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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:

[Redacted]

Office: NEBRASKA SERVICE CENTER

Date:

NOV 14 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, Nebraska Service Center. The Associate Commissioner for Examinations dismissed a subsequent appeal on January 8, 2001. The matter is now before the Associate Commissioner for Examinations on a motion to reopen and reconsider. The motion is granted. The decision of the Associate Commissioner will be affirmed.

The petitioner is an Oregon corporation that claims to be an exporter of commodity items to Russia. It seeks to employ the beneficiary as its export manager/president. Accordingly, 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 a primarily executive or managerial capacity.

The Associate Commissioner affirmed the director's decision on appeal. The Associate Commissioner further determined beyond the decision of the director that the record did not support a finding that a qualifying relationship existed between the United States company and the foreign entities.

On motion, counsel for the petitioner asserts that the Associate Commissioner did not fully consider all arguments set forth by the petitioner.

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.

The first issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity for the United States entity.

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 in its initial letter to support the beneficiary's classification provided the following job description for the beneficiary's position:

[The beneficiary] is responsible for directing foreign sales, negotiating contracts with Russian customers, and coordinating and arranging export sale of commodity items with U.S. suppliers to customers in the Russian Far East. He will primarily direct the management of export sales, including directing shipping activities, such as export licenses, customers declarations, and routing; interacting with sales personnel and distributors in Russia and in the U.S.; representing the Company in contract negotiations; and handling Russian customer's problems by arriving at mutual agreements. [The beneficiary] will establish goals and policies for export sales, he will exercise a wide latitude of discretionary decision making, and he will receive only general supervision and direction for [sic] the shareholders of the Company. [The beneficiary] will communicate with customers and sales personnel in Russian. He will also be responsible for sales forecasting, preparing and examining invoices, sales confirmations and shipping documents for export orders to Russia.

The director requested that the petitioner identify each of the its employees by job title and to describe their assigned duties.

In response, the petitioner provided the same job description for the beneficiary as previously submitted but emphasized that the beneficiary's duties would be managerial in nature because he would manage an essential function of the petitioner. The petitioner stated that the beneficiary would oversee and manage the exporting procedures and negotiating with Russian customers and that this was an essential function of the petitioner.

The petitioner also submitted position descriptions for the product manager/vice-president of the company and an accounting manager/international traffic manager. The petitioner further submitted its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 1998. The Form 1120 revealed gross receipts in the amount of \$3,474,972, compensation of the beneficiary in the amount of \$37,400, compensation of the vice-president in the amount of \$32,800 and salaries paid in the amount of \$26,000.

The director determined that the three employees of the company had all been designated managerial employees. The director further determined that the company did not employ non-managerial employees and concluded that the beneficiary would be performing routine day-to-day business activities.

On appeal, the petitioner through its counsel stated that an employee other than the beneficiary performed the non-managerial duties of the company. The petitioner further added that the beneficiary "generally reviews the day-to-day functions performed by [the third employee]; he therefore performs managerial supervisory functions." The petitioner also asserted that the review of invoices and bills of lading is a managerial duty.

The Associate Commissioner determined that the addition of the purported supervisory duties on appeal did not comport with the record previously submitted. The Associate Commissioner also questioned why the petitioner's third employee was paid a greater salary in 1998 as reflected in employee's IRS W-2, Wage and Tax Statement than was reflected on the petitioner's IRS Form 1120 as salaries paid. The Associate Commissioner determined that the record did not clearly establish that the beneficiary would work in a primarily executive or managerial capacity.

On motion, counsel asserts that the petitioner simply provided additional detail on the petitioner's general statements regarding the beneficiary's authority over the person taking care of the day-to-day functions. Counsel also asserts that the further detail provided on appeal did not contradict the record. Counsel also explains that the petitioner's IRS Form 1120s for 1997 and 1998 are based on tax years beginning June 1, 1997 and ending May 31, 1998. Thus the salaries reflected on the IRS Form 1120 reveal only a portion of the salaries paid to a particular individual in a tax year. Counsel asserts that the beneficiary's duties meet the definition of managerial and executive capacity.

Counsel's assertion is 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 instant case, the petitioner initially provided a broad position description that vaguely refers, in part, to duties such as "directing foreign sales," "directing shipping activities," and "representing the Company in contract negotiations." Furthermore, the position description states that the beneficiary "will establish goals and policies for export sales, he will exercise a wide latitude of discretionary decision making, and he will receive only general supervision and direction for [sic] the shareholders of the Company." This statement merely paraphrases portions of the statutory definition of "executive capacity" without describing the actual duties of the beneficiary with respect to the daily operations. 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. These job duties are too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis.

The petitioner also included general statements regarding the beneficiary's duties that are more indicative of an individual performing the basic operational tasks of the petitioner. Such statements include "[being] responsible for sales forecasting, preparing and examining invoices, sales confirmations and shipping documents for export orders to Russia", and "coordinating and arranging export sale of commodity items with U.S. suppliers to customers in the Russian Far East," and "interacting with sales personnel and distributors in Russia." 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). Based on the petitioner's representations as noted above, the beneficiary is providing services to the enterprise rather than primarily directing or managing the enterprise

Counsel's explanation on motion, that the beneficiary is supervising the accounting manager/international traffic manager and this supervision is just further supporting detail of the petitioner's initial statement that the beneficiary is "supervise[ing] workers" does not contribute to a finding that the beneficiary will be employed in a managerial or executive capacity. Counsel is quite clear that the accounting manager/international traffic manager is the employee that is performing basic non-managerial tasks for the company. The description of this employee's duties does not describe a professional and this employee does not supervise anyone. Even if the additional detail regarding the beneficiary's supervisory duties had been sufficiently explained initially, this demonstrates only that the beneficiary is a first-line supervisor. 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. See Section 101(a)(44)(A)(iv) of the Act.

Counsel is claiming that the beneficiary is employed in both a managerial and an executive capacity. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if the beneficiary is representing he or she is both an executive and a manager. In this case 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 general in nature and are more indicative of an individual performing the basic operations of the company. 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.

The second issue in this proceeding raised by the Associate Commissioner in the dismissal of the appeal is whether the petitioner has established a qualifying relationship between itself and an overseas 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.

The petitioner initially stated that it was owned 50 percent by Too "TOR", the company that had previously employed the beneficiary. The petitioner also provided its stock certificate number 3 issued to Too "Tor" in the amount of 100 shares. The petitioner also provided its stock certificate number 4 issued to Too "Amurko" in the amount of 100 shares. Both stock certificates are undated. As noted by the Associate Commissioner, the petitioner does not provide any evidence of a joint venture between the two companies. Furthermore, the record does not contain any documentation regarding the number of outstanding shares. The record does not contain any information regarding stock certificates numbers 1 and 2. Finally, the petitioner's IRS Form 1120 Schedule K, Line 5 and Line 10 further describe the petitioner's ownership in attached statements. The statements providing further detail regarding Line 5 and Line 10, both indicate that the petitioner is owned by the beneficiary and another individual in 50 percent proportions.

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, supra; 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).

The petitioner has submitted inconsistent documentation regarding its ownership and control. It states that it is a subsidiary of a foreign entity but submits inconsistent documentation regarding its ownership and does not submit evidence of a joint venture. As noted in the Associate Commissioner's earlier decision, 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 Russian company or companies.

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, the petitioner has not sustained that burden.

ORDER: The decision of the Associate Commissioner dated January 8, 2001 is affirmed.