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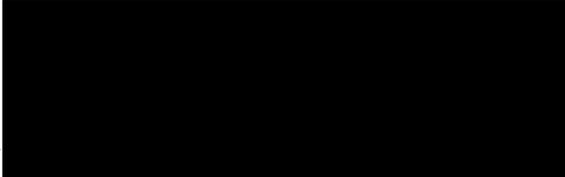
U.S. Department of Justice

Immigration and Naturalization Service

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



File:

Office: TEXAS 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

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Texas Service Center denied the employment-based preference visa and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation that partially owns the [REDACTED]. It seeks to employ the beneficiary as its general manager and, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C).

The director denied the petition on the bases that (1) the proffered position is neither executive nor managerial in nature, and (2) a qualifying relationship does not exist between the petitioning entity and the foreign entity.

On appeal, counsel submits a brief and copies of documents already included in the record. Counsel states, in part, that the Service cannot deny the immigrant petition because of the prior approval of an L-1A nonimmigrant visa in the beneficiary's behalf.

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.

In the initial petition filing, the petitioner described itself as a corporation that ran the [REDACTED]. The petitioner did not indicate on the I-140 petition the number of its employees or its gross annual income. In a letter that accompanied the filing of the I-140 petition, counsel stated that the hotel employed 15 individuals and noted that the petitioner owned 50% of the outstanding shares in the Landmark Hotel. In an August 10, 2000 letter to the director, the petitioner described the proffered

position of general manager as follows:

[The beneficiary] establishes standards for personnel administration and performance, service to patrons, room rates, advertising, publicity, credit, food selection and service and type of patronage to be solicited. He plans dining room, bar and banquet operations. He allocates funds, authorizes expenditures and assists in planning budgets for departments. He interviews, hires and evaluates personnel. He answers complaints and resolves problems. He delegates authority and assigns responsibilities, inspects guests' rooms, public access areas and outside grounds for cleanliness and appearance. He processes reservations and adjusts guests' complaints.

The director denied the petition on the grounds that the proffered position was neither executive nor managerial in nature, and that a qualifying relationship did not exist between the United States and foreign entities. Regarding the proffered position, the director stated that the beneficiary's duties primarily consist of tasks that are necessary to ensure the daily function of the petitioner. Regarding the issue of a qualifying relationship, the director noted that the petitioner did not present any documentary evidence to show that the beneficiary owns the United States entity.

On appeal, counsel states the director erred in finding that the beneficiary is the owner of the United States entity. According to counsel, the beneficiary's father, whose name is similar to the beneficiary's name, owns 2/3 of the outstanding shares in the United States entity and the majority of shares in the foreign entity. Counsel further states that the issues of ownership and whether the proffered position is executive or managerial in nature have already been favorably adjudicated in an L-1A petition that the petitioner filed in the beneficiary's behalf. Counsel claims that this prior approval should be sufficient to approve the immigrant petition.

Prior to discussing the merits of this case, the Service will address counsel's claim that the immigrant petition must be approved because the Service previously approved an L-1A petition in the beneficiary's behalf for the same position and with the same relationship between the foreign and U.S. entities. While counsel claims that the Service is estopped from reviewing issues that have been favorably adjudicated, the United States Supreme Court has held that "the normal estoppel rules applicable to private litigants" do not apply to the Service in its enforcement of "the public policy established by Congress." INS v. Pangilinan, 108 S.Ct. 2210, 2215 (1988) citing INS v. Hibi, 414 U.S. 5, 8 (1973). The Associate Commissioner, through the

Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S. Ct.51 (U.S. 2001). Accordingly, counsel's claim that the Service cannot review issues in this petition that were favorably decided in an L-1A nonimmigrant petition is unfounded.

I. EMPLOYMENT OF THE BENEFICIARY IN AN EXECUTIVE OR MANAGERIAL CAPACITY

Pursuant to 8 C.F.R. 204.5(j)(2):

Executive capacity means an assignment within an organization in which the employee primarily:

- (A) Directs the management of the organization or a major component or function of the organization;
- (B) Establishes the goals and policies of the organization, component, or function;
- (C) Exercises wide latitude in discretionary decision-making; and
- (D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Managerial capacity means an assignment within an organization in which the employee primarily:

- (A) Manages the organization, or a department, subdivision, function, or component of the organization;
- (B) 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;
- (C) 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
- (D) Exercises direction over the day-to-day operations

of the activity or function for which the employee has authority.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. Champion World, Inc. v. I.N.S., 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. (Wash.)).

The petitioner's description of the proffered position does not include any of the high level responsibilities that are specified in the definitions of executive capacity and managerial capacity. The petitioner ascribes to the beneficiary mundane duties such as planning menus, inspecting guest rooms, taking reservations, and setting room rates. None of these duties relate to either directing the management of an organization or managing an organization. Rather, the beneficiary performs the day-to-day tasks that must be executed in order for the hotel to remain functional. These tasks, therefore, require the beneficiary to perform the services of the petitioner's operations. 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 (BIA 1988).

On appeal, counsel notes that the size of the petitioner's operations cannot be the basis of the petition's denial. The Service agrees with counsel's conclusion. If staffing levels are used as a factor in determining whether an individual is an executive or manager, section 101(a)(44)(C) of the Act requires the Service to consider the reasonable needs of the organization in light of its overall purpose and stage of development. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. Systronics Corp. v. I.N.S., 153 F.Supp.2d 7 (D.D.C. 2001).

The petitioner submits an updated organizational chart as evidence that the beneficiary functions at a high level within the petitioner's organizational structure. According to this organizational chart, the beneficiary supervises one promotions manager and 15 other employees who are listed as "housekeepers, reception, concierge, etc." The petitioner does not provide job descriptions for these employees.

The petitioner's submission of a new organizational chart does not mask the fact that, at the time the petition was filed, the proffered position was neither executive nor managerial in nature. When determining whether the proffered position is either

an executive or managerial position, the Service looks at the petitioner's organizational structure at the time the petition was filed. A petitioner must establish eligibility at the time of filing the immigrant petition; an immigrant petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971).

At the time of filing the immigrant petition, the petitioner claimed to employ 15 individuals; however, no evidence of their titles or job descriptions was provided. The petitioner cannot expect the Service to find that an individual has supervisory control over subordinate employees when it fails to specify the names or specific duties of persons supervised by the beneficiary.

See Republic of Transkei v. INS, 923 F.2d 175 (D.C. Cir. 1991). While the petitioner claims to employ one promotions manager in addition to the 15 employees, the Service cannot take into consideration any change to the petitioner's organizational structure that occurred after the filing of the petition. Therefore, the fact that the petitioner hired a promotions manager after the filing of the petition is irrelevant. The petitioner's staffing levels at the time the petition was filed, which included 15 individuals in unknown positions, indicate that the reasonable needs of the petitioner in light of its overall stage of development did not require the services of an individual whose only responsibilities would be to execute primarily executive or managerial duties. Accordingly, the director's decision to deny the petition on this basis will not be disturbed.

II. QUALIFYING RELATIONSHIP BETWEEN THE UNITED STATES AND FOREIGN ENTITIES

Pursuant to 8.C.F.R 204.5(j)(3)(i)(C), a petition shall submit with the I-140 petition evidence that 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. Affiliate and subsidiary are both in defined in 8 C.F.R. 204.5(j)(2):

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.

Here, the foreign company is [REDACTED] corporation organized under the laws of Turkey. The petitioner is [REDACTED] a corporation organized under the laws of Florida. The beneficiary is assigned to work [REDACTED] a partnership that is also organized under the laws of Florida.

Counsel claims that [REDACTED] (the petitioner) and the foreign entity are affiliates because they are owned and controlled by the same individual, [REDACTED]. According to counsel, [REDACTED] owns 2/3 of the petitioner's shares of stock and 99% of the foreign entity's shares of stock.

Counsel's statements on this issue are insufficient. Counsel focuses on the relationship between the foreign entity and the petitioner; however, three entities are involved in this petition - the foreign entity, the petitioner, and the entity that actually employs the beneficiary, which is the [REDACTED]. Therefore, the petitioner is required to establish both that it has a qualifying relationship with the foreign entity and that the [REDACTED] the foreign entity have either an affiliate or subsidiary relationship.

The petitioner is [REDACTED]. According to its articles of incorporation, the petitioner issued 10,000 shares of stock. The record contains one stock certificate that is issued to [REDACTED] for the 10,000 shares. The back of this certificate indicates that [REDACTED] transferred 5,000 of these shares to the beneficiary, and the record contains a second stock certificate, which is issued to the beneficiary for 5,000 shares of stock. This evidence indicates that [REDACTED] who owns the foreign entity, only owns 50% of the petitioner.

The record also contains evidence regarding the [REDACTED] the beneficiary's place of employment. The petitioner [REDACTED] owns 50% of the hotel. [REDACTED] owns the remaining 50% of the hotel.

Mr. [REDACTED] the principal owner of the foreign entity, does not own and control the petitioner or the [REDACTED]. The evidence indicates that [REDACTED] only owns 50% of the petitioner's outstanding shares of stock, and does not have any ownership of the [REDACTED]. Therefore, a qualifying

relationship does not exist among the foreign entity, the petitioner, and the entity that actually employs the beneficiary.

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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.