



BH

U.S. Department of Justice

Immigration and Naturalization Service

certification data deleted to prevent identity information invasion of personal privacy

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



MAY 13 2002

File: WAC 99 223 53287 Office: CALIFORNIA SERVICE CENTER

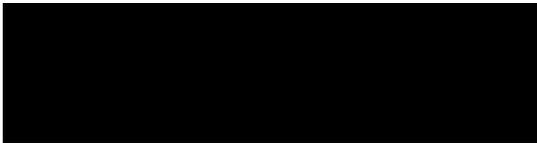
Date:

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 preference visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a company incorporated in Hawaii in 1995 and is engaged in handyman services. 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 had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner contends that the beneficiary meets the requirements of an individual employed in an executive or managerial capacity and that the Service erred in denying the petition.

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 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 petitioner is a Hawaiian company incorporated in October of 1995. The petitioner claims that a Japanese company owns 51 percent of the petitioner. The petitioner also indicates that the beneficiary is its 100 percent owner on its 1998 and 1999 Internal Revenue Service (IRS) Form 1120-A, U.S. Corporation Short-Form Income Tax Return. The petitioner proffered a salary of \$42,000 in its statement of job offer to the beneficiary.

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 described the beneficiary's responsibilities as president as follows:

- 1) Complete decision-making authority on all company policy directives and day-to-day operations of its business, including financial matters;
- 2) Complete authority on personnel matters, from hiring and firing to promotions;
- 3) Authority to direct and supervise the development of business plans for future business activities in the United States;
- 4) Developing and implementing training programs for employees to impart Parent's business philosophies, policies and directives to be applied in its activities in the United States;
- 5) Directing and supervising all public relations activities for the Company; and
- 6) Other duties incidental to the above activities.

The petitioner also expanded upon its business description, stating that its services included but were not limited to, yard care, bonsai trimming and care, tree trimming, transplanting of trees and flowers, termite treatment of piano and furniture, house painting, window replacement, sprinkler repair, minor constructions [sic] work (including roof and ceiling repair, installing rain gutters, etc.), putting up walls, etc.

The petitioner also included its 1998 IRS Form 1120-A. The 1998 IRS Form 1120-A reflected gross receipts of \$31,040, compensation of officers in the amount of \$24,000, no salaries paid and taxable income of negative \$2,279.

The director requested a copy of the petitioner's organizational chart including the beneficiary's position in the chart and all the employees under the beneficiary's supervision by name and job title. The director also requested the source of remuneration of all employees and whether the employees were on salary or were paid by commission.

In response, the petitioner provided a copy of its organizational chart listing the beneficiary as president, a part-time housekeeper paid \$850 to \$950 per month, a part-time assistant paid \$300 to \$950 per month, and a part-time yard worker who started working in October of 2000 paid \$9 per hour.

The petitioner also submitted its 1999 IRS Form 1120-A reflecting gross receipts in the amount of \$43,263, compensation of officers in the amount of \$28,500, salaries paid of \$435, taxable income in the amount of negative \$475.

The director determined that the beneficiary would be involved with day-to-day non-supervisory duties and was also functioning as a first-line supervisor, in charge of three non-professional employees. The director concluded that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner contends that the Service incorrectly classified the beneficiary's duties as being managerial, when, in fact, they are clearly executive in nature. Counsel further asserts that even if the beneficiary's duties are considered managerial, the beneficiary's duties are clearly managerial and not that of a first-line supervisor. Counsel also questions how the Service can come to a different conclusion when the petitioner has used the same description for the beneficiary's duties for the beneficiary's L-1A classification and those petitions were approved.

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 such as "authority to direct and supervise the development of business plans," and "directing and supervising all public relations activities," and "developing and implementing training programs." Furthermore, the position description states that the beneficiary is responsible for "complete decision-making authority on all company policy directives and day-to-day operations of its business." This statement merely paraphrases the statutory definition of "managerial capacity" without describing the actual duties of the beneficiary with respect to the daily operations.

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. The petitioner has not submitted any documentary evidence to establish that the beneficiary has actually conducted the broadly cast description. Furthermore, counsel's assertion that the "[beneficiary] is not involved in installing rain gutters, transplanting trees and repairing roofs" is not supported in the record. First, counsel's assertions 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). Second, 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). The petitioner's IRS Form 1120-A for 1998 and 1999 do not reflect that the petitioner has regularly employed anyone to perform any of the day-to-day activities of the petitioner. The 1998 return reflected that the petitioner did not pay salary to anyone other than its officer, the beneficiary. The 1999 return reflected that salaries in the amount of only \$435 had been paid.

Counsel's submission of the petitioner's projected business plan for 2001 and a statement from an income tax service that it was paid \$250 in the year 2000 for its services, also do not contribute to a finding that the beneficiary was performing managerial or executive duties at the time the petition was filed.

A petitioner must establish eligibility at the time filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45,49 (Comm. 1971).

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's 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. In addition, a portion of the position description serves to merely paraphrase the statutory definition of managerial capacity. The description of the duties to be performed by the beneficiary does not demonstrate that 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 he beneficiary has managed 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 an executive or a manager simply because the beneficiary possesses an executive title.

Counsel for the petitioner noted that the Service had previously approved other L-1 petitions for this beneficiary and questions why this petition should not also be approved when the same evidence has been submitted. The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. The record of proceeding does not contain copies of the visa petitions that were previously approved. However, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the Service. 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).

Beyond the decision of the director, the petitioner has presented contradictory information regarding its ownership. The petitioner states that it is owned 51 percent by a Japanese company but the petitioner's 1998 and 1999 IRS Forms 1120-A reflect that the beneficiary is the 100 percent owner of the petitioner. 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).

Further, the petitioner has not submitted adequate evidence of its

ability to pay the beneficiary the proffered salary of \$42,000. The petitioner has not paid the beneficiary a salary of \$42,000 for either the year 1998 or 1999. The petitioner's 1998 and 1999 IRS Forms 1120-A do not reveal that the petitioner had net income that was 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.

As the appeal will be 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.