



BH

U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted
prevent clearly unwarranted
invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



25 JUL 2000

File: [Redacted]

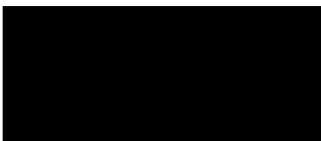
Office: NEBRASKA SERVICE CENTER

Date:

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 denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation incorporated in Virginia in 1996. The petitioner is engaged in importing and packaging bulk commodities and consulting work. 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 that the beneficiary's proposed position qualified as an executive or managerial position.

On appeal, counsel for the petitioner asserts that the beneficiary as its sole employee is engaged in an executive and managerial position.

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.

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.

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.

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 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 submitted a letter referencing the beneficiary's employment as an executive based upon his status as the President, Secretary and Treasurer of the petitioner and his responsibility for signing all contracts on behalf of the company.

The petitioner included its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the year 1999. The IRS Form 1120 revealed gross receipts in the amount of \$50,517, total income in the amount of \$26,951, taxable income in the amount of \$12,141 and that no compensation had been paid to officers or salaries paid to employees.

The director requested evidence to establish that the beneficiary qualified under all four criteria found in the definition of manager or executive as defined in Section 101(a)(44)(A) or (B) of the Act. The director also requested a statement describing the beneficiary's intended employment in the United States.

In response, the petitioner explained that it had entered into a consulting agreement with another company as an independent contractor and that the beneficiary was performing all consulting services under the contract. The petitioner also noted that the beneficiary was responsible for the importing side of its business and negotiated the actual goods to be imported, located and contracted with textile sources in Pakistan and did this with no supervision or direction from higher level executives, directors or stockholders.

The petitioner also provided its IRS Form 1120 for 1998 revealing gross receipts in the amount of \$8,257, total income in the amount of \$8,257, taxable income as a negative \$12,452 and that no compensation had been paid to officers and that no salary had been paid to employees.

The director determined that the entire financial status of the petitioner did not demonstrate that it could support a managerial or executive position. The director also determined that the record demonstrated that the beneficiary was performing non-qualifying duties. The director further noted that the Service was not bound by previous incorrect decisions regarding the beneficiary's L-1A non-immigrant status.

On appeal, counsel for the petitioner asserts that the Service should defer to its previous decisions granting the beneficiary L-1A non-immigrant status. Counsel also asserts that because the beneficiary is the sole decision-maker for the petitioner that the beneficiary is necessarily an executive of the petitioner. Counsel further asserts that the beneficiary's role as a small business owner also qualifies him as a manager. Counsel also cites several unpublished decisions to support his assertion. Counsel also asserts that the director improperly relied upon the petitioner's staffing levels as a determining factor as to whether the beneficiary's position was an executive or managerial position. Counsel finally asserts that the petitioner's financial status is not controlling.

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). In the initial petition, the petitioner provided the beneficiary's titles and concluded that based on the beneficiary's various corporate titles that the beneficiary was an executive. However, the Service is not compelled to deem the beneficiary to be a manager or an executive simply because the beneficiary possesses an executive title. The petitioner must

provide a description of the beneficiary's duties and responsibilities that demonstrate the beneficiary is employed in a managerial or executive capacity.

In response to the director's request for additional information regarding the beneficiary's job duties, the petitioner stated that the beneficiary was performing all consulting services under a consulting service's contract. Furthermore, the petitioner stated that the petitioner was providing all the services necessary to begin and continue the importing side of its business. The petitioner also confirmed that the beneficiary was its sole employee. The petitioner's own statements confirm that the beneficiary is the individual providing services to the company rather than primarily directing the management of the company or otherwise managing the company through the work of others. As has long been established by case law, 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 citation to unpublished decisions to support a conclusion that a sole employee can be a manager or an executive is not persuasive. Counsel has not furnished evidence to establish that the facts of the instant petition are analogous to those cases cited. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c). In the present case, the beneficiary has not been employed in a primarily managerial or executive position as the evidence demonstrates that he has been performing all the tasks necessary to maintain the petitioner's business.

Counsel mistakenly assumes that the director based his decision partially on the size of the enterprise and the number of staff. The director, however, properly considered the lack of staff in the context of the beneficiary performing non-qualifying duties. We note that at the time of filing the petition, the petitioner was a four-year-old company that employed only the beneficiary. The petitioner stated that it did not employ any other individuals, leaving the beneficiary as the only individual to perform all the actual day-to-day operations, non-managerial operations of the enterprise. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of one managerial employee and no subordinate staff. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel's reliance on past approvals of petition's for the beneficiary's L-1A non-immigrant status is misplaced. The Service

is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g. Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that the Service or any agency must treat acknowledged errors as binding precedent. Sussex Engg. Ltd. v. Montgomery 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988). Furthermore, the Administrative Appeal Office's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Just as district court decisions do not bind the court of appeals, service center decisions do not control the Administrative Appeals Office. The Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the rulings of service centers that are contradictory. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000).

Upon review, the petitioner has provided insufficient evidence to overcome the director's determination that the beneficiary is not a manager or executive capacity as defined by the Act.

Beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the salary of \$26,951 proffered in the petition. 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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petitioner's filing date. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is October 4, 2000. The beneficiary's salary, as stated in the petition, is \$26,951. The petitioner has not paid the beneficiary a salary of \$26,951 for the years 1998, 1999 or 2000. The petitioner's 1998, 1999 and 2000 IRS Forms 1120 reveal that no salary has been paid to employees and no compensation has been paid to officers. The same IRS Forms do not show a net income that is at least equal to the proffered wage. Further, the petitioner's IRS Forms 1120 do not reflect that the petitioner has sufficient net current assets to pay the proffered wage. The petitioner has not established that it has the ability to pay the beneficiary the proffered wage.

Further beyond the decision of the director, the petitioner has not established that the beneficiary previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity and is coming to the United States to work for the same entity, or its affiliate or subsidiary. The petitioner states that the foreign entity in this case is a sole proprietorship owned by the beneficiary. A sole proprietorship is not a legal entity separate and apart from its owner or owners. Matter of United Investment Group, 19 I&N Dec. 248 (Comm. 1984). The record does not sufficiently establish that the foreign entity and the petitioner are affiliated in a qualifying relationship for purposes of this immigrant classification.

As the appeal is dismissed for the reason stated above, these issues are not examined further.

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.