

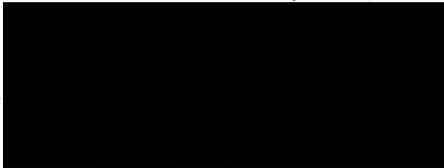


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U.S. Department of Justice  
Immigration and Naturalization Service

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



WAC 01 001 52985

File: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 19 2002

IN RE: Petitioner: [Redacted]  
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:



**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 corporation organized in the State of California in May of 1995. It is engaged in the retail of custom lighting. It seeks to employ the beneficiary as its vice-president of operations. 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 the beneficiary's foreign employer. The director also 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, the counsel for the petitioner contends that there is a clear qualifying relationship between the claimed foreign entity and the petitioner. Counsel further contends that the beneficiary will be employed in a managerial capacity.

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 beneficiary's foreign employer in this case.

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.

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.

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*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 share certificates one through three. Share certificate number one was issued to an individual in the amount of 1,250 shares on September 15, 1995. Share certificate number two was issued to a second individual also in the amount of 1,250 shares on September 15, 1995. Share certificate number three was issued to the claimed foreign entity in the amount of 5,000 shares on January 1, 1998. The petitioner's Articles of Incorporation indicate that the petitioner is authorized to issue 10,000 shares of common stock.

Counsel noted in a letter in support of the petition that the claimed foreign entity owned 66 percent of the petitioner and thus had majority ownership and control of the petitioner. A manager in a letter on the beneficiary's foreign employer's letterhead also stated that the beneficiary's foreign employer owned 66 percent of the petitioner. The petitioner further submitted its 1999 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return. The IRS Form 1120 at Schedule E identified three officers and noted that two of the officers each owned a 25 percent interest in the petitioner. The IRS Form 1120 at Schedule K, Line 5 revealed that a foreign entity owned 50 percent of the petitioner. The accompanying statement filed with the Form 1120 identified the foreign entity as the beneficiary's foreign employer.

The director requested additional documentary evidence to establish a qualifying relationship between the United States company and the beneficiary's foreign employer. The director specifically requested evidence that the claimed foreign employer had paid for its interest in the petitioner.

In response, counsel for the petitioner submitted photocopies of two checks allegedly from the claimed foreign employer to two individuals. The checks are dated in June and July of 1999. Counsel also stated that the claimed foreign employer had given traveler's checks to two individuals for the benefit of the petitioner. The traveler's checks were brought into the United States in or around June 1997 and July 1999.

The director determined that the petitioner had not submitted sufficient information of a qualifying relationship and thus the Service could not determine that the beneficiary had been employed outside the United States for at least one year by the same employer or a subsidiary or affiliate of the prospective United States employer.

On appeal, counsel for the petitioner asserts that the share certificates and tax returns demonstrate that the beneficiary's foreign employer is the majority shareholder of the petitioner. Counsel also asserts that the checks sent directly from the foreign employer to the owners of the petitioner is proof the foreign employer is putting money into the petitioner. Counsel also re-submits the share certificates and checks previously submitted as well as a portion of the petitioner's IRS Form 1120 for 2000. The petitioner's IRS Form 1120 for 2000 also shows that two of the petitioner's officers each hold a 25 percent interest in the petitioner and that the beneficiary's foreign employer is a foreign entity holding more than a 25 percent interest in the petitioner. Counsel does not provide Schedule K, Line 5 of its IRS Form 1120 for 2000. Counsel also notes the previous approval of an employment-based preference visa for another individual employed by the petitioner as a manager and questions how the Service can find a qualifying relationship in one case and not in the other.

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. The initial petition presented conflicting information regarding the petitioner's ownership and control. The beneficiary's foreign employer stated that it owned 66 percent of the petitioner. The petitioner submitted three share certificates that appeared to confirm this ownership. However, the petitioner also provided its IRS Form 1120 that revealed the petitioner's ownership divided between two individuals each holding a 25 percent interest and the beneficiary's foreign employer owning a 50 percent interest 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). Moreover, the petitioner has not submitted minutes of relevant annual shareholder meetings, agreements relating to the voting of shares, the distribution of profit, the management and direction of either the petitioner or the foreign entity. The Service is unable to determine the elements of ownership and control in the present petition.

In addition, checks including traveler's checks issued to individuals do not evidence that the petitioner received these funds in return for the issuance of 5000 shares of the petitioner's stock. The stock certificate issued to the beneficiary's foreign employer is dated January 1, 1998. The checks issued to the two individuals are dated in June and July of 1999. The individuals carrying the traveler's checks allegedly for the benefit of the petitioner brought the funds into the United States in 1997 and 1999. Neither counsel nor the petitioner has provided independent supporting documentation that the funds given to individuals was actually used to purchase a portion of the petitioner's stock. Moreover, the petitioner issued the 5000 shares in January of 1998 and the checks were issued either some time before or sometime after the stock was issued. Such a discrepancy in time does not support a finding that the money was used for the actual purchase of stock.

Counsel's reference to an approval of an employment-based petition for this petitioner for another beneficiary is noted. The record of proceeding does not contain copies of the visa petition that is claimed to have been previously approved. However, if the previous immigrant petition was approved based on the same inconsistent and unsupported evidence that is 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). 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).

Upon review, the petitioner has not established that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer.

The next issue to be examined is the nature of the beneficiary's employment with 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 provided a job description for the beneficiary as follows:

As Vice-President, Operations, [the beneficiary] will be responsible for managing all aspects of the company's day-to-day operations. [The beneficiary] will have broad authority in personnel decision making and will have authority to hire and fire personnel. Additionally, functioning autonomously, [the beneficiary] will have discretionary authority over the day-to-day running of operations.

He will also supervise other professional and managerial personnel, including our financial, marketing and accounting staff. He will be responsible for setting operational goals and ensuring that these goals are adhered to. In summary, he will have autonomous control over and exercise a wide latitude and discretionary decision-making in many areas of our business. He will establish the most successful course of action for operations, incorporating out expansion plans.

The director did not specifically request additional detail regarding the beneficiary's proposed position but instead requested information on the petitioner's structure and the type of employees that would be under the beneficiary's supervision.

Counsel for the petitioner provided an organizational chart depicting the beneficiary's proposed position as vice-president of operations with a vice-president of marketing and outdoor sales and a vice-president of in-house sales and retail purchasing reporting to the beneficiary. The organizational chart also revealed an office manager, a retail sales manager, a sales and delivery person, and a maintenance and delivery person indirectly under the beneficiary's supervision. The chart included a brief description of the job duties for each of the positions.

In denying the petition, the director found that the beneficiary was not an executive or a manager because of the structure of the business and the numerous executives already employed by the petitioner. The director questioned the necessity of another

manager and implied that the beneficiary would be a manager in title only.

On appeal, counsel for the petitioner asserts that the beneficiary's experience is needed to assist the petitioner with its expansion plans. Counsel asserts that currently the petitioner is contracting out work that the petitioner could do in-house if the beneficiary is employed as the vice-president of operations. Counsel also provides a letter from the petitioner wherein the petitioner states that the beneficiary "will be responsible for managing all aspects of the company's day-to-day operations with regard to our store expansion and expansion of services offered." The petitioner further states in the letter that:

[the beneficiary] will establish the most successful course of action for operations, incorporating our expansion plans. We have plans to expand our building to a 10,000 square feet facility, which will double the size of our current warehouse. We will be making a separate contractor entrance and exit. This will then be developed to become the wholesale division of our company and the front part of the store will remain the retail part of the store. In order to initiate and then maintain the entirely new operation (which will double our current size and output), we require the services of a new management level person.

We have given the position the title of Vice-President, Operations - to facilitate and then maintain new expansion operations.

The petitioner also states that it is currently subcontracting "some of these tasks" to other people and that the petitioner desires "to bring this all in-house under the beneficiary's leadership."

Counsel's assertions and the petitioner's plans are not sufficient to overcome the director's determination on this issue. 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 "managing all aspects of the company's day-to-day operations," and having "discretionary authority over the day-to-day running of operations" and "setting operational goals and ensuring that these goals are adhered to." These job duties are vague and too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis. Furthermore, the position description borrows liberally from phrases found in elements of the managerial and executive definition. See 101(a)(44)(A)(iii) and (iv) and 101(a)(44)(B)(iii) of the Act.

The petitioner states that the beneficiary "will supervise other professional and managerial personnel, including our financial, marketing and accounting staff" but fails to provide adequate supporting documentation that it employs professional or managerial staff. 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 stated on appeal that some individuals in its organization with managerial titles do not perform managerial duties. The Service cannot determine from the organizational chart provided and the one sentence position descriptions of the other members of the petitioner's staff's which if any of the petitioner's staff are actually performing managerial or executive tasks. The record is not sufficient to determine that the beneficiary would be performing at a higher level than a first-line supervisor of non-professional employees.

On appeal, counsel and the petitioner's more elaborate description of the beneficiary's proposed duties in connection with the petitioner's proposed expansion does not contribute to a finding of eligibility for this visa classification. The beneficiary's duties regarding the expansion are not clearly delineated. When the petitioner references outside personnel currently handling tasks that could be performed by the beneficiary, the tasks are not clearly identified. Without a clear understanding of the beneficiary's proposed tasks, the Service cannot discern whether the beneficiary will be performing managerial or executive duties with respect to the tasks or whether the beneficiary will be actually performing the tasks. 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 will be 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. 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 in the proposed position 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.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner.