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U.S. Department of Justice

Immigration and Naturalization Service

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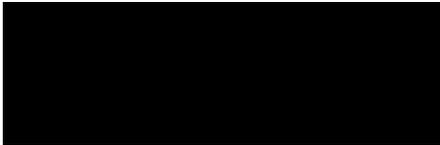
Date: MAY 03 2002

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

for Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a sole proprietorship that is a full-service travel agency. It seeks to employ the beneficiary, an otolaryngologist, as its president and, therefore, seeks 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 because the petitioner failed to establish that the petitioner would employ the beneficiary in a primarily executive or managerial capacity.

On appeal, counsel submits a brief and additional evidence. Counsel asserts, in part, that the Service erred in finding that the beneficiary would not be assuming a primarily executive capacity with the petitioning entity's operations.

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 his denial letter, the director noted that the beneficiary was not eligible for this particular immigrant visa classification because (1) the beneficiary, as an otolaryngologist, has no experience in the travel industry; (2) the petitioner is able to run itself without the services of the beneficiary; and (3) the beneficiary is not fluent in the English language.

On appeal, counsel presents several arguments in rebuttal to the director's conclusions. First, counsel states that neither the statute nor the regulations requires a beneficiary to have prior

experience in the field of the petitioner's endeavors. Counsel states that the Service should focus solely on whether the beneficiary has acquired executive skills that could qualify him to work in an executive capacity in the United States. Counsel submits two affidavits from the owners of travel agencies, each of whom state that prior experience in the travel industry is not required to successfully perform the duties of the proffered position.

Second, counsel maintains that the director distorted the evidence when he concluded that the petitioner could "run itself" without the services of the beneficiary. Counsel notes that the current president, [REDACTED] will step-down as president and assume the role of vice president when the beneficiary is transferred to the United States. Counsel states that the current president executes executive level job duties that the beneficiary will assume.

Third, counsel states that contrary to the director's opinion, the beneficiary is fluent in the English language and, therefore, would be able to assume the duties of the petitioner's president.

Finally, counsel notes that the size of the petitioner should not be a determining factor in the adjudication of this petition. Counsel states that the petitioner's employment of eight individuals would be considered at least a medium-sized travel agency.

Counsel does not present a persuasive argument on appeal. As the record is presently constituted, the evidence does not support a conclusion that the beneficiary would be employed by the petitioner in a primarily executive or managerial capacity.

At the time it filed the petition, the petitioner claimed that it employed eight individuals. These individuals were the president, one executive assistant, one office manager, one corporate accounts individual and four travel agents.¹ The petitioner claimed that the beneficiary, as the president, would assume the following job duties:

- Business planning and development
- Policy formulation and implementation
- Reviewing annual budgets and monthly financial reports
- Negotiating all sales contracts and vendor agreements
- Marketing, advertising, and sales promotion
- Hiring, firing, promoting and re-assigning company employees

¹ The petitioner also claimed that the beneficiary would assume the role of president upon his transfer to the United States and the current president would assume the role of vice president, which is a position that does not currently exist in the petitioner's organizational structure.

- Conducting employee performance reviews
- Authorizing employee leave time and bonus allocations
- Overseeing all of Cricket's Carefree Travel Inc.'s financial, personnel, operational, and administrative functions
- Maintaining full and final authority to define corporate goals and objectives
- Training and disciplining management-level staff
- Authorizing proposed investment and sales strategies
- Structuring research & development directions
- Preparing annual budgets and business plans
- Executing vendor agreements on behalf of Cricket's Carefree Travel, and
- Implementing internal operating procedures and guidelines

In order to be found eligible for this immigrant visa classification as an executive, the record must clearly show that the beneficiary 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.

See. 8 C.F.R. 204.5(j)(2).

The petitioner fails to establish that the beneficiary would work in a primarily executive role because it has not provided sufficient evidence of the beneficiary's actual job duties.

Here, the petitioner does not provide any detail about the actual job duties that the beneficiary would perform. Instead, the petitioner lists generalized job duties such as "business planning and development" and "policy formation and implementation" and does not describe the types of duties that are associated with executing these rather broad job responsibilities. "Specifics are clearly an important indication of whether an applicant's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations." Fedin Bros. Co., Ltd. v. Sava, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989),

aff'd, 905 F. 2d 41 (2d. Cir. 1990).² In this particular case, the petitioner has not stipulated the beneficiary's actual job duties but, rather, has chosen to present a generalized job description of the beneficiary's overall duties.

The Service notes that an individual who works in an executive capacity may occasionally perform duties that would not generally be classified as executive-level tasks. However, the petitioner bears the burden of establishing that the beneficiary primarily executes executive duties and any non-executive duties are merely incidental to the position.

The petitioner has not shown that non-executive duties would merely be incidental to the beneficiary's primary job responsibilities. First, the petitioner has stressed in the petition that the beneficiary would assume the role that is presently occupied by the petitioner's current president. The current president stated in her job description that "[n]ot only do I run the company but I also actively sell travel." Thus, if the beneficiary would be assuming the current president's functions, then he would, therefore, also perform the services that the petitioner provides, which include the selling of travel packages to customers.

In addition, on appeal, counsel notes that when the current president steps down to assume the role of vice president, she will handle "primary marketing and sales promotion functions." However, the petitioner had previously stated that a job duty of the beneficiary, as president, would be to assume the "marketing, advertising, and sales promotion." Obviously, these two job duties are identical, and the petitioner has not addressed how the president's and vice president's job duties would be separate and distinct from each other.

For the reasons stated above, there is insufficient evidence to conclude that the beneficiary's role as president would be to primarily direct the management of the petitioner or a function of the petitioner. Accordingly, the beneficiary does not qualify for classification as a multinational executive.

In order to be found eligible for this immigrant visa classification as a manager, the record must clearly show that the beneficiary primarily:

- (A) Manages the organization, or a department, subdivision, function, or component of the organization;

² The court in Fedin Bros. Co., Ltd. v. Sava also noted that "[t]he actual duties themselves reveal the true nature of the employment." See id. at 1108.

- (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.

See. 8 C.F.R. 204.5(j)(2).

The petitioner also fails to show that the proffered position involves primarily managerial functions. While it appears that the beneficiary may have the authority to hire and fire personnel, the evidence is not sufficient to establish that the beneficiary would manage the organization.

Here again, the petitioner's submission of a broad job description for the beneficiary is not adequate evidence of the beneficiary's employment in a primarily managerial capacity. In IKEA US, Inc., v. U.S. Dept. of Justice I.N.S., 48 F. Supp. 2d 22 (D.D.C. 1999), the court upheld the Service's denial of a nonimmigrant L-1A petition because the petitioner failed to document the percentage of time the beneficiary devoted to managerial duties versus his non-managerial duties. Like the petitioner in IKEA, the petitioner in this case does not provide any indication of the types of managerial-level duties that the beneficiary would execute as the president of the petitioner. Therefore, the beneficiary also does not merit classification as a multinational manager.

As the record is presently constituted, the Service cannot find that the beneficiary would be coming to the United States to assume a primarily executive or managerial role with the petitioning entity. Therefore, the petition may not be approved.

Beyond the decision of the director, there is no credible evidence of a qualifying relationship between the foreign and U.S. entities, and there is insufficient evidence that the beneficiary was employed in an executive or managerial capacity by the foreign entity for the requisite period of time.

In the initial petition, the petitioner claimed that the overseas parent company, Lin Chien-Fu Otolaryngology Clinic ("Clinic"), had purchased one hundred percent of the petitioning entity's assets, thereby creating a wholly-owned subsidiary. In support of this claim, the petitioner submitted a copy of an *Absolute Purchase Agreement*, dated April 5, 2000, which was executed by the Clinic and the petitioner.

According to the contract, the Clinic agreed to purchase the business owned by the petitioner, composed of all tangible and intangible personal property, as well as "all other assets" of the petitioner, including the furniture, fixtures, equipment, business, phone numbers, trade name, good will, and all other property owned and used by the petitioner in the business. The agreement provided that the assets of the business would be purchased by the Clinic for \$425,000 US dollars. According to the agreement:

The cash portion of the purchase price shall be paid by the Purchaser to the Seller as follows: The entire Purchase Price (see section 2 herein) in case, payable within twenty-five (25) days of approval of the permanent residency petition or two (2) years, whichever comes first, with an annual interest rate of six percent (6%) of the unpaid balance.

The petitioner has not shown that it is a subsidiary of the Clinic because the Clinic did not own the petitioner at the time it filed the petition.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this immigrant visa classification. Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988); see also Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant visa proceedings); Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant visa proceedings). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. Matter of Church of Scientology International at 595.

In the current petition, the Clinic did not own the petitioner at the time the I-140 petition was filed because the purchase agreement specifically stated that funds from the Clinic would not transfer to the petitioner until "within twenty-five (25) days of approval of the permanent residency petition or two (2) years, whichever comes first." There is no evidence that the Clinic has

contributed the \$425,000 US dollars that it agreed to pay for to purchase the petitioner. The terms of the purchase agreement are prospective in nature, conditioned on the issuance of the beneficiary's immigrant visa. As the contract would only be finalized after visa issuance, the Service would be denied the opportunity to confirm that the transaction occurred and the claimed qualifying relationship was established. It is noted that the petitioner has not submitted any evidence to demonstrate that the sale of the business has been finalized and registered or recorded, as would be normal in a typical business transaction.

Ultimately, there is no evidence that the claimed purchase of the petitioning enterprise actually occurred or that the claimed parent company maintains ownership and control of the petitioning enterprise.

Notwithstanding the petitioner's failure to establish the claimed transaction, the nature of the petitioner's business also presents an obstacle to the petition's approval. As a matter of law, there is no prospective United States employer which 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 United States petitioner is a sole proprietorship, which claims to have sold the entirety of its assets to an overseas entity.³ There is no evidence, nor is there any claim, that the petitioner in this matter is a corporation, partnership, or other legal entity which would have a 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).

As stated in the purchase agreement between the Clinic and the petitioner, the overseas entity purchased the total assets of the petitioner's business. The purchase agreement did not purport to transfer a firm or corporation or any other separate legal business entity, but only the assets of the business. As a consequence, the sole proprietorship would not survive the change of ownership or the sale of all of its assets. See id. Because the petitioner did not submit sufficient evidence to establish the foreign entity's ownership interest, and because the petitioner is a sole proprietorship which would not survive the change of

³ It is also noted that the petitioner has not revealed the nature of the claimed overseas parent company. The petitioner did not reveal whether the Clinic is a corporation, partnership, sole proprietorship, or some other type of commercial entity. Based on the submitted tax returns and other documents, the overseas company also appears to be a sole proprietorship.

ownership or the sale of its assets, the petitioner has not met the burden of establishing that a qualifying relationship exists.

The final issue in this proceeding is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity for at least one year in the three years immediately preceding the filing the petition. However, as the appeal is being dismissed on other grounds, this issue will not be 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.