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U.S. Department of Justice

Immigration and Naturalization Service

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



File: [Redacted] Office: TEXAS SERVICE CENTER

Date: MAY 07 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 employment-based visa petition was denied by the Director, Texas Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the state of Florida and is engaged in the import and export of computer parts. It seeks classification of 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 had been or would be employed in an executive or managerial capacity. The director also determined that the record was insufficient to establish a qualifying relationship between the petitioner and the foreign entity.

On appeal, counsel for the petitioner submits a brief. Counsel for the petitioner asserts that the petitioner's description of corporate duties for the beneficiary describes duties of a primarily managerial or executive nature.

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 petitioner was incorporated in the state of Florida in July of 1993. The petitioner claimed gross receipts in the amount of \$542,356 for the year 1998. Regarding the ownership of the company, the petitioner noted on its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return that it was 99 percent owned [REDACTED] and 1 percent owned by Rosemari Caneri.

The first issue in this proceeding is whether 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.

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. 8 C.F.R. 204.5(j)(5).

In a letter submitted with the initial petition, signed by an unidentified individual and purporting to be on behalf of a "parent" company, the position to be held by the beneficiary was described as follows:

The Vice-President will bring together the team work [sic] on each expansion of our export market. He will supervise the entire office, and set the standards for the work and general guidelines for each assignment

which [sic] must be performed by employees of our office in Florida and Brazil with its exports and services to Venezuela, Brazil and Bolivia. The Vice-President must also coordinate and schedule the work of out-side [sic] contractors who are regularly engaged to perform services on accounts, such as advertisements, promotions, and federal regulations on licenses, permits, legal issued, [sic] and customs.

The letter also described the beneficiary's responsibilities as follows:

[The beneficiary] will be in charge of the overall marketing plan and philosophies of our company:

- (1) promote the local consumers name to be synonymous with quality Exporting Company
- (2) identify new markets for penetration and act as liaison with distributors to assure that these markets are accessed
- (3) create marketing strategy to reach both retailers and consumers
- (4) educate wholesaler's sales teams regarding the characteristics of the product line
- (5) oversee distribution and inventory control and [sic]
- (6) maintain communication with local consumers in South America regarding expansion of production by means of our constant growth and quality service.

The petitioner also submitted its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 1998. The petitioner did not note any salaries paid for the year 1998 on the 1998 Form 1120 but did show payment of professional fees in the amount of \$1,392 and payment for casual labor in the amount of \$4,000. The petitioner also submitted its September 1998 renewal for its occupational tax license wherein it claimed one employee.

In response to the director's request to submit evidence of the petitioner's staffing level including the position titles, duties and educational level of all employees, the petitioner submitted IRS Form 941 (Employer's Quarterly Federal Tax Return) for the four quarters of 1999. The Form 941 for each quarter showed the same four employees and the total salary paid by the petitioner per quarter to be \$14,300.

In response to the director's request for a definitive statement describing the specific job duties of the beneficiary for the

United States entity including a list of all duties and percentage of time spent on those duties counsel for the petitioner submitted the following statement:

[The beneficiary] will direct and manage the corporation in order to promote the corporation (30%), [sic] Identify new markets for penetration and act as liaison with distributors to assure that these markets are accessed. (20%) [The beneficiary] will create new marketing strategy to reach both retailers and consumers, educating wholesaler's sales teams regarding the characteristics of the product line. (15%) [The beneficiary] will direct and control the oversee [sic] distribution and inventory control maintaining communication with local consumers in South America regarding expansion of production by means of our constant growth and quality service. (15%) Report to the parent company (10%). [The beneficiary] will manage, train and direct the managers in order for them to accomplish the company' goals. (10%)

In response to the director's request to detail the number of subordinate managers and supervisors who would report to the beneficiary in his United States position, counsel for the petitioner indicated that the beneficiary would direct two managers and four employees. Counsel also identified five employee positions of the company by position title and a brief description of their job duties. The five positions included a marketing manager, a commercial manager, a sales person, a purchase person and a secretary. Counsel also indicated that the individuals who provided the sales and services for the business would be found in the attached Exhibit J. However after a thorough search of the file, Exhibit J was not discovered.

It is noted that the petitioner did not clarify whether the beneficiary would be engaging in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The director determined that the evidence submitted did not demonstrate that the petitioner had employees who would relieve the beneficiary from performing the day-to-day duties of the company. The director further determined that the evidence did not demonstrate that the [beneficiary] would primarily be managing professional or supervisory employees or that he would primarily be acting in an executive capacity.

On appeal, counsel for the petitioner asserts that the "detailed description of corporate duties for the beneficiary is of primarily managerial and executive nature." Counsel further points out that the beneficiary "did not regularly, applied [sic]

his skills as public relations or lobbying which may not be primarily and strictly executive, neither does he have an accountant's credentials." Counsel also refers to "additional" and "more" evidence that is attached to the appeal, but upon a thorough review of the file, the only evidence attached to the appeal is information submitted in response to the director's request for evidence.

Upon review, 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 submitted a broad position description that vaguely refers, in part, to duties of the vice-president such as supervising the entire office, setting work guidelines and coordinating the work of outside contractors. It is unclear from the letter submitted who is identifying these duties. Furthermore, the described duties of the beneficiary demonstrates that the beneficiary will be in charge of the marketing plan, promoting the local consumer's name, identifying new markets and creating marketing strategy, as well as educating sales teams and overseeing the distribution and inventory control. The Service is unable to determine from these statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities.

The job duties described by the petitioner are vague and too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis. Counsel's response to the director's request for evidence is more indicative of an individual that is primarily performing the basic operations of the company. Counsel's response indicates that the beneficiary will be promoting the corporation and identifying markets for the corporation and creating a marketing strategy. In addition, though counsel indicates that the beneficiary will be directing two managers and four employees, counsel only identifies five employee positions. Further, this information does not comport with the staffing level of the petitioner as found in the petitioner's IRS Form 941s, Form 1120 and the occupational tax license. 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). 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).

Counsel's assertion on appeal that the beneficiary did not actually engage in public relations or lobbying is insufficient to demonstrate that the beneficiary is acting in a primarily

managerial or executive capacity. 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).

The record contains insufficient evidence to demonstrate that the beneficiary duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are vague and fail to describe the actual day-to-day duties of the beneficiary. The description of the duties to be performed by the beneficiary in the position of vice-president does not demonstrate the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive title. The petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity.

The second issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioner and the claimed parent 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:

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.

In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities, in that the petitioning

company is the same employer or an affiliate or subsidiary of the overseas company.

In the initial petition, the petitioner claimed to be a wholly-owned subsidiary of Doc. Print Maquinas e Sistemas de Escritorio LTDA., apparently a Brazilian company. The petitioner also submitted an undated share certificate issuing 3000 shares to Doc. Print Maquinas & Sist. De escritorio LTDA. The petitioner further submitted its IRS Form 1120 indicating that it was 99 percent owned by Domingos Do Bocorro Olivira and 1 percent owned by Rosemari Caneri.

The director requested that the petitioner submit a copy of the stock ledger and evidence of payment for all the shares issued. In response, the petitioner re-submitted the undated share certificate. The director determined that the petitioner had not clearly established that a qualifying relationship existed between the petitioner and a foreign company.

Counsel did not address this issue on appeal.

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 the United States and a foreign entity for purposes of this immigrant visa classification. Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988) (in immigrant proceedings); 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 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 case at hand, the record contains evidence that is inconsistent with the undated stock certificate issued by the petitioner indicating that it is wholly-owned by a Brazilian company. 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). Upon review, the petitioner has not established that a qualifying relationship exists between the petitioner and the claimed parent company.

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 sustained that burden.



ORDER: The appeal is dismissed.