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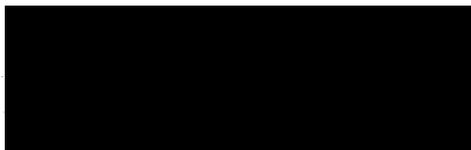
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U.S. Department of Homeland Security

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Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
BCIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536

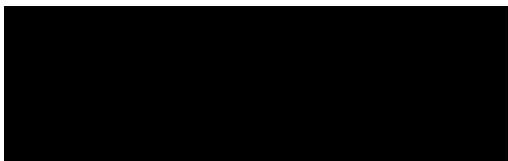


File: WAC 02 046 54977 Office: CALIFORNIA SERVICE CENTER Date: **DEC 17 2003**

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 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 decision of the director will be withdrawn and the petition remanded for further action and consideration.

The petitioner is an organization established in the State of California in March 1997. It is engaged in commercial maintenance management. It seeks to employ the beneficiary as its director of marketing. 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 a qualifying relationship between the petitioner and the beneficiary's foreign employer.

On appeal, counsel for the petitioner asserts that the director's decision is in error and that one individual owns the majority of stock issued by both the petitioner and beneficiary's foreign employer; as such, one individual also controls the petitioner and the beneficiary's foreign employer.

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. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer.

The regulation at 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.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

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 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 provided documentary evidence that an individual owned 55 percent of its outstanding shares. The petitioner also provided documentary evidence that the same individual owned 99 percent of the beneficiary's foreign employer's shares. The petitioner also provided documentary evidence that this same individual paid for the purchase of the petitioner's shares.

The director's decision centers on the above definition of affiliate. The director determined, and the petitioner confirms,

that two individuals participate in the ownership of the petitioner. The director thus focused his attention on part B of the definition of "affiliate" as part A of the definition refers to the same parent or individual in singular terms. Thus, part A appears to restrict its applicability to entities with only one owner. The director, turning his attention to part B of the affiliate definition, determined that the petitioner and the beneficiary's foreign employer were not owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

On appeal, counsel for the petitioner asserts that the petitioner is a subsidiary of the beneficiary's overseas employer because one individual owns more than half of the petitioner and thus controls the petitioner. Counsel asserts further that even if the relationship between the two entities in question is an affiliated relationship, the petitioner and the foreign entity are both owned and controlled by the same individual.

Counsel's assertion that the petitioner is a subsidiary of the foreign entity is not persuasive. The beneficiary was not employed by the owner or owners of the foreign entity, but rather, was employed by the foreign entity. The petitioner in this matter is one of two subsidiaries owned by two individuals but controlled by one individual. The petitioner and the foreign entity are subsidiaries and appear to be affiliated companies. The director in this case, however, followed a restrictive interpretation of part A of the definition of affiliate. Upon review, the director should have applied a more expansive interpretation of part A of the "affiliate" definition. A more common sense perspective would expand the interpretation of part A to include two subsidiaries where one parent or individual owns a majority interest in both subsidiaries and controls both subsidiaries as a consequence of the majority ownership, even if the parent or individual is not the sole owner of both subsidiaries.

Because the director's decision relied on a restricted interpretation of qualifying relationship between the two affiliated companies, the director's decision of September 25, 2002, will be withdrawn and the matter will be remanded for the purpose of a new decision.

However, review of the record reveals additional issues that must be addressed by the director before a decision is entered. It is noted that the director did not address the issue of the work to be performed by the beneficiary for the petitioner and whether the evidence provided established that the beneficiary would be employed in a primarily executive or managerial capacity.

The petitioner has submitted a brief description of the beneficiary's duties for the petitioner. It is not possible to

discern from the petitioner's description whether the beneficiary will be primarily engaged in managerial or executive duties or whether the beneficiary will be primarily performing the tasks associated with the day-to-day marketing 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).

In addition, the petitioner has not provided job descriptions for the employees under the beneficiary's supervision. It is not possible to determine from the record that the petitioner employed individuals to relieve the beneficiary from primarily engaging in non-managerial or non-executive tasks. 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).

The petitioner's evidence of the beneficiary's claimed managerial and executive capacity consisted only of the petitioner's description of the beneficiary's duties and an organizational chart including position titles. It is not possible to determine from this information that the beneficiary is a manager or an executive, rather than primarily a first-line supervisor of non-professional employees. See 101(a)(44)(A)(iv) of the Act. Likewise, the beneficiary's duties for the foreign entity in this case are not sufficiently detailed to conclude that the beneficiary was assigned duties in a primarily managerial or executive capacity for the foreign entity. The petitioner also has not provided sufficient supporting information of its ability to pay the beneficiary the proffered wage of \$48,000 per year.

These additional issues must be thoroughly examined by the director before entering a new decision.

Accordingly, this matter will be remanded for the purpose of a new decision. The director must afford the petitioner reasonable time to provide evidence that is pertinent to the above issues and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility.

ORDER: The director's decision of September 25, 2002 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.