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U.S. Department of Homeland Security

Citizenship and Immigration Services

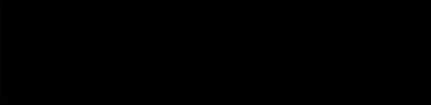
ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536



File: WAC 01 150 52056 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:



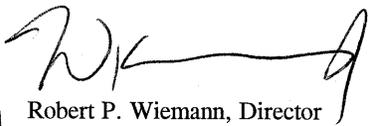
INSTRUCTIONS:

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 appeal will be dismissed.

The petitioner is a corporation organized in the State of California in May 1999. It is engaged in providing education and career training. 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 primarily employed in either a managerial or executive capacity. The director also determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer. The director further determined that the petitioner had not established its ability to pay the beneficiary the proffered wage of \$40,000 per year.

On appeal, counsel for the petitioner asserts that the director's decision was inappropriate and a result of confusion because prior counsel was unable to clarify the issues the director raised.

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 first issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the petitioner.

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 stated the beneficiary directed the overall business management of the company and that his primary responsibilities involved developing the company. The petitioner stated further that the beneficiary was "currently engaged largely in Business Development and Marketing functions, including managing and overseeing all business expansion and organizational aspects of the company, establishing contractual commitments with U.S. employers, developing the company's image/presence in the U.S. market, and supervising the company's budgeting, finance/accounting, advertising, and personnel functions." The petitioner also stated that the beneficiary was "in charge of market research, facilities development, arranging potential client meetings, and drafting program proposals and contracts." The petitioner noted that, in addition, the beneficiary was involved in creating a business infrastructure and formulating, establishing, and directing the company's development and marketing policies, strategies, and goals as well as policies concerning financial, accounting, and personnel functions. The petitioner also stated that the beneficiary was given total discretionary authority in establishing the actual development programs and goals of the company. The petitioner further stated that the beneficiary managed a department of the organization, supervised and controlled the work of other supervisory/managerial employees, managed an essential function of the organization, had authority to hire and fire employees, operated at a senior level within the organization, and exercised direction over the day-to-day operations of the function for which he had authority.

The petitioner also provided its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the year 2000. The IRS Form 1120 showed the petitioner had gross receipts of \$609,233, paid salaries in the amount of \$28,265, did not compensate officers, and had a net taxable income of \$11,844.

The director requested additional evidence including a list of the specific goals and policies established by the beneficiary, discretionary decisions made by the beneficiary, and a specific day-to-day description of the beneficiary's duties. The director also requested a list of all employees subordinate to the beneficiary, their job titles and the percentage of time the

employees spent in each of their listed job duties. In addition, the director requested the petitioner's organizational chart.

In response, the petitioner through its counsel indicated that the beneficiary had signed contracts regarding recruitment of students and placement of international interns in temporary positions, and had established a two-level management hierarchy for the company, and had transferred the company's corporate business administration agenda to the Oracle database system. The petitioner also noted that the beneficiary had established credit lines, hired and fired employees, authorized workers compensation insurance, settled a lawsuit, and authorized bonuses. The petitioner indicated that the beneficiary spent 40 percent of his time coordinating a team of the company's employees and international independent contractors, 15 percent of his time negotiating with suppliers and strategic development partners, 15 percent of his time supervising billing procedures and cash flow, 15 percent of his time participating in development team work on new project areas, and 15 percent of his time negotiating with key clients, supervising contracts, and assuring the quality handling of key client issues.

The petitioner provided its organizational chart showing the beneficiary as president and chief financial officer, a vice-president, a manager of client relations, a manager of U.S. marketing, two student coordinators, a "communication" person, and two unpaid interns. The chart indicated that the petitioner utilized 11 international independent contractors and that the accounting and payroll services were outsourced to other companies.

The director determined that the petitioner did not have a reasonable need for an executive because it was a small education and career training service. The director also determined that a business of this nature did not require three managers out of its six employees. The director further determined that the beneficiary would necessarily be assisting in the performance of numerous menial tasks because the organization did not have a sufficient number of employees to perform those tasks. The director also determined that the beneficiary was not a manager because his position was a first-line managerial position over non-managerial and non-professional employees. The director also determined that the beneficiary was not a functional manager.

On appeal, counsel clarifies that the petitioner is seeking to classify the beneficiary as an executive and not a manager. Counsel explains that the petitioner was created to offer consulting and business services to European business interested in doing business in the United States. Counsel also indicates that the beneficiary's role in the company encompasses the following:

Deciding the company's short and long range [sic] business objectives, and directing, controlling, and coordinating the management of [the petitioner]. He develops and maintains business relationships with both the U.S. and European clients. He devises both marketing and development strategies, and [the beneficiary] is the highest-level executive in both the parent and subsidiary companies, sitting on the Boards of both entities. He has full authority to recruit, hire and termination all employees of both companies.

Counsel provides a list of the petitioner's employees and their job duties. Counsel asserts that it is a misapplication of the law to require the petitioning business to be a certain size before the business would require an executive.

Counsel is correct that the director based her decision in part on an improper standard. In her decision, the director stated that the petitioner did not have a reasonable need for an executive because it was a small education and career training service. The director should not hold a petitioner to her undefined and unsupported view of "common business practice" or "standard business logic." The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. Although the Bureau must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some reasonable basis for finding a petitioner's staff or structure to be unreasonable. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in sales or services will not preclude the petitioner from qualifying for classification under section 203(b)(1)(C) of the Act.

However, the director also determined that the petitioner had not established that the beneficiary's assignment involved primarily performing in an executive capacity. 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's initial description of the beneficiary's duties, in addition to paraphrasing elements of the definition of "executive capacity" is indicative of an individual setting up a business in the United States. See section 101(a)(44)(B) of the Act. The beneficiary established contractual commitments, developed the petitioner's image or presence in the United States, performed market research, arranged client meetings, drafted program proposals and contracts, and created the business' infrastructure. These duties are indicative of an individual primarily providing services to 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).

In addition, the record does not substantiate the employment of individuals other than the beneficiary at the time the petition was filed. 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 initial petition provided only a description of the beneficiary's duties and the petitioner's IRS Form 1120 to substantiate the executive nature of the beneficiary's position. As stated previously, the initial description focused on the beneficiary's duties relating to setting up the corporation, engaging in marketing functions and business development. The IRS Form 1120 indicated that \$28,265 was paid in salaries. There was no initial evidence indicating which employee(s) received a salary. The Form I-140, Immigrant Petition for Alien Worker, indicates that the petitioner employed six individuals but the record contains no substantiating evidence of the employment of these individuals. 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 director's request for additional evidence asked for a list of the petitioner's employees and the percentage of time the employees spent on their listed duties. The petitioner did not provide job descriptions for its claimed employees or the percentage of time each employee spent on their duties. Nor did the petitioner provide documentary evidence of its alleged use of independent contractors. The record does not contain sufficient information to demonstrate that the beneficiary planned, organized, directed, and controlled the petitioner's management or major functions through the work of other employees or independent contractors.

Counsel's description of the beneficiary's duties on appeal is also not persuasive. The description does not provide added detail regarding the beneficiary's duties. Moreover, the description is so general that the AAO still cannot distinguish what duties the beneficiary performs, if any, in an executive capacity and what duties continue to be the performance of operational and administrative services for the petitioner. Further, if the petitioner's business is to provide consulting services as counsel states, the petitioner has not explained who performs the consulting services. As stated previously, 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, supra*. Counsel also does not provide documentary evidence to substantiate the petitioner's number of employees at

the time of filing the petition. Also as stated previously, going on the record without documentary evidence is not sufficient for the purpose of these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999), *supra*.

In sum, the record is deficient in demonstrating that the beneficiary's assignment is primarily in an executive capacity. The Bureau 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.

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

As the director noted, 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 director also observed that the petitioner provided inconsistent evidence regarding its ownership. The petitioner provided a stock certificate and stock ledger that showed the petitioner had issued 10,000 shares to the beneficiary's foreign employer, and the petitioner's Articles of Incorporation state that the petitioner is only authorized to issue 10,000 shares. However, the petitioner's IRS Form 1120 for the year 2000 shows on Schedule K, Line 4 that the petitioner is not a subsidiary in an affiliated group or a parent-subsidiary controlled group. The petitioner on Line 5 of the same Schedule K indicates that no corporation owned, directly or indirectly, 50 percent or more of the petitioner's voting stock. The petitioner's response on appeal regarding this discrepancy is that it was not required to file IRS Form 5472 because it did not have any reportable transactions with the foreign related party and thus was exempt from filing this statement. This explanation does not sufficiently explain the petitioner's answer to the questions at Line 4 and 5 of Schedule K of the IRS Form 1120. 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 third issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered wage.

The regulation at 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.

In determining the petitioner's ability to pay the proffered wage, CIS 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. Tex. 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).

The beneficiary states that the petitioner paid him \$59,500 for the year 2000. However, the alleged payment is not reflected on the petitioner's IRS Form 1120 for the year 2000. As noted earlier, the petitioner's IRS Form shows that no compensation was paid to officers and that the petitioner paid salaries in the amount of \$28,265. The petitioner submits on appeal several transfer orders dated in April 2002 in support of the beneficiary's statement that he was paid a salary in the year 2000. The petitioner has not provided any independently verifiable documentary evidence that it paid the beneficiary in 2000 or in 2001. The petitioner has not provided copies of its annual reports, federal tax returns, or audited financial statements to support its claim that it has the ability to pay the proffered wage of \$40,000 per year. See *Matter of Ho*, *supra*.

The petitioner has not provided information sufficient to overcome the director's decision on this issue.

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.