day execution of his position. Further, the record is insufficient to establish that at the time of filing the petition, the petitioner had a staff sufficient to relieve the beneficiary from performing non-qualifying duties. It appears the beneficiary will be performing operational rather than managerial or executive duties. The evidence submitted must demonstrate that the majority of the beneficiary's actual daily activities have been and will be managerial or executive in nature. 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).

Counsel's assertion that the length of time the petitioner has been in business is evidence that the beneficiary is managing an essential function of the organization is without merit. 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). Furthermore, counsel does not describe the purported essential function nor provide

evidence to support a finding that the beneficiary is managing an essential function. 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).

Upon review of the complete record, the petitioner has not established that it is a multinational company, has not established that it has the ability to pay the beneficiary the proffered wage and has not established that the beneficiary would be primarily performing managerial or executive duties. Any one of these reasons is sufficient to affirm the director's decision to revoke the approval of the petition.

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.