

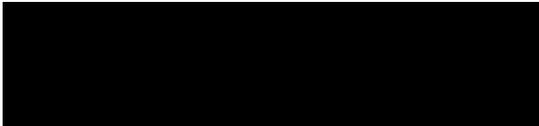
U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

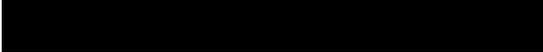
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ADMINISTRATIVE APPEALS OFFICE  
425 Eye Street N.W.  
BCIS, AAO, 20 Mass. Ave., 3rd Floor  
Washington, D.C. 20536

**PUBLIC COPY**



FILE: WAC 01 253 60311 Office: CALIFORNIA SERVICE CENTER Date: **AUG 18 2003**

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)

ON BEHALF OF PETITIONER:



**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

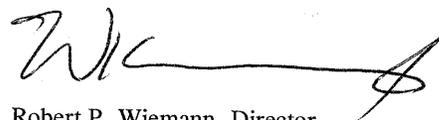
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.



Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in 1998 in the State of California and is claimed to be a subsidiary of [REDACTED] located in [REDACTED]. The petitioner is engaged in the business of trading and distributing laser equipment. It seeks to employ the beneficiary as its "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 failed to establish a qualifying relationship with a foreign entity. The director further determined that the petitioner had failed to establish that the beneficiary would be employed in a managerial or executive capacity, that the petitioner has been doing business, and that the petitioner has the ability to pay the beneficiary's proffered wage.

On appeal, the petitioner submits a statement, seemingly explaining why the beneficiary was the sole owner of the petition's stock at the time of its initial commencement.

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.

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 which 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.

The first issue in this proceeding is whether the petitioner has established the existence of a qualifying relationship with a foreign organization.

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;

*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.

In the initial petition, the petitioner claimed that the beneficiary owns 70% of the parent company and 100% of the petitioning organization. The petitioner submitted a copy of a stock certificate indicated that the beneficiary is the owner of 500 shares of the petitioner's stock.

On December 23, 2001, the director issued a notice requesting that the petitioner submit additional evidence establishing that it has a qualifying relationship with the claimed parent entity. The petitioner was asked to submit a number of documents addressing this issue. Although the petitioner provided information addressing other issues in the director's request, none of the documents addressed the issue of a qualifying relationship. It is noted that failure to submit requested evidence which precludes a material line of inquiry, as the petitioner did in the instant case, shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

Furthermore, where a petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, the Bureau will not consider evidence submitted on appeal for any purpose. Rather, the Bureau will adjudicate the appeal based on the record of proceedings before the director. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). If the petitioner desires further consideration of such evidence, the petitioner may file a new petition. As the petitioner in the instant case failed to submit evidence requested in the Service's notice, the evidence submitted on appeal in regards to this issue will not be considered.

It is noted that where a petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, the Service will not consider evidence submitted on appeal for any purpose. Rather, the Bureau will adjudicate the appeal based on the record of proceedings before the director. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). If the petitioner desires further consideration of such evidence, the petitioner may file a new petition. As the petitioner in the instant case failed to submit evidence requested in the Service's notice, the evidence

submitted on appeal in regards to this issue will not be considered.

Consequently, the petitioner's statements on appeal regarding the ownership of its shares will not be considered in the instant proceeding.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this 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 visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant visa proceedings). In the instant case, the petitioner has failed to provide evidence establishing that common ownership and control exist between the foreign and U.S. entity. Therefore, the petitioner has failed to establish the existence of a qualifying relationship as statutorily required.

The next issue in this proceeding is whether the beneficiary has been and will be performing managerial or executive duties.

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.

As previously stated by the director, the brief description of the beneficiary's duties provided in the initial filing was insufficient. Therefore, the director requested additional evidence, including the petitioner's organizational chart identifying the beneficiary's position. The director also asked for a more detailed description of the beneficiary's job duties, a list of all of the employees under the beneficiary's supervision, brief descriptions of their jobs, education levels, and salaries or wages, as well as state quarterly wage reports for all employees for the last four quarters.

In response to the above request, the petitioner provided the following supplemental list of the beneficiary's duties:

- Market survey for finds [sic] new good items for Korea [sic] market.
- Follows up Korean company as they requested.
- Main duty to make a harmony between Korean and US employee.

The petitioner also indicated that it employs a director and a secretary. It provided the following list of their combined duties:

- Support to exhibition in Korea
- Shipping
- Order follow up
- Market survey for US items in Korea
- Negotiation with sellers in US

The petitioner did not indicate whether the above two employees were performing the same list of duties. Although the petitioner's organization chart indicates that the director is in charge of "market survey" and that the secretary is in charge of shipping, it is not clear which of the employees performs which of the above duties. Furthermore, the petitioner failed to indicate the education levels of either of the two employees, therefore making it impossible to determine whether the beneficiary supervises employees that are professional. Furthermore, the petitioner failed to provide any of the requested quarterly wage reports to establish that the petitioner has in fact, paid the claimed employees.

The director concluded that the petitioner failed to establish that the beneficiary's duties are primarily of an executive nature.

The petitioner does not provide any evidence or information to address this issue on appeal.

In examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The descriptions of the beneficiary's job duties are too general to

convey an understanding of exactly what the beneficiary will be doing on a daily basis. Furthermore, the petitioner has indicated that one of the beneficiary's duties is conducting market surveys. However, as pointed out by the director, this is also a duty that the petitioner claims is performed by the director, one of the beneficiary's two subordinates. 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, 591-92 (BIA 1988). The petitioner in the instant case has neither acknowledged nor provided an explanation for the inconsistency in the description of job duties.

On review, the record contains insufficient evidence to demonstrate that the beneficiary has been and will be employed in a primarily managerial or executive capacity. Further, the description of the duties to be performed by the beneficiary in the proposed position does not persuasively demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Nor does the record sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non-qualifying duties. The Bureau is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

The next issue in this proceeding is whether the petitioner has established that it has been doing business.

The regulation at 8 C.F.R. § 204.5(j)(2) states that "doing business" means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

The director properly noted that the few wire transfers, UPS labels and single sales invoice do not sufficiently establish that the petitioner is doing business. Therefore, the director instructed the petitioner to submit additional evidence in the

request for additional information. The director asked for such documentation as sales invoices identifying gross sales for the years 2000 and 2001, shippers export declarations, customs forms, etc.

The petitioner did not submit any of this requested evidence in its response. Therefore, it is concluded that the submitted evidence fails to establish that the petitioner has engaged in the regular, systematic, and continuous provision of goods.

The remaining issue in this proceeding is whether the petitioner has established that it has the ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states that following, in pertinent part:

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."

In determining the petitioner's ability to pay the proffered wage, the Service will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D.Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Bureau had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. The court

specifically rejected the argument that the Bureau should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

In the director's request for additional evidence, the petitioner was instructed to submit certified copies of its income tax return for the year 2000, as well as quarterly wage reports.

As previously noted, the petitioner failed to submit any of the requested quarterly wage reports. Although the petitioner attempted to submit its tax return for the year 2000, it failed to submit the complete document. The submission included only the first page of the tax return and, contrary to the director's request, the copy submitted was not certified. Even if the Bureau were to overlook these obvious deficiencies, the information found within the document indicates that no money was attributed to the compensation of officers or to salaries and wages of employees.

The petitioner provided no additional evidence to address this issue on appeal. It is concluded that the evidence submitted does not establish that the petitioner has the ability to pay the beneficiary's proffered wage. For this, and the other reasons discussed above, this petition cannot 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.