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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536



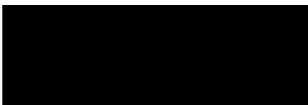
File: WAC 01 218 51319

Office: CALIFORNIA SERVICE CENTER

Date:

DEC 9 - 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:



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 (CIS) 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 employment-based 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 is a corporation organized in the State of California in March 2000. It wholesales diamonds. It seeks to employ the beneficiary as its president. 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 managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the petitioner provided sufficient evidence to establish that the beneficiary had been and would be performing in an executive and/or 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 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 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. See 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established that the beneficiary's primary assignment for the petitioner will be in a 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.

Initially, the petitioner submitted Form ETA 750, Application for Alien Employment Certification. The form described the beneficiary's duties:

Plans, develops and establishes policies and objectives of business organization in accordance with board directives. Reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions.

The petitioner stated on the Form I-140, Immigrant Petition for Alien Worker that it currently employs two personnel. The petitioner provided its California Form DE-6, Employer's Quarterly Wage and Withholding Report for the quarter ending December 31, 2000. The California Form DE-6 confirmed the employment of the beneficiary and one other individual. The petitioner also included Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement issued to two individuals in the year 2000.

The director requested further evidence to establish the managerial or executive capacity of the beneficiary. The director specifically requested a day-to-day description of the beneficiary's duties, a list of specific discretionary decisions made by the beneficiary, and the petitioner's organizational chart. The director requested that the organizational chart show all employees under the beneficiary's supervision and include a brief description of their job duties.

In response, the petitioner provided a letter from the beneficiary dated August 9, 2002. The beneficiary indicated that the petitioner had employed only three people in 2001 but in 2002 the petitioner employed eight individuals, including a general manager. The beneficiary indicated that he was free to run the business as he pleased and that he made minor and major decisions almost every day. The beneficiary stated that he set the goals and policies of the company, directed the management of the company, was responsible for hiring and firing, and was responsible for the finances of the company. The beneficiary included among his discretionary decisions, health insurance and extra liability insurance purchases, increasing the range of merchandise, extending credit to customers, expanding the business outside California, and marketing.

The petitioner also submitted its organizational chart showing the beneficiary as president with a general manager reporting to him. The chart also showed an accountant, clerk, and four salespersons reporting to the general manager. The petitioner provided its IRS Form 1120, U.S. Corporate Income Tax Return for the fiscal year beginning March 1, 2001 and ending February 28, 2002. The Form 1120 showed the general manager had been compensated \$18,000 as an officer and that the petitioner had paid \$30,200 in salaries for the fiscal year.

The director determined that it was reasonable to believe, when considering the nature of the petitioner's business, that the beneficiary would be involved in day-to-day non-supervisory duties. The director also determined that the petitioner's staffing levels were not sufficiently complex to warrant an individual acting in a managerial or executive capacity as defined by the regulations. The director further determined that the beneficiary would, in essence, function as a first-line supervisor over non-professional employees. The director concluded that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner claims that the director improperly considered staffing levels without considering the reasonable needs of the petitioner. Counsel cites an unpublished decision in support of this claim. Counsel asserts that every organization requires an executive or manager to function. Counsel suggests that the beneficiary manages an essential function as the beneficiary is the president and has ultimate authority over the operation of the organization.

Counsel's claims are not persuasive. When examining the beneficiary's executive or managerial capacity, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The petitioner and the beneficiary's descriptions of the duties for the beneficiary's position paraphrase elements of the definitions of managerial and executive capacity. See sections 101(a)(44)(A)(iii) and 101(a)(44)(B)(i) and (ii) of the Act.

In addition, counsel and the petitioner make no distinction between the beneficiary's claimed duties as a manager and claimed duties as an executive. Therefore, the petitioner is apparently attempting to claim that the beneficiary is both a manager and/or executive without addressing every element of the definitions of managerial or executive capacity. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. In this matter, the description of the beneficiary's duties is insufficient to establish that the beneficiary is either an executive or a manager.

Moreover, when the petition was filed, the petitioner employed only two employees. At a later undisclosed time, the petitioner hired a third employee. Subsequently, at an even later time, the petitioner hired additional employees. However, a 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 director's obligation to take into consideration the reasonable needs of the petitioner when considering the petitioner's staffing levels does not obviate the requirement that the petitioner establish that it has a sufficient number of employees to relieve the beneficiary from primarily performing non-qualifying duties. In this matter, the petitioner only employed the beneficiary and one other individual to perform all the necessary sales, operational, and administrative duties of the petitioner. 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).

Counsel's citation to an unpublished case carries no probative value. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the unpublished case. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. See 8 C.F.R. § 103.3(c).

Counsel's implicit assertion that the beneficiary manages an essential function is not persuasive. The term "essential function" generally applies when a beneficiary does not supervise or control a petitioner's staff but instead is primarily responsible for managing a function. To allow the broad application of the term "essential function" to include all individuals who head organizations would render the term meaningless. If counsel claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, as well as, establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive description of the beneficiary's duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. In this case, the petitioner has not provided evidence that the beneficiary manages an essential function. Furthermore, as previously explained, satisfying only one element of the statutory definition of managerial capacity, does not demonstrate that the beneficiary's primary assignment is in a managerial capacity.

In sum, the petitioner has not established that the beneficiary's primary assignment is to provide executive or managerial services for the petitioner; instead, the beneficiary primarily provides operational and administrative services. *Matter of Church Scientology International, supra.*

Beyond the decision of the director, the petitioner has not provided sufficient evidence to establish that the beneficiary's employment for the foreign entity was in a managerial or executive capacity for one year prior to entering the United States as a nonimmigrant. See 8 C.F.R. § 204.5(j)(3)(i)(B). The petitioner's organizational chart for the foreign entity shows that the beneficiary was the vice-president supervising an accountant, clerk, and three assorters. The organizational chart shows the beneficiary's position to be in the position of a first-line supervisor. The record does not show that the individuals supervised were employed in a professional capacity. See section 101(a)(44)(A)(iv) of the Act. The record does not sufficiently establish that the beneficiary's assignment was primarily in a managerial or executive capacity. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Also beyond the decision of the director, the petitioner has not established a qualifying relationship with the beneficiary's foreign employer. 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 foreign entity.

The petitioner did not provide sufficient evidence that the claimed parent company purchased shares in the petitioner. The director requested that the petitioner provide documentary evidence of wire transfers to demonstrate that the beneficiary's foreign employer actually paid for the purchase of its shares. In response, counsel for the petitioner stated that the beneficiary's foreign employer did not wire money to the petitioner. Instead, the overseas entity instructed a United States customer to pay the petitioner money owed to the foreign employer rather than send it to the foreign employer in India. The petitioner submitted a letter dated April 4, 2000 from the beneficiary's foreign employer to a third party directing the third party to forward monies owed to the beneficiary's foreign employer to the petitioner. The petitioner also provided a letter dated April 25, 2002 from the third party acknowledging the foreign employer's request and agreeing to forward a sum of money to the petitioner.

The petitioner was incorporated in March 2000 and the shares issued by the petitioner are dated March 2000. The petitioner's IRS Form 1120 for the year ending February 28, 2002 shows that the petitioner has issued common stock valued at \$50,000. However, according to the date on the letter from the third party agreeing to forward money to the petitioner on behalf of the beneficiary's

foreign employer, the foreign employer had not actually paid for the stock prior to April 2002. The inconsistencies contained in the documentary evidence on actual payment for stock issued have not been explained. 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 beneficiary's letter in response to the director's request for evidence implies that the beneficiary is able to run the petitioner as a sole proprietorship. Thus, the record raises concerns regarding the actual relationship between the petitioner and the beneficiary's foreign employer.

For these additional reasons, the petition will 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.