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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: WAC 00 037 52316 Office: CALIFORNIA SERVICE CENTER Date: NOV - 4 2002

IN RE: Petitioner:
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:

[redacted]

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, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a non-resident sole proprietorship engaged in the consulting business. 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 performing the duties of an executive or manager either for the United States entity or abroad. The director also determined that the petitioner had not established its ability to pay the beneficiary the proffered wage. The director also noted that it appeared the claimed affiliated company was no longer doing business.

On appeal, counsel for the petitioner asserts that the petitioner can prove the beneficiary is employed in an executive capacity because of the prior issuance of an L-1A visa to the beneficiary. Counsel also asserts that the petitioner is complying with the requirement to pay the proffered wage and that both businesses are doing business.

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):
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> * * *
>
> (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 first issue in this proceeding is whether the beneficiary has been and will be performing executive or managerial duties for either the United States enterprise or the claimed foreign affiliate abroad.

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
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> 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-
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the organization, component, or function;
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> iii. exercises wide latitude in discretionary decision-making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petition described the beneficiary's duties as an executive manager and international business consultant both for the United States entity and the claimed foreign enterprise abroad.

The director requested additional documentation to establish that the beneficiary had been employed in an executive or managerial position in the United States and abroad. The director specifically requested the foreign entity's organizational chart as well as the petitioner's organizational chart describing its managerial hierarchy and staffing levels. The director also specifically requested a more detailed description of the beneficiary's duties in the United States and abroad.

In response, the petitioner described the beneficiary's duties as follows:

> [The beneficiary] is working in an executive capacity as defined. He establishes the goals and policies of the petitioning Company [sic] and is executing decision-making [sic] on a day-to-day basis as well as wide latitude in discretionary [sic].

The petitioner also stated that the beneficiary is "the sole owner of both Companies" [the United States and the claimed foreign entity] and "therefore directs both businesses with wide latitude in discretion in any aspect and without any supervision. The beneficiary defines, establishes and executes the policy goals . . ." The petitioner provided a graph with the headings of "Define & Establish Policy Goals (20% of time)," and "Exercise Policy Goals & Directing U.S. & German Company (80% of time)." Under the latter heading, the petitioner listed the words executive, strategy & marketing, consulting, and financial analysis. The petitioner also stated that the beneficiary was performing the following duties:

> As an executive manager, he performs duties on a day-to-day basis as well as on long-term strategy. Day-to-day [sic] includes financial analysis such as checking statements on all business accounts, insuring [sic] incoming as well as outgoing payments on time, prepare documents such as balance sheets, profit and loss projections, cash flow projections, key ratios/ analysis and income tax returns.

The petitioner also stated that:

> [T]he German Company . . . and the American company . . . are only consisting on [sic] the executive manager [the beneficiary] and both businesses having no [sic] employees. Therefore the requested organizational chart is not applicable.

The petitioner reiterated several times that various documents requested by the director were inapplicable because the petitioner did not have any employees.

The director determined that the beneficiary was performing consulting services and concluded that the petitioner had not shown that the beneficiary would be employed in a managerial or executive capacity for the United States entity. The director further determined that because the beneficiary was performing essentially the same duties abroad, that the beneficiary had not been employed abroad in a managerial or executive capacity.

On appeal, counsel for the petitioner states that a petition pursuant to Section 203(b)(1)(C) can be filed either for the executive or managerial category and asserts that the beneficiary qualifies as an executive. Counsel asserts that the beneficiary's qualifications for the executive category were confirmed by the prior approval of the L-1A visa for the beneficiary. Counsel also asserts that the petitioner outsources administrative functions and has a cooperative agreement with an attorney and an accountant. Counsel provides a statement from the outside agency indicating that the agency forwards phone calls and mail as well as performing other clerical functions for the petitioner.

Counsel also notes that the beneficiary performs in an executive capacity for the foreign enterprise and that the beneficiary acquired several new clients while in Germany. Counsel also provides a timetable indicating that between June 14, 1999 and April 15, 2000, during the year the beneficiary's L-1A visa was valid, the beneficiary spent approximately three and a half months in the United States and approximately five and a half months in Germany.

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 case at hand, the petitioner submits a broad position description that borrows liberally from portions of the statutory definition of executive capacity. The more descriptive portion of the beneficiary's job duties specifically describes an individual performing basic consulting services for the petitioner as well as performing the administrative functions of analyzing checking statements, paying bills, preparing balance sheets and income tax returns. 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 statement that the beneficiary need meet only the criteria set out in the definition of executive capacity is correct, however, the petitioner has not demonstrated that the beneficiary is directing the management of the company, rather, as noted above, he is performing the basic operations of the enterprise. Counsel's indication on appeal that the beneficiary is acting in an executive capacity does not take into account the repeated references provided by the petitioner that the beneficiary is an "executive manager." The record is unclear on whether the petitioner believes that the beneficiary is both a manager and an executive or is simply an executive. However, it is clear that the petitioner has not demonstrated that the beneficiary manages the enterprise or an essential function of the enterprise through the work of others. For the record, the beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Counsel on appeal refers to the petitioner outsourcing administrative functions and employing an attorney and accountant on a "cooperative" basis. However, these references and the letters of the outsourcing agency, accountant, and attorney do not contribute to a finding that the beneficiary is either an executive or a manager. Outsourcing receptionist duties to an answering service does not relieve the beneficiary from performing the everyday consulting services of the enterprise. Further, the petitioner has not provided evidence supporting the full-time use of an attorney and an accountant to perform services that relieve

the beneficiary from performing menial tasks associated with operating an enterprise. 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 Service is not compelled to deem the beneficiary to be an executive or manager solely because the beneficiary possesses the title "executive manager."

It is also not possible to find that the beneficiary spent a majority of his time working for either the United States entity or the claimed foreign entity. It appears the beneficiary attempted to divide his time between the two enterprises making it highly unlikely that the beneficiary was primarily engaged in executive or managerial duties for either one or the other enterprise.

Counsel's reliance on a previously approved petition for the beneficiary's L-1A status is not persuasive. As established in numerous decisions, 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.*, Sussex Engq. Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988); Matter of Church Scientology Int'l., 19 I&N Dec. 593, 597 (BIA 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). Further, the Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decisions of a service center. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000). Further, if the previous L-1A petition was based on the same unsupported evidence that is contained in this petition, the approval would constitute clear and gross error on the part of the Service.

Upon review, 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 general in nature. In addition, a portion of the position description serves to merely paraphrase the statutory definitions of managerial and executive 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 the 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 a manager or executive

simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity for either the United States entity or the claimed foreign enterprise.

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

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.

The petition indicated that the petitioner would pay the beneficiary $625 per week. As noted by the director in her request for additional evidence on this issue, the petitioner must show that the United States employer has the ability to pay the proffered wage at the time the priority date is established (the filing date of the petition) and continuing until the beneficiary obtains lawful permanent residence.

In response to the director's request for verifiable evidence on this issue, the petitioner indicated that the Internal Revenue Service accepts losses of a brand new business. The petitioner also noted that the claimed affiliated company would ensure the beneficiary's paycheck until the petitioner was sufficiently established. The petitioner further noted that since both the United States petitioner and the claimed affiliated company were actually sole proprietorships that the beneficiary would be actually paying himself.[1] The director determined that the petitioner had not established its ability to pay the proffered wage.

On appeal, counsel for the petitioner again stresses that the claimed foreign affiliate will pay the beneficiary the proffered wage. Counsel asserts that the law does not require that the petitioner establish that it is paying the wage through generated revenue rather than through liquid assets provided by the claimed

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[1] As will be discussed in detail below, one of the primary reasons the petitioner may not be a sole proprietorship is to prevent the beneficiary from petitioning for and actually paying himself.

foreign affiliate.

Counsel's assertion is not persuasive. The regulation clearly requires that the *prospective United States employer* have the ability to pay the proffered wage. In addition, the petitioner has not provided any agreement that the claimed foreign entity is obligated to pay the beneficiary the proffered wage. Further, in determining the petitioner's ability to pay the proffered wage, the Service will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. Elatos Restaurant Corp. v. Sava, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986)(citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F.2d 1305 (9th Cir. 1984)); see also Chi-Feng Chang v. Thornburgh, 719 F.Supp. 532 (N.D. Texas 1989); K.C.P. Food Co., Inc. v. Sava, 623 F.Supp. 1080 (S.D.N.Y. 1985); Ubeda v. Palmer, 539 F.Supp. 647 (N.D.Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983). Federal tax returns provide an independent assessment of the solvency or insolvency of an entity. The petitioner has not overcome the director's determination on this issue.

The third issue in this proceeding is whether the claimed foreign entity continues to do business thus maintaining a qualifying relationship with the United States enterprise.[2] The petitioner has not submitted independent, objective evidence that the German enterprise continues to do business. The petitioner has submitted a business plan, financial statements, and an uncertified letter indicating that the claimed foreign enterprise is doing business. However, as the claimed foreign entity's sole business appears to be performing consulting work, and the petitioner has not provided evidence of consulting or other agreements, the petitioner has not met its burden of proof in overcoming the director's conclusion on this issue.

Beyond the decision of the director, the petitioner has not established that it has been doing business in the United States for one year. In a letter submitted with the initial petition, the beneficiary on behalf of the petitioner stated that "[t]he US Company . . . was founded on 23RD of November 1998 and went into business on 01ST of January 1999." The petition was filed November 22, 1999. The regulations require that the petitioner submit evidence that the prospective United States employer had been doing business for one year. See 8 C.F.R. 204.5(j)(3)(i)(D). In this case, the petitioning entity states quite clearly that it had been doing business for only a little more than eleven months at the time of filing the petition.

In addition, the very nature of the petitioner's business presents

[2] The petitioner has not established it is a multinational company as is further discussed below.

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. Further, there is no United States entity, because the beneficiary who is self-petitioning is an alien. For these reasons, the petitioner cannot be defined as a multinational company.

As the appeal is dismissed for the reasons 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.