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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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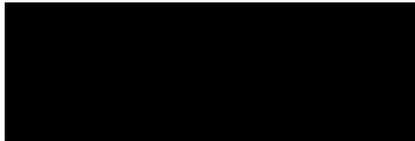
IN RE: Petitioner:

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

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DISCUSSION: The employment-based visa petition was denied by the Director, Vermont Service Center. The matter 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 engaged in trading steel and metal products. 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 would be employed in either a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the Service's decision was based on erroneous reasoning and on information, which was incomplete, or should have been discovered during the review.

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.

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 beneficiary has been and will be performing managerial or executive duties for the United States enterprise.

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.

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. 8 C.F.R. 204.5(j)(5).

It is noted that the petitioner does not clarify whether the beneficiary claims to be engaged in managerial duties under section 101(a)(44)(A) of the Act or executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner initially described the beneficiary's proposed "executive" duties as:

set[ting] the goals and policies of the company;
make[ing] decisions on company's day-to-day operations;
direct[ing] [the petitioner] in operations;
control[ling] the work of the employees of the company;
create[ing] a political strategy of [sic] company in
current business conditions.

The petitioner also submitted its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 1998. The Form

1120 showed assets of \$1,027,170, gross receipts of \$34,440, taxable income of \$21,968, and that no salaries had been paid and no compensation provided to officers of the company.

The director requested the petitioner provide additional information to demonstrate the beneficiary had been employed in a managerial or executive position within the three years prior to the filing date of the petition on April 14, 2000. The director also requested a breakdown of the number of hours devoted to each of the beneficiary's proposed job duties on a weekly basis and an explanation of how he would spend most of his time.

In response, counsel for the petitioner stated that the beneficiary would perform the same duties for the United States company as the beneficiary performed for the foreign entity. The petitioner provided a letter from the managing director of the foreign entity that listed the beneficiary's job duties for the foreign entity as follows:

1. Responsibilities

- Manages corporate business
- Assigns tasks to corporate managers
- Makes decisions on: strategy of business development, prices, contract signing, payments, payroll, hiring and dismissal

Supervises:

Contracts execution, merchandise shipping and receiving schedules, accounts payable/receivable, tax calculations and withholding schedule, Quarterly and Annual Report proofing and scheduling.

- Represents the corporation at negotiations with Government authorities and business partners.

2. [The beneficiary] devotes 70-80% of his business hours to exercise his administrative duties.

3. To qualify for the position of Director General a candidate must be proficient in the following:

- Special alloys' production process and quality assurance procedures . . .
- Basic Management, Administration, Labor Law, Tax Law, basic accounting and reporting . . .

4. Authority of Director General.

Exercises absolute authority within the scope of his responsibilities.

The petitioner also submitted the first page of its IRS Form 1120 for the year of 1999. The first page indicated the petitioner had \$359,645 in total assets, \$50,957 in gross receipts, \$20,481 in taxable income and that no salaries had been paid.

The director found that the petitioner had not submitted the

requested information regarding the beneficiary's proposed duties. The director did take into account the description of duties the beneficiary performed for the foreign entity but noted that the foreign entity employed more employees than the three employees the petitioner had listed on the petition. The director also determined that the evidence submitted was vague. The director also opined that the yearly salary of \$52,000 offered to the beneficiary was low for a vice-president. The director concluded that the petitioner had not established that the beneficiary would be employed in either a managerial or an executive capacity.

On appeal, counsel for the petitioner asserts that the petitioner plans to hire 3 to 10 additional office workers and that it has hundreds of thousands of dollars in its bank account and therefore is capable of hiring new personnel. Counsel also states that the petitioner indicated that the beneficiary would perform the same duties as he performs in Russia with the same breakdown of weekly hours. Counsel also restates the description of job duties the beneficiary performed for the foreign entity. Counsel asserts that the salary offered to the beneficiary is reasonably high for an executive position as evidenced by information found in The Occupational Outlook Handbook.

Upon review, counsel's assertions are 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 duties such as "set[ting] the goals and policies of the company; make[ing] decisions on company's day-to-day operations; direct[ing] [the petitioner] in operations; control[ling] the work of the employees of the company; create[ing] a political strategy of [sic] company in current business conditions." This description of job duties is vague and general in nature, essentially serving to paraphrase elements contained in the statutory definition of managerial and executive capacity. No concrete description is provided to explain what the beneficiary will do in the day-to-day execution of his position.

The job duties described by the petitioner do not convey an understanding of what the beneficiary will be doing on a daily basis. In response to the director's request for evidence, the petitioner did not submit any evidence to establish that the beneficiary was or would be actually conducting the broadly cast description of his duties. The description of the beneficiary's responsibilities with the foreign entity that was provided in response to the request for evidence envisioned the beneficiary assigning tasks to other corporate managers and supervising certain tasks. However, the petitioner has not submitted documentary evidence of its alleged three 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). The petitioner has only submitted a letter signed on behalf of the petitioner by an individual who claims he is the petitioner's president. The record does not indicate that this individual has ever been paid or that this individual has ever been elected to the position. Furthermore, the description of the beneficiary's job duties with the foreign entity and that are proposed for the petitioner indicates that the beneficiary would be primarily performing the basic operations 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). Regarding actual operations, the petitioner proposes that the beneficiary will be making decisions on prices, contract signing, payments, payroll, hiring and dismissal and will be representing the corporation at negotiations. As noted above, these duties cannot be delegated as the petitioner apparently has not yet employed anyone. Further, counsel's assertion that the petitioner plans to hire employees with its substantial bank reserves has no merit. The petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm 1971).

The record contains insufficient evidence to demonstrate that the beneficiary's duties will be primarily managerial or executive in nature. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will manage the organization through the work of others. Further, the record does not sufficiently demonstrate that the beneficiary will manage 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 an executive simply because the beneficiary possesses a managerial or executive title.

Beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered salary. Counsel's note that the proposed salary is reasonably high is accepted. However, the petitioner has not paid the beneficiary in the past, as his salary has been paid by the foreign entity. The IRS Form 1120 for the year 1999, the pertinent year to consider when looking at the issue of ability to pay the proffered wage, is incomplete. Although the petitioner states on the first page of the IRS Form 1120 that it has \$359,645 in total assets, the Service cannot determine if these assets are encumbered or not without reviewing the tax return in its entirety. Inasmuch as the record is incomplete in this regard, the Service will not assume that the petitioner has the ability to pay the proffered wage to the beneficiary.

Further, the petitioner has not adequately established the affiliate relationship between itself and the foreign entity. The record contains assertions by counsel and an accountant regarding the ownership and control of the petitioner and a copy of share certificate number 2 issued to the beneficiary in the amount of 100 shares. However, the assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980) and the accountant's statement is unsupported by documentary evidence. Matter of Treasure Craft of California, supra. Moreover, the record contains the petitioner's 1998 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return. The tax return at Schedule K, Lines 5 and 10 indicate that an individual did not own more than 50 percent of the petitioner and that no foreign person owned more than 25 percent of the petitioner. The petitioner's tax returns directly contradict the claimed ownership and control 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). The petitioner has not established a qualifying relationship with a foreign entity.

As the appeal will be dismissed for the reason stated above, these issues will not be 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.