



U.S. Department of Justice
Immigration and Naturalization Service

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PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: [Redacted] Office: NEBRASKA SERVICE CENTER

Date: FEB 25 2003

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

IN 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 Service 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, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a company incorporated in the State of Michigan in April of 2000. It is engaged in operating a gas station and convenience shop. 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 primarily managerial or executive capacity. The director further determined that the petitioner had not established its ability to pay the beneficiary the proffered wage.

On appeal, counsel for the petitioner asserts that the beneficiary is the key person in the petitioner's business and is responsible for all executive decisions. Counsel asserts that it has supplied substantial proof of the beneficiary's executive capacity. Counsel further asserts that the Service misread the petitioner's tax return and that the petitioner has the ability to pay the beneficiary the proffered wage.

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.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

(i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the

petitioning United States employer which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

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.

The first issue to be examined in this proceeding is the nature of the beneficiary's employment with the United States entity.

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.

It is noted that the petitioner does not clarify whether the beneficiary claims to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. 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 the petitioner is representing the beneficiary is both an executive and a manager.

The petitioner in its letter supporting the petition stated that

the beneficiary "managed the store from his back office." The petitioner also indicated that it employed two full-time employees and three part-time employees. The petitioner indicated that the beneficiary had the authority to enter into contracts and was the authorized and sole point of contact for all matters relative to the petitioner.

The director requested that the petitioner detail the actual duties the beneficiary would be performing on behalf of the petitioner on a day-to-day basis.

The petitioner provided a list of the beneficiary's duties. The list is repeated in the director's decision and will not be repeated here. The director determined that the job description did not demonstrate that the beneficiary's role with the company would be managerial or executive in nature.

On appeal, counsel submits several reference letters signed on behalf of various companies doing business with the petitioner. The letters essentially state that the beneficiary exercises key functions of the petitioner and is active in the Grand Rapids, Michigan community. Counsel also provides correspondence to the beneficiary and photographs of the beneficiary to demonstrate the beneficiary's standing in the international community. Counsel also submits information showing that the beneficiary is negotiating to expand the existing business. Counsel asserts there is sufficient evidence in the record to support a conclusion that the beneficiary is an executive.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The petitioner's description of the beneficiary's job duties contains phrases such as "[u]nitary decision making authority" and "[d]evelopment and revision of corporate policy procedure, [sic] and regulations," and "[e]stablishment of long and short-term company goals." These phrases are general in nature and paraphrase the statutory definition of executive capacity without conveying an understanding of the beneficiary's everyday activities. The petitioner also borrows phrases from the statutory definition of managerial capacity to explain the beneficiary's job duties. Many of the other phrases used by the petitioner to describe the beneficiary's position are indicative of an individual providing operational services for the petitioner. For example, "[d]eciding on ethnic Indian inventory to be provided, sold, and prices at Eastern Mobil" and deciding what services and inventory are to be added, cut, or maintained" are indicative of an individual performing the duties of a "buyer" for 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).

The petitioner's description of the beneficiary's duties is too general to describe an individual primarily performing executive or managerial tasks for the petitioner.

At the time of filing the petition, the petitioner employed three¹ individuals in addition to the beneficiary. The job positions for these individuals as described on the petitioner's organizational chart are supervisor, customer service advocate, and cashier. Counsel describes the supervisor's duties as managing the two subordinate employees, handling the food counter, and providing assistance to the cashier. The petitioner does not specify the amount of time the "supervisor" spends on supervisory duties and her other duties. The customer service advocate acts as supervisor in the absence of the supervisor and also handles the cash register and attends to customer inquiries and concerns. The cashier in addition to her cashier duties helps price and stock goods. The Service looks behind job titles and artificial organizational charts to understand the basic tasks of a petitioner's employees. In the case at hand, there is nothing in the brief position descriptions provided that supports a conclusion that these subordinate employees are primarily managerial, supervisory, or professional employees.

Counsel and petitioner on appeal provide letters from outside parties as well as photographs to establish the beneficiary's international standing and to support the conclusion that the beneficiary is the "key person" acting on behalf of the petitioner. However, assertions from outside parties that the beneficiary performs in a key position or is acting as an executive are not sufficient for immigration purposes. We note that in this case the beneficiary claims to be the majority shareholder of the petitioner. It is understood that a majority shareholder would have significant authority and play a key role in the operations of a petitioner. However, the record does not support a conclusion that a majority of the beneficiary's duties relate to operational or policy management, and not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are general and fail to completely describe the actual day-to-day duties of the beneficiary. The more descriptive portion of the beneficiary's position duties is more indicative of an individual performing operational tasks for the petitioner. In addition, a

¹ Although the petitioner apparently hired a stockboy at a later date, his name is not included on the Internal Revenue Service (IRS) Form 941 for the quarter ending September 30, 2001.

portion of the position description serves to merely paraphrase the statutory definitions of managerial and executive capacity. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service 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 its ability to pay the beneficiary the proffered wage of \$66,000 per year.

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.

On appeal, counsel provides a letter from the petitioner's accountant to explain the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return for the year 2001. The accountant explained that because the petitioner acquired an existing business in June of 2001, the tax return did not accurately reflect the company's total revenue for the year but for only about six months. The IRS Form 1120 for the year 2001 reflected compensation paid to the beneficiary in the amount of \$13,500 and total net income in the amount of \$30,954.

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 Service 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 petitioner's explanation through its accountant that the tax return covered only six months of the year and, if properly annualized, would double both the beneficiary's compensation and the net income is not persuasive. The Service requires that the petitioner establish its ability to pay the beneficiary at the time the petition is 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). Although the accountant's explanation is understandable, it does not contribute to a finding that the petitioner had the ability to pay the beneficiary the proffered wage at the time of filing. The Service declines to speculate on the continued success or failure of the petitioner's business.

Beyond the decision of the director, the petitioner has not established it has been doing business in a regular, systematic, and continuous manner one full year prior to filing the petition. When examining the regulatory requirement at 8 C.F.R. § 204.5(j)(3)(i)(D), the requirement clearly sets forth that the prospective United States employer must have been doing business for one year.

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

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.

Review of the record discloses that the petitioner purchased a pre-existing business in June of 2001, only a month prior to filing the petition on July 24, 2001. Prior to the purchase of the pre-existing business, the petitioner had incorporated in April of 2000 and entered into a lease agreement for office premises in the Washington D.C. area. The petitioner has also provided evidence that it entered into an agreement for the purchase of the gas station business in November of 2000. However, prior to the actual purchase the petitioner apparently did not generate any revenue. The record provides no evidence that the petitioner provided goods and services prior to the actual purchase of the gas station. The petitioner's accountant seems to confirm this conclusion when explaining the petitioner's ability to pay the beneficiary the proffered wage.

Although we recognize that the petitioner has assumed the existing business's duties, rights, obligations, liabilities, assets, good

will, and is located in the same place as the pre-existing business, we decline to speculate that the petitioner will enjoy the same or similar viability as the pre-existing business for immigration purposes. The petitioner has not satisfied the requirement that it (not a previously existing business owned and managed by unrelated parties) has been doing business for one year prior to filing the petition.

In addition, the petitioner has not established a qualifying relationship with the beneficiary's foreign employer in this case.

The petitioner submitted documentation indicating that the overseas entity was doing business as a sole proprietorship with the beneficiary as its sole proprietor. The petitioner has submitted two share certificates to detail its ownership. Share certificate number two is issued to the beneficiary in the amount of eighty shares. Share certificate number three is issued to another individual in the amount of 20 shares. The petitioner does not provide an explanation regarding share certificate number one. The record does not contain sufficient information to conclusively establish that the petitioner is in a parent/subsidiary or affiliate relationship with an overseas entity as defined in 8 C.F.R. § 204.5(j)(2).

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.