



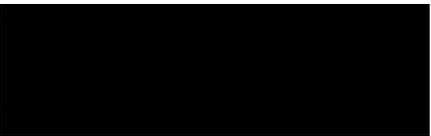
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U.S. Department of Justice

Immigration and Naturalization Service

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



File: WAC 99 185 51437

Office: CALIFORNIA SERVICE CENTER

Date: 7 SEP 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, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation originally organized in the state of California in April of 1997. The petitioner claims to have been re-incorporated in Nevada in April of 1999 and to be engaged in the import and export of computer products. It seeks to employ the beneficiary as its executive director and chief executive officer. 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 that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, the petitioner submits a letter on behalf of the beneficiary, its Internal Revenue Service (IRS) Form 1120s for 1997, 1998, and 1999, and IRS Form W-2, Wage and Tax Statement for the beneficiary for the year 2000. The petitioner also asserts that the beneficiary manages and is employed by a viable company.

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 issue in this proceeding is whether the petitioner has established that the beneficiary 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 initially submitted a letter of appointment from [REDACTED] PLC [REDACTED] a foreign company, stating that [REDACTED] agreed to employ the beneficiary as an executive director and chief executive officer for the petitioner [REDACTED] Inc.). The letter further stated that the beneficiary would be responsible for marketing and distributing activity as required by ZIT and that the beneficiary agreed to further contact and expand business relationships with American companies and perform work at the direction of [REDACTED]. The petitioner also provided a business plan dated April 30, 1999. The business plan provided a paragraph on the petitioner's "management team" noting that the company was in the development stage but that its organizational chart indicated its anticipated departments and titles. The organizational chart depicted the beneficiary as president and the

rest of the anticipated positions as unfilled.

The director requested a more detailed description of the beneficiary's duties in the United States.

In response, the petitioner provided a company profile that noted the beneficiary was critical to the operation of the petitioner and that the beneficiary spoke fluent Bulgarian, English and Russian. The petitioner also noted in the company profile that it employed the services of a corporate attorney, a firm of accountants and other consultants. The petitioner again noted that it "is a development stage company," and that "[f]or the next 12 to 24 months the company does not anticipate revenues," and that "[t]otal cash in-flows will be provided by ██████████ PLC from Bulgaria." The petitioner also provided its IRS Form 1120 for the year 1999 reflecting gross revenues in the amount of \$32,210, salaries of \$10,000 and that no compensation was paid to officers. The petitioner further provided its payroll earnings report as of May 31, 1999 showing \$10,000 paid to the beneficiary.

The director determined that the record did not provide sufficient information to conclude that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, the petitioner states the following in regard to the beneficiary:

(1) Managerial capacity Section 203(b)(1)(2):

[The beneficiary] serves as the President, Secretary and Treasurer of ██████████ Inc. (see copy of list of officers filed with the Secretary of State of Nevada dated 3/9/00 . . .). In this capacity it is her responsibility to:

- (A) Has complete authority to direct the management of ZIIT, Inc.
- (B) Establish all goals and policies of ZIIT, Inc.
- (C) Has complete decision making ability
- (D) Has complete authority to hire and fire [sic] employees.
- (E) Has complete authority to formulate and execute marketing decisions.
- (F) Has complete management control over the company.
- (G) Has complete supervisory authority over all employees or independent contractors.

The above authority is granted through the authority of the Board of Directors. The Board of Directors provides general supervision and direction only. While final responsibility of the

corporation rests with the Directors, daily operations are delegated exclusively to [the beneficiary].

It is noted that the petitioner appears to believe on appeal that the beneficiary qualifies as a manager for the purpose of this immigrant petition. However, the petitioner has not conveyed an understanding of the beneficiary's daily managerial duties, if any. The petitioner has not provided a comprehensive description of the beneficiary's job duties. In the petition and in response to the director's request for evidence, the petitioner only indicates that the beneficiary's job duties include responsibilities for marketing and distributing activity as required by ZIT and contacting and expanding business relationships with American companies. It is not possible to discern from the vague statements provided whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities. 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). It is also not possible to discern from these statements if the beneficiary will be employed by the petitioner or by a foreign company. Furthermore, on appeal, the petitioner borrows from elements contained in the statutory definitions of both managerial and executive capacity to describe the beneficiary's responsibilities. Not only is a recitation of the statutory definition insufficient to clarify the beneficiary's actual job duties, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In addition, the petitioner states that it only employs the beneficiary and has not provided evidence to demonstrate the use of independent contractors. 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 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 fail to describe the actual day-to-day duties of the beneficiary. 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 her 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.

Beyond the decision of the director, the petitioner has not established that a qualifying relationship exists between the petitioner and a foreign company. 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 states that a foreign entity owns 50 percent of its outstanding shares and that the beneficiary owns the other 50 percent. However, the petitioner has submitted confusing and inconsistent statements regarding the foreign entity and the number of the petitioner's outstanding shares.

First, the name of the purported foreign entity is not consistent. An amended IRS Form 1120 for 1998 reflects the foreign owner to be ██████████ PLC Ltd. On April 30, 1999 a company called "Computing Machinery Works PLC ██████████" appoints the beneficiary to work for the petitioner. A resolution filed with the Bulgarian Chamber of Commerce and Industry refers to the foreign entity as ██████████ EAD. The stock certificates issued to purportedly establish the 50 percent ownership of the foreign entity are issued to ██████████ ONE SHAREHOLDER LIMITED." It is not possible to determine if the foreign entity referred to by these various names is the same foreign entity or are different companies.

Second, the petitioner's Articles of Incorporation filed April 1999 states that "the aggregate number of shares which the corporation shall have authority to issue shall consist of a single class of Two Thousand Five Hundred (2,500) shares of common stock without par value." The petitioner's 1999 IRS Form 1120 at Schedule L, Line 22(b) indicates only 1000 shares of common stock issued. Stock certificate number 3 is issued to "ZIT ONE SHAREHOLDER LIMITED" in the amount of 2,500 shares. Stock certificate number 4 is issued to the beneficiary in the amount of 2,500 shares.¹

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is

¹ Stock certificates 1 and 2 were also provided and indicate that they were issued on April 14, 1998 and cancelled on April 30, 1999.

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). The petitioner has failed to provide consistent evidence to show that the petitioner is the same employer, a subsidiary or affiliate of a foreign entity. The petitioner has failed to establish that a qualifying relationship exists between the petitioner and a foreign entity.

Further beyond the decision of the director, the petitioner has failed to establish that it has been doing business for at least one year at the time the petition was filed as required by 8 C.F.R. 204.5(j)(3)(i)(D). The petitioner makes reference to previously being incorporated in California sometime in 1997. The only information provided regarding the California company is an unsigned IRS Form 1120 for 1997 reflecting no income and an unsigned California Corporation Franchise or Income Tax Return for 1997 also reflecting no income. There is no evidence that either of these forms were ever filed with the appropriate government agency. The petitioner's 1998 IRS Form 1120 reflects the only income received by the petitioner as \$919 from money market dividends. The petitioner has not provided evidence that it was engaged in the regular, systematic, and continuous provision of goods and/or services for at least one year prior to filing the petition in June of 1999.

Finally, beyond the decision of the director, the petitioner has not provided evidence of its ability to pay the beneficiary. 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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petitioner's filing date. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is June 21, 1999.

The petitioner has not provided evidence of its ability to pay the beneficiary the proffered wage of \$24,000 per year. The petitioner states and has provided tax information demonstrating that the beneficiary was paid a salary of \$10,000 in 1999. The petitioner's 1999 IRS Form 1120 does not reveal that the

petitioner had 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. The petitioner cannot rely on payments made to the beneficiary from outside sources to demonstrate its ability to pay the beneficiary the proffered wage.

For these three additional reasons, the petition may not be approved.

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.