

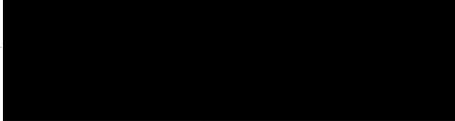


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U.S. Department of Justice
Immigration and Naturalization Service

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invasion of personal privacy**

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



File: EAC 00 241 53423

Office: VERMONT SERVICE CENTER

Date: NOV - 6 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 preference visa petition was denied by the Director, Vermont Service Center, and 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 New York and is engaged in the business of importing finished jewelry from its parent company for retail in the United States. It seeks to employ the beneficiary as its vice-president of marketing. 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 a qualifying relationship between itself and a foreign entity. The director also determined that the petitioner had not established that the beneficiary had been employed in a primarily managerial or executive capacity for the foreign entity.

On appeal, counsel for the petitioner asserts that a qualifying relationship has been established and that the beneficiary has more than one year of experience as a manager or executive for the foreign entity. Counsel relies on the Service's approval of the petitioner's previous L-1A petitions for the beneficiary.

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 first issue to be examined is whether the petitioner has established a qualifying relationship with the foreign entity in this case.

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.

The petitioner initially submitted its certificate of incorporation stating that it was authorized to issue 200 shares of non par value stock. The petitioner also provides two stock certificates. Stock certificate number five was issued to [REDACTED] (Bombay) in the amount of six shares on December 3, 1997. Stock certificate number six was issued to the beneficiary in the amount of four shares on December 3, 1997. The petitioner also submitted its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 1999 revealing in Schedule K, Line 10(a) that 50 percent of the petitioner was owned by a foreign person from India. The petitioner did not file an attachment to the IRS Form 1120 further explaining the foreign ownership. The IRS Form 1120, Schedule L, Line 22 (b) revealed common stock with a value of \$5000 as shareholder's equity.

The director requested further documentation on the ownership of the petitioner including all issued and outstanding stock or share certificates and a copy of the petitioner's stock ledger.

Counsel for the petitioner responded in February of 2001 stating that the petitioner was authorized to issue 200 shares and had issued 30 of those shares. The petitioner provided a copy of its stock ledger and copies of six share certificates that it had issued. The share certificates were issued as follows:

- #1 5 shares to Kapil Nevatia on September 1, 1996
- #2 5 shares to Shishir Nevatia on September 1, 1996
- #3 4 shares to Kavita Nevatia on March 27, 1997
- #4 6 shares to Kapil Nevatia on May 3, 1997
- #5 6 shares to Sunjewels India (Bombay) on Dec. 3, 1997
- #6 4 shares to Shaalesh R. Punwani on Dec. 3, 1997

The stock ledger indicated that the balance of the number of shares issued to individuals by share certificates one through four was zero. The stock ledger did not list the balance of shares held by the holders of share certificates five and six.

The director determined that the information provided by the petitioner was questionable in regard to the 60 percent ownership of the petitioner by foreign entity. The director concluded that the petitioner had failed to establish that it qualified as a subsidiary of a foreign entity or had otherwise established a qualifying relationship.

On appeal, counsel for the petitioner asserts that the foreign entity has consistently maintained, more than a 50 percent share of the petitioner and that this has been confirmed by the previously submitted and approved petitions for L-1A status for the beneficiary. Counsel also states that the foreign entity at various times has owned 100 percent, 90 percent, or 60 percent of the petitioner. Counsel asserts that petitioner's previous counsel erroneously stated that the petitioner had 30 shares of stock outstanding. Counsel concludes that share certificates #1 and # 6 reflect the 60 - 40 split of ownership. Counsel also provides minutes of various meetings of the directors of the petitioner to establish the ownership of the petitioner.

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.

Case law confirms 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 a 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 proceedings); Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant 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.

The petitioner has submitted inconsistent documentation regarding its ownership and control. None of the share certificates submitted bear a notation that they have been cancelled. The petitioner's 1999 IRS Form 1120 indicates that a foreign person owns 50 percent of the petitioner. A former counsel for the petitioner states that a total of 30 shares have been issued by

the petitioner, a statement disputed by current counsel. Current counsel states that the foreign entity in this case has always owned a majority of the petitioner although the two allegedly original share certificates were issued to individuals. 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). With the apparent indiscriminate use of stock certificates with no other independent supporting documentation the Service is unable to determine the elements of ownership and control in the present petition. Upon review, the petitioner has not established that a qualifying relationship exists between the petitioner and the claimed foreign entity.

Counsel's reliance on the previous approvals of an L-1A nonimmigrant petition is misguided. If the previous nonimmigrant petition was approved based on the same inconsistencies that are contained in this petition, the approval would constitute clear and gross error on the part of the Service. 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 Enqq. 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).

The next issue to be examined is the nature of the beneficiary's employment with the foreign entity. In denying the petition, the director found that the beneficiary was not an executive or a manager because it appeared the beneficiary had begun work for the foreign entity as the vice-president of marketing when he was only 20 years old. Although the director noted that it was not impossible to assume a managerial role at the age of 20, the director questioned the reliability of the petitioner's information in light of the representations concerning the ownership of the petitioner.

The petitioner initially submitted a position description stating that the beneficiary was part of a management team responsible for managing and directing the operations of the foreign entity. The petitioner further stated that the beneficiary had primary responsibility and an essential role in:

- Identifying potential new market segments
- Determining marketing strategies to capture the attention of new customers and address their needs and concerns.
- Directing and managing the public relation function of our company.
- Maintaining responsibility for personnel staff,

including hiring, training, evaluation. Compensation leaves and discharges.

- Selecting trade shows and avenues of marketing in the U.S.

On appeal, counsel for the petitioner states that the beneficiary held a degree in commerce, had completed three internships in three different large companies, and had been groomed by the chairman of the foreign entity to manage and execute the duties of a future manager and executive who would operate, oversee, direct, and supervise the United States entity. Counsel provides letters in support of the beneficiary's previous position with the foreign entity.

Upon review, the petitioner has provided information regarding the beneficiary's job duties that is more indicative of an individual performing a marketing service for the petitioner rather than performing executive or managerial tasks for the petitioner. 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).

The record contains insufficient evidence to demonstrate that the beneficiary was employed in a primarily managerial or executive capacity for the foreign entity during the requisite time frame. The description of the duties performed by the beneficiary does not demonstrate that the beneficiary had managerial control and authority over a function, department, subdivision or component of the foreign company. Further, the record does not sufficiently demonstrate that the beneficiary managed a subordinate staff of professional, managerial, or supervisory personnel who relieved 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 was employed in either a primarily managerial or executive capacity for the foreign entity.

Again counsel's reliance on past approvals of nonimmigrant petitions is not persuasive. As noted above, prior approvals do not mandate the approval of a petition. The petitioner has not provided sufficient evidence to establish that the beneficiary primarily worked in either a managerial or executive position for the foreign entity.

Beyond the decision of the director, the petitioner's description of the beneficiary's duties for the petitioner is not sufficient to establish that the beneficiary will be working in the proposed position in a managerial or executive capacity. We again note that the beneficiary appears to be performing the necessary operational duties of the petitioner rather than performing managerial or executive duties. As the appeal is dismissed for

the reasons stated above, this issue is 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.