



U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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prevent clearly unwarranted
invasion of personal privacy**

File:

Office: NEBRASKA SERVICE CENTER

Date: JAN 15 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)

IN BEHALF OF PETITIONER:

INSTRUCTIONS:

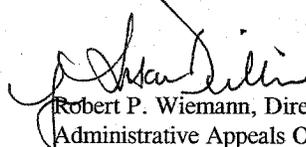
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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 which 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation engaged in the design and development of communication programs for other business. It seeks to employ the beneficiary as its director of acquisitions and investments at a salary of \$120,000 per year. Accordingly, it seeks 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 it had the ability to pay the proffered wage to the beneficiary.

On appeal, counsel for the petitioner asserts that the Service decision is based upon an incorrect application of law and service policy.

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.

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 issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered wage of \$120,000 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.

The petitioner initially provided its unaudited financial statements for the year ending December 31, 1999 in support of its ability to pay the beneficiary the proffered wage. The director requested the petitioner's latest annual report, United States tax return, and audited financial statements to establish the petitioner's ability to pay the proffered wage. In response, the petitioner provided a balance sheet for a three month time period ending March 31, 2001. The balance sheet depicted "salaries managerial" as an expense in the amount of \$128,336.57 for the current month and for the year to date in the amount of \$317,093.25. The petitioner also provided a reviewed but unaudited balance sheet for the year ending December 31, 2000.

The director determined that the record did not contain sufficient independent evidence to demonstrate the petitioner's ability to pay the beneficiary the proffered wage.

On appeal, counsel for the petitioner cited an unpublished decision in support of his assertion that the petitioner was maintaining its ability to pay the proffered wage with the financial backing from its parent company. Counsel also asserted that the petitioner had actually paid the beneficiary the proffered wage. Counsel submitted the petitioner's expense's list and payroll records to demonstrate that the beneficiary was actually paid \$62,500.00 before taxes from the beginning of the fiscal year (2001) to the current pay period (June 6, 2001).

Counsel's assertions are not persuasive. The regulation requires that the *prospective United States employer* (emphasis added) has the ability to pay the proffered wage. The petitioner has not provided evidence that the claimed parent company is bound to continue its support of the petitioner. Whether the claimed parent company will continue to maintain its support of the petitioner is a matter of speculation. Moreover, counsel has not established that the facts of the instant petition are analogous

to those in the cited case and unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c). As noted by the director, the petitioner's net income for the first three months of the year in which the petition was filed (2001) is a negative \$73,754.52. The petitioner has not established that it has sufficient net income to pay the beneficiary the proffered wage.

Counsel's assertion that the petitioner paid the beneficiary a salary of \$62,500 for the first six months of the 2001 year is not adequately supported by the record. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). The balance sheet submitted does not identify the managers paid. The payroll records submitted on appeal, depict the beneficiary's name as well as another name as being paid various sums of money totaling approximately \$122,334. There is no explanation of how the funds are divided between the beneficiary and the other individual. Further there is no explanation why the payroll records do not identify the wage paid to a particular person. The payroll record only shows the beneficiary alone being paid \$13,456.26. The record is deficient in independent evidence demonstrating the actual wage paid to the beneficiary.

The petitioner has not established that it has the ability to pay the beneficiary the proffered wage.

Beyond the decision of the director, the petitioner has not provided adequate evidence of the qualifying relationship between the petitioner and the claimed foreign parent.

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.

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 overseas company.

The petitioner has provided insufficient evidence of a qualifying relationship between itself and a foreign entity. The petitioner represented to an outside accounting service that it is a wholly-owned subsidiary of [REDACTED] as of December 31, 2000 and 1999. The petitioner also represented to the Service that it is a wholly-owned subsidiary of [REDACTED] a Finnish company. To support these representations, the petitioner provided several different incarnations of its Articles of Incorporation. The September 1985 Articles of Incorporation established the petitioner under the name Telemarketing, Inc. and authorized capital stock in the amount of 50,000 shares with a par value of \$1.00 per share. The restated Articles of Incorporation filed December 1985 authorized capital stock in the amount of 250,100 shares with a par value of \$1.00 per share. In January of 1992 the corporation filed a certificate of amendment changing its name to [REDACTED] Inc. In June of 2000 the corporation changed its name to [REDACTED]

[REDACTED] The record is completely deficient in showing if shares were ever issued and if so, in what amounts and to whom. The statement of cash flow for [REDACTED] for the year ending 2000, prepared by an accountant indicates the company received proceeds from issuance of stock in the amount of 7,500. However, there is no record that the petitioner actually issued stock. Currently, the record contains confusing information regarding the name of the petitioner and a lack of information regarding the petitioner's ownership. 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).

Upon review, the petitioner has not established that a qualifying relationship exists between the petitioner and the claimed Finnish parent company. For this additional reason, the petition may not be approved.

Also beyond the decision of the director, the petitioner has not provided a comprehensive job description that describes how the beneficiary will meet all four criteria set out in either the statutory definition of executive or the statutory definition of manager. The petitioner must establish that the beneficiary is acting primarily in an executive capacity and/or in a managerial capacity by providing evidence that the beneficiary's duties comprise duties of each of the four elements of the statutory definitions. Although the record contains a description of the



beneficiary's proposed duties for the United States petitioner, the description is insufficient to establish the beneficiary's daily duties. It is not possible to determine from the description provided that the beneficiary will be performing managerial or executive duties. Further, the record does not contain a description of the beneficiary's duties for the claimed foreign entity. As the appeal will be dismissed for the reasons stated above, these issues are not examined further.

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, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.