



BH

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

File: [redacted] Office: TEXAS SERVICE CENTER Date: 4 SEP 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:

SELF-REPRESENTED

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

The petitioner is a corporation engaged in the sale, import and export of used pianos and electronic games. 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 demonstrated that the beneficiary functioned in an executive or managerial capacity for the petitioner or that the beneficiary's position with the foreign entity was primarily executive or managerial in nature.

On appeal, the petitioner asserts that the director misinterpreted the information submitted and incorrectly applied the requirements of the Act.

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.

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 that 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 primary issue in this proceeding is whether the beneficiary has been and 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 was incorporated in the State of Florida in January of 1996. The beneficiary in this case is the sole proprietor of the foreign entity. She also owns 100 percent of the outstanding shares of the petitioner. The petitioner indicated the beneficiary's salary as \$800 per week paid by "U.S. and Japan." The petitioner provided the following description of the beneficiary's proposed job duties:

[the beneficiary] serves as President and Chief Executive Officer of [the petitioner]. She has day to day administrative and operational control of the company, and is responsible for hiring and supervising all US personnel. She also exercise [sic] supervisory authority over inbound shipments including scheduling, documentation, and logistics.

The petitioner also included a copy of its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for

1999. The 1999 IRS Form 1120 reflected gross receipts of \$21,244, compensation of the beneficiary as an officer in the amount of \$2,980 and salaries paid in the amount of \$8,000. The petitioner also provided IRS W-2 Forms, Wage and Tax Statement for the year 1999 reflecting salary paid to one individual in the amount of \$8,000, and \$2,980 paid to the beneficiary.

The director requested additional details regarding the proposed position of the beneficiary. The director specifically requested a description of the beneficiary's daily duties and the percentage of time spent on each of the daily duties.

In response, the petitioner stated that the beneficiary is the President and Chief Executive Officer and that her daily duties included the following:

- a) Implementing the marketing plan for the US market
- b) Identifying and negotiating terms with additional US distributors to grow the company's US sales base
- c) Implementing operations policy for the US office
- d) Supervising the daily administration and operation of the US office and the activities of the current US clerical employee
- e) Supervising the US clerical employee in coordinating inbound shipments with the US customs brokers, Japanese freight forwarders, Japanese suppliers, and KNS Japan
- f) Liaising [sic] with the company's US banking, accountancy, and legal advisors
- g) Hiring and supervising additional staff as needed to appropriately staff the US office as sales increase

The petitioner stated that the beneficiary spent 80 percent or more of her time meeting with and negotiating with distributors and the remaining 20 percent of her time was spent supervising the administration of the US firm and its employee. The petitioner further stated that it used customs brokers on a contract basis and financial and legal advisors to ensure compliance with all fiscal and regulatory requirements. The petitioner also noted that the beneficiary continued to manage the foreign company as well.

The director determined that the beneficiary was primarily performing all the duties associated with an import and export company and that the beneficiary was not primarily functioning in an executive or managerial capacity for the petitioner.

On appeal, the petitioner asserts that the beneficiary clearly meets the definition of an executive, in that she directs the management of the organization, she establishes the firm's policies and goals, she exercises wide latitude in discretionary decision making, and she operates at the highest level of the organization. The petitioner also contends that its use of independent freight forwarders, shipping companies, and customs

house brokers is at the direction of the beneficiary. The petitioner further asserts that it is not a large operation, is still developing and that its use of outside contractors in carrying out its daily operations mitigates the need for in-house workers. The petitioner concludes that the low-level daily activities of the enterprise are carried out by both the in-house clerical worker and outside contractors and that the beneficiary is primarily responsible for sensitive decision making and ensuring that the petitioner's employees and contractors carry out its daily operations to meet organizational goals.

Upon review, petitioner'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 initial petition, the petitioner submitted a broad position description that vaguely refers, in part, to the beneficiary's "administrative and operational control of the company," and "hiring and supervising all US personnel," and "exercise[ing] supervisory authority over inbound shipments including scheduling, documentation, and logistics." 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.

In the response to the request for evidence, the petitioner provided further general terms outlining the beneficiary's tasks for the petitioner. The petitioner did not submit evidence to establish that the beneficiary had actually conducted the broadly cast description of her duties. Furthermore, contrary to the petitioner's claim that the beneficiary meets the criteria of an executive, the description of the beneficiary's job duties states that the beneficiary is responsible for "implementing the marketing plan for the US market," and "identifying and negotiating terms with additional US distributors," and "implementing operations policy," and supervising the clerk and liaising with outside legal and financial counsel. We note that the petitioner in the response to the request for evidence identified the majority of the beneficiary's duties (80 percent) as meeting with and negotiating with distributors. These tasks are more indicative of an individual primarily performing the necessary tasks of the company. 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 petitioner's contention that one clerical employee and outside contractors perform all the low-level tasks of the petitioner is not supported by the record. Although the record contains evidence substantiating the employment of the clerical employee, the record is deficient in evidencing contractual employees. The petitioner's IRS Form 1120 notes that only \$512 was paid in shipping and mailing costs and there are no agreements or other evidence substantiating the

sustained use of contractual employees. 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). It is apparent that the beneficiary does not direct the management of the company but rather performs the majority of the basic non-managerial tasks of the petitioning company.

At the time of filing, the petitioner was a four-year old import and export company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioner require an executive as defined by the regulations and case law. As noted above, the record does not sufficiently demonstrate that the majority of the beneficiary's actual daily activities have been and will be managerial or executive in nature rather than the performance of services necessary to continue the operation of the company.

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 description of the beneficiary's job duties is more indicative of an individual primarily performing the necessary tasks of the petitioner. The petitioner confirms that the beneficiary does not manage a subordinate staff of professional, managerial or supervisory personnel and fails to establish that the beneficiary manages an essential function. Further, the record does not sufficiently establish that the beneficiary will be directing the management of the organization or a function of the organization. The Service is not compelled to deem the beneficiary to be a manager or an executive simply because the beneficiary possesses an executive title. The petitioner has not established that the beneficiary has been or will be acting in a primarily managerial or executive capacity.

The petitioner likewise has not established that the beneficiary's position for the foreign entity in this case was managerial or executive in nature. Although the petitioner provided a list of the beneficiary's duties, the list included negotiating purchase terms and terms with freight forwarders, identifying distributors in the United States and inspecting or supervising the inspection of merchandise, supervising the clerical assistant and budgeting and planning. These duties again are more indicative of an individual performing the daily operations of the company rather than managing the organization. The petitioner has not provided sufficient evidence to overcome the decision of the director on this issue.

Beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered wage of \$800 per week.

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 petitioner has not provided evidence that the United States employer has paid the beneficiary \$800 per week in the past. The petitioner's 1999 IRS Form 1120 does not reveal that the petitioner had a net income that was at least equal to the proffered wage. Further, the petitioner's 1999 IRS Form 1120 does not reflect that the petitioner has sufficient net current assets to pay the proffered wage.

Further beyond the decision of the director, the petitioner's qualifying relationship with the foreign entity has not been established. The petitioner has offered inconsistent evidence regarding the qualifying relationship. The petitioner has submitted statements and a stock certificate indicating that the beneficiary owns 100 percent of the outstanding shares of the petitioner. However, the petitioner's 1999 Form 1120 at Schedule K line 10 indicates that no foreign person or corporation owns more than 25 percent of the company's stock. 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).

As the appeal is dismissed for the reason stated above, these issues are not examined further.

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 appeal is dismissed.