

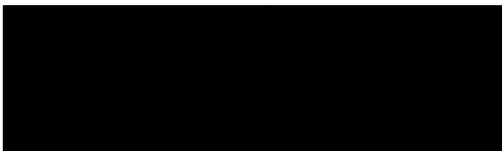
B4

U.S. Department of Homeland Security

Citizenship and Immigration Services

PUBLIC COPY

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



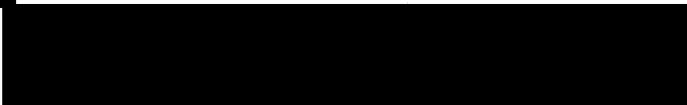
DEC 23 2003

File:

Office: CALIFORNIA SERVICE CENTER

Date:

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 identity 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 (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 Director, California Service Center initially approved the employment-based visa petition. Upon review of the record, the director properly issued a notice of intent to revoke and ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in July 1995 in the State of California. Its Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Returns indicate it is operating a liquor store and delicatessen. The petitioner indicates that it specializes in importing Russian delicacies and cuisine. 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 initially approved the petition on November 30, 2000. Upon review, the director determined that the evidence in the record did not establish a qualifying relationship with the beneficiary's overseas employer. The director also determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity. After properly issuing a notice of intent to revoke, the director revoked the approval of the petition on July 16, 2002.

On appeal, counsel for the petitioner asserts the director erred as a matter of fact and law.

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

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

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 entity in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

The petitioner provided a copy of its Articles of Incorporation and Consent of the Board of Directors that directed the president and secretary of the corporation to issue 510 shares of the corporation to a Russian foreign entity for the consideration of \$5,100. The president and secretary were also directed to issue shares 490 to the beneficiary for the consideration of \$4,900. The petitioner provided share certificates one and two evidencing the issuance of such shares.

The director requested evidence that the foreign company had, in fact, paid for its interest in the United States entity. The

director requested that such evidence include wire transfers from the parent company, cancelled checks, and deposit receipts detailing monetary amounts for the stock purchase. The director noted that the originator(s) of the monies deposited or wired must be clearly shown and that the petitioner must explain the source and reason for any funds not originating with the foreign company.

In response, the petitioner provided a letter from its bank that confirmed a wire transfer into the petitioner's account in September 1995 in the amount of \$91,584. Counsel for the petitioner claims that the money was wired from the petitioner's parent company for the purchase of stock and to fund the United States operation. Counsel points out that the petitioner's bank stated that the bank retained records for only seven years thus specific details of a wire transfer made in 1995 were unavailable.

In the notice of intent to revoke, the director observed that the petitioner had not submitted evidence that the foreign company had purchased an interest in the United States company.

In rebuttal, counsel for the petitioner asserts that the issuance of share certificates to the claimed parent company is sufficient to establish ownership and control of the petitioner. Counsel further asserts that the payment or lack of payment for the issued stock relates only to the issue of consideration for the stock, and not to the issue of the petitioner's ownership and control. Counsel contends further that the regulations do not require a business relationship between the petitioner and the claimed parent company, only a qualifying relationship that is dictated by the ownership of the petitioner's shares.

The director determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer on the grounds stated in the notice of intent to revoke.

On appeal, counsel repeats his previous assertions and again contends that a parent/subsidiary relationship is based on ownership and control, a different issue from payment for shares of the subsidiary. Counsel cites *Matter of Siemens Medical Systems, Inc.*, *Matter of Hughes*, and *Matter of Tessel* in support of his contention. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *Matter of Tessel* 17 I&N Dec. 631 (Comm. 1981).¹

Counsel's assertions are not persuasive. The stock certificate alone is not sufficient to establish that the beneficiary's

¹ Counsel cites cases that address the issue of *de facto* or negative control of a 50-50 joint venture. These cases are not relevant to the underlying issue of the validity of stock certificates.

foreign employer owns a controlling interest in the petitioner. Stock certificates may evidence ownership but are also easily issued and manipulated. As such, the director may request such other evidence as the director may deem necessary to establish the validity of a particular element or of each element of the visa classification. See 8 C.F.R. § 214.2(1)(3)(viii). Ownership is a critical element of this visa classification and CIS may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. See *Matter of Siemens Medical Systems, Inc., supra*. As the director notes, evidence of this nature should include documentation of monies, property, or other payment furnished to the entity in exchange for stock ownership.

Counsel's contention that the issue of ownership and control and the issue of actual payment for stock are two separate issues has some merit. However, for the reasons stated above, the record must substantiate that a foreign company actually purchased a controlling interest in a petitioner, thus creating the qualifying relationship. In this matter, the petitioner's inability to assemble any documentary evidence of the original remitter of monies transferred into the petitioner's account in July 1995 may be plausible due to the passage of time. However, the petitioner's IRS Forms 1120 can be reviewed to assist in the determination of the funding and capitalization of the petitioner.

Counsel asserts and the petitioner's bank confirms that \$91,584 was transferred to the petitioner in September 1995. A review of the petitioner's 1996² IRS Form 1120, Schedule L shows at the beginning of the 1996 year, the petitioner did not have loans from stockholders or liabilities other than the stockholder's equity of \$10,000 in common stock. At the end of the year Schedule L and the accompanying statements indicates that stockholders had advanced \$13,000 to the petitioner and that a long term loan payable to an unknown individual or entity in the amount of \$21,092 had been created. The petitioner's IRS Forms, Schedule L do not acknowledge receipt of the \$91,584 remitted to the petitioner in September of 1995 as a liability of the corporation.

As the record does not contain the petitioner's IRS Form 1120 for 1995, the AAO is unable to determine if the \$86,484 in funds in excess of the alleged purchase price of shares is otherwise accounted for. 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). Of concern in this matter is that an individual(s) or other organizations in addition to or in place of the foreign company purchased an interest in the petitioner.

² The record does not contain the petitioner's IRS Form 1120 for 1995.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

Of note, counsel stresses that the petitioner need not maintain a business relationship with the overseas entity. However, this visa classification is for a multinational executive of manager. The term multinational is defined by immigration regulations as noted above. Thus the qualifying entity, or its affiliate, or subsidiary, must conduct business in two or more countries, one of which is the United States. Even if a qualifying relationship had been established, the record in this matter does not demonstrate that the claimed qualifying foreign entity continues to conduct business, either with the petitioner or with other businesses, thus maintaining the multinational business of the petitioner.

The petitioner has not provided independent, consistent documentary evidence that the beneficiary's foreign employer purchased a controlling percentage of the petitioner's stock. 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). In this matter, the petitioner must explain or otherwise resolve the issue of the purchase of the petitioner's shares. Asserting that a large sum of monies transferred to the petitioner included the purchase price of shares is not sufficient without substantiating documentary evidence.

The second issue in this proceeding is whether the beneficiary will be performing 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 provided a broad position description for the beneficiary including responsibility for "directing, overseeing, and leading the overall logistical, business, marketing, and administrative processes for [the petitioner]." The petitioner added that the beneficiary would implement expansion and diversification plans and would serve as the communication link between the Russian company and the petitioner. The petitioner also indicated that the beneficiary would "exercise extremely broad discretionary authority over the day-to-day operational decisions," and would "oversee the job performance of managerial and administrative staff, who in turn direct the activities of support staff and independent contractors."

In response to a request for evidence, the petitioner provided its organizational chart. The chart showed the beneficiary as

president with a salary of \$2,000 per month.³ The chart also showed a general manager, directly subordinate to the beneficiary's position and an accounting position subordinate to the general manager's position. The chart also included an inventory assistant, a sales/distribution assistant, and a receptionist. The petitioner's California Form DE-6, Employer's Quarterly Wage and Withholding Report confirmed employment of the beneficiary, the receptionist, and the sales/distribution assistant in the quarter in which the petition was filed. The petitioner's California Forms DE-6 do not show the employment of the persons in the positions of general manager and accountant for almost two years subsequent to the date of filing the petition.

The director issued a notice of intent to revoke stating that the beneficiary could not be classified as an executive because the petitioner did not have a reasonable need for an executive due to its type and size. The director concluded that because of the petitioner's number of employees, the beneficiary would be required to assist in performing non-qualifying duties. The director determined that the beneficiary could not be classified as a manager because the beneficiary was in essence a first-line supervisor of non-professional positions. Last, the director determined that the petitioner had not established that the beneficiary managed a function but rather that the beneficiary performed routine operational activities of the organization.

In rebuttal, counsel asserted that CIS placed undue emphasis on the relative size and staffing level of the petitioner's company. Counsel cited *Mars Jewelers, Inc. v. INS* and asserted that the federal district court specifically rejected such an approach. *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570 (N.D. GA. 1988). Counsel also cited an unpublished decision in support of his assertion that the number of employees does not determine whether an individual holds a managerial or executive position. Counsel also submitted statements from two authorities and their interpretation of the needs of the petitioner as regards the employment of an executive. Counsel contended that the petitioner had a sufficient number of employees to perform the petitioner's non-qualifying duties. Counsel claimed, in addition, that the beneficiary exercised discretion to change the course of the company policy and to serve as a venture capitalist for other international corporations.

The director determined that the petitioner had not submitted sufficient evidence to overcome the grounds for revocation.

On appeal, counsel disagrees with the director's assessment that the petitioner only has two to six employees. Counsel asserts that the petitioner provided ample evidence that it employs ten individuals and identifies the six positions described on the

³ The petition stated the beneficiary's annual wage would be \$52,000 per year.

previously submitted organizational chart. Counsel also cites the same two cases cited in rebuttal and sets forth the same arguments submitted in rebuttal. Counsel concludes that the CIS revocation is based on unsupported statements and unstated presumptions and that the director's decision is without legal or factual foundation.

Counsel's assertions are not persuasive. 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). In this matter, the AAO will review the evidence as it relates to the beneficiary's eligibility for this classification as of the date 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).

Moreover, when examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of job duties. See 8 C.F.R. § 204.5(j)(5). The petitioner's initial description of the beneficiary's duties was broad and did not convey an understanding of the beneficiary's actual daily duties. The petitioner indicated that the beneficiary would direct, oversee, and lead the overall logistical, business, marketing, and administrative processes for the petitioner and would implement expansion and diversification plans. The AAO cannot discern from this description of duties whether the beneficiary is or will be performing primarily managerial or executive duties in relation to these activities or whether the beneficiary will be providing primarily operational services for 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).

The petitioner also indicated that the beneficiary would "exercise extremely broad discretionary authority over the day-to-day operational decisions," and would "oversee the job performance of managerial and administrative staff, who in turn direct the activities of support staff and independent contractors." However, a review of the record does not support the petitioner's description of the beneficiary's delegation of duties and responsibilities to others. When the petition was filed, the petitioner employed two people in addition to the beneficiary: (1) the sales/distribution assistant who is responsible for stocking shelves, interacting with customers, and distributing imported goods, and (2) a receptionist. The beneficiary, thus, would be responsible for performing the remaining day-to-day operations of the company including negotiating foreign sales, establishing distribution outlets, arranging shipping details, and supervising the clerical staff in carrying out their duties. The

record in this matter does not contain independent evidence that the petitioner employed sufficient personnel or utilized independent contractors to carry out the majority of the petitioner's day-to-day business when the petition was filed.

The director's determination that the record did not support an approval of the petition was proper. Although the director could have better articulated his determinations, the record fully supports the conclusion that the beneficiary would be assisting in the day-to-day non-qualifying duties.

Counsel concedes that the director may consider staffing levels as a factor in determining a beneficiary's managerial or executive capacity. Counsel's citation to *Mars Jewelers, Inc. v. INS* is not persuasive. First, a Georgia District Court decided *Mars Jewelers, Inc. v. INS*, a case with no precedential value in this proceeding. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, however the analysis does not have to be followed as a matter of law. *Id.* at 719. Second, the *Mars Jewelers, Inc. v. INS* decision dealt with the Georgia court's application of the 1983 regulations to that matter, not to the application of subsequent and relevant regulations.

The two experts interpretation of the petitioner's reasonable need for an executive is of little probative value in this matter. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). It is apparent that the two experts did not review the petitioner's staffing when the petition was filed. In addition, the experts' interpretation of this beneficiary's duties does not appear to be based on the evidence in the record. As stated above, someone must perform the basic administrative and operational tasks of the petitioner. It is not possible to conclude from the record that the petitioner's three employees could serve the reasonable needs of the petitioner, without the beneficiary contributing to the performance of a majority of the operational tasks of the company. *Matter of Church Scientology International, supra.*

Counsel also submitted an unpublished decision in support of his assertion that the number of employees does not determine whether an individual holds a managerial or executive position. However, counsel's citation to the unpublished case carries little probative value. Counsel has not furnished evidence to establish that the facts of the instant petition are 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 claim that the beneficiary exercised discretion to change the course of the company policy and to serve as a venture capitalist for other international corporations is also not persuasive. The petitioner has only provided evidence that its primary purpose is to operate a liquor and delicatessen shop. The petitioner had a limited number of employees when the petition was filed and the employees provided the stocking, cashiering, and clerical duties of a small convenience store. The petitioner has not provided sufficient evidence to establish that the petitioner's primary purpose was to invest in other companies or otherwise engage in activities foreign to the operation of a liquor and delicatessen shop. Likewise, the record does not establish that the beneficiary's primary assignment for the petitioner has been or will be in a primarily managerial or executive capacity.

In sum, the record does not support a finding that the beneficiary's duties are or will be in a managerial or executive capacity. The petitioner has not provided evidence that the beneficiary will be relieved of performing the petitioner's primary services. The petitioner has not provided sufficient evidence that the beneficiary's assignment will be in a primarily managerial or executive capacity.

In addition, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of a petition's approval, provided the record supports the director's revised opinion. *Matter of Ho, supra*. In this matter, the decision to revoke will be affirmed on the ground that the petitioner has not established that the beneficiary has been primarily employed in a managerial or executive position and that a qualifying relationship has not been established.

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.