



B4

U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[Redacted]

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

JAN 29 2003

File: WAC 01 294 56804 Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: Petitioner:
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:

[Redacted]

PUBLIC COPY

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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the employment-based preference visa and the matter is now before the Administrative Appeals Office ("AAO") on appeal. The appeal will be dismissed.

The petitioner is a California corporation that engages in the distribution of computer systems. It seeks to employ the beneficiary as its managing director 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 grounds that (1) the proffered position is neither executive nor managerial in nature, (2) the petitioner has not been doing business, and (3) no qualifying relationship exists between the petitioner and the overseas entity.

On appeal, counsel submits a brief, copies of documents already included in the record, and a letter from the petitioner's certified public accountant (CPA). Counsel states, in part, that the beneficiary possesses the depth and breath of experience required to execute the duties of the proffered position, which counsel describes as "demanding" because it involves the management of an international business.

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 petitioner claims to distribute, market, maintain and support leading brands of computers on a worldwide basis, as a subsidiary of Rosco Ltd., of Russia. At the time of filing the petition on September 24, 2001, the petitioner employed three individuals, including the beneficiary, and had a gross annual income of \$800,000. The petitioner is offering the beneficiary an

approximate salary of \$75,000 per year to be its managing director on a permanent basis.

The director cited three grounds for denying the petition - the proffered position is not managerial or executive in nature, the petitioner has not been doing business, and no qualifying relationship exists between the petitioner and the overseas entity - each of which shall be separately addressed below. However, prior to discussing these issues, the Service notes that counsel claims on appeal that the denial of this immigrant petition is inconsistent with the approval of an L-1A nonimmigrant petition that the petitioner filed in the beneficiary's behalf for the same position as the proffered position. While counsel claims that the original L-1A petition and a subsequent extension were both approved by the director without delay, such evidence, if true, does not warrant an automatic approval of this immigrant petition. In approving the L-1A petition and a subsequent extension, the director may have made a gross error if, as shall be discussed, the facts in the nonimmigrant petition were the same facts in this immigrant petition. The Administrative Appeals Office is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v. INS, Louisiana Philharmonic Orchestra v. INS, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Accordingly, counsel is not persuasive in her claim that this immigrant petition should be approved merely because of a nonimmigrant petition's prior approval.

I. EXECUTIVE OR MANAGERIAL NATURE OF THE PROFFERED POSITION

In the initial petition filing, the petitioner described the proffered position of managing director as follows:

. . . [The beneficiary] exercises broad discretionary [sic] authority in regard to hiring, firing, training, delegation of assignments, promotions and remuneration, contract negotiating and executing [contracts] with the major computer manufacturing companies and so forth. He conducts the company's meetings to review the performance [of] employees and ensures that his staff followed corporate procedures.

[The beneficiary] is also responsible for managing and directing all development activities of [the petitioner] as they pertain to our international operations. He has a key role in the expansion plans, and his continuing presence is essential in bringing the expansion efforts to a successful conclusion. . . . In sum, [the beneficiary] has autonomous control over, and exercises wide latitude and discretionary decision-making in, establishing the most advantageous course of action for the successful management and direction of

our ambitious expansion plans.

The director found the petitioner's initial description of the proffered position vague, and he requested a more detailed description of the proffered position including a breakdown of the number of hours that the beneficiary devotes to each of the proffered position's duties. The director also requested an organizational chart of the petitioner's operations and complete position descriptions of the petitioner's other employees.

In response, the petitioner expanded upon the duties of the proffered position. According to the petitioner, the proffered position entails responsibility for corporate strategy, budgeting, financial planning, marketing and promotional strategy, business solicitation, sales and distribution of computer hardware and software, contract negotiation, and the supervision of the petitioner's daily operations. The petitioner also claimed that the operational tasks were delegated to subordinate employees, who were identified as professional employees with "higher education" in the positions of sales manager, market research, and international customer relations.

The director denied the petition, in part, because the proffered position is not in an executive or managerial capacity. The director noted that the petitioner's organizational structure, which consists of a three-person operation, did not require the services of an individual who would primarily execute executive or managerial tasks.

On appeal, counsel notes that the number of a company's employees is not determinative of whether an individual is acting in a managerial or executive capacity. Counsel maintains that the proffered position's executive or managerial nature is clearly supported by the documentation that the petitioner submitted to the Service. Specifically, counsel states that the beneficiary both manages and directs the petitioner by supervising all purchase orders, supervising and controlling professional employees, maintaining the authority to hire and fire personnel, and making purchasing decisions for the company. Counsel notes that the petitioner has employed various individuals since it was established in 2000; however, counsel asserts that these individuals are employed in professional capacities because each individual possesses at least a baccalaureate degree. Counsel also states that the director erroneously assumed that the beneficiary assists with the day-to-day operational duties, when the evidence indicates that the petitioner's other employees perform these duties.

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.) July 30, 1991) (emphasis in original).

The petitioner's description of the proffered position does not contain the level of detail that is needed in order to show that the proffered position involves the high level responsibilities that are specified in the definition of executive capacity or

managerial capacity. The duties of the proffered position are described in broad terms, and are merely a reiteration of the definitions of executive capacity and managerial capacity.

For example, the petitioner claims that the proffered position is responsible for "corporate strategy" and the "company's national and international operations." However, the petitioner does not associate any specific activities with either of these rather generalized job responsibilities. Thus, the Service cannot determine, with any degree of certainty, that either of these duties is a high level job responsibility that would fit within the definition of executive capacity or managerial capacity.

Specifics are clearly an important indication of whether an applicant's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. Fedin Bros. Co., Ltd. v. Sava, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), aff'd, 905 F.2d 41 (2d. Cir. 1990). Here, the petitioner has not provided any specificity to the job description of the proffered position. Instead, the petitioner relies upon its statement that the scope of the proffered position is extensive. Such a statement is, however, insufficient evidence of the proffered position's level of authority within the petitioner's organizational structure. Simply 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).

Another factor in determining whether the proffered position is either an executive or managerial position is 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).

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 record reveals that at the time of filing the petition on September 24, 2001, the petitioner employed three individuals who filled the positions of managing director (beneficiary), international customer relations, and office administrator/shipping coordinator. Since the filing of the petition, the titles of two employees have changed. For example,

the title for the position "international customer relations" is now "sales manager," and the individual who was identified as the office administrator/shipping coordinator is now identified as the marketing research director.

The petitioner's perfunctory change of its employees' titles will not mask the fact that, at the time the petition was filed, the petitioner did not have a reasonable need for an executive or managerial position considering its overall purpose and stage of development. The petitioner had only been incorporated for less than two years and was not fully engaged in the business in which it claimed to be involved, namely, the distribution, marketing, maintenance and support of leading brands of computers on a worldwide basis. The petitioner submitted evidence that showed it was only engaged in buying computer equipment for shipment to Finland.

More importantly, however, the petitioner did not provide any job descriptions for the positions of international customer relations and office administrator/shipping coordinator. The petitioner cannot expect the Service to conclude that the proffered position involves the supervision of professional, managerial or supervisory employees when it fails to specify the names or specific duties of persons supervised by the beneficiary. Cf. Republic of Transkei v. INS, 923 F.2d 175 (D.C. Cir. 1991). Similarly, the petitioner cannot expect the Service to find that the proffered position is not involved in the day-to-day duties of the petitioner's operations when it fails to explain how it provides the services and/or products of its operations.

The petitioner has not identified how one international customer relations person and one office administrator/shipping coordinator provides the services of a business that has a stated business plan of distributing, marketing, maintaining and supporting computers worldwide. The actual duties themselves reveal the true nature of the employment. Fedin Bros. Co., Ltd. v. Sava, supra. Here, the petitioner has not sustained its burden of establishing that the nature of the employment of the international customer relations person and one office administrator/shipping coordinator is to provide the products and/or the services of the petitioner's business. It is evident from a view of the documents in the record that, at the time of filing the petition, the reasonable needs of the petitioner would have required its purported executive/manager to engage in non-qualifying duties. For the reasons stated above, the petitioner has not met its burden of establishing that the proffered position is in an executive or managerial capacity.

II. DOING BUSINESS

The director also denied the petition on the basis that the petitioner was not engaged in the regular, systematic and continuous provision of goods and/or services. According to the

director, the petitioner is merely an agent of the foreign entity because the evidence in the record shows that the petitioner purchases computer parts and security devices and ships them to Finland.

On appeal, counsel states that the petitioner is not an agent for the overseas entity, as its role is to conduct market research and purchase computer products for export to Russia and other countries in the former Soviet Union. Counsel notes that the petitioner submitted ample evidence that it has been doing business, including copies of the petitioner's federal income tax returns, sales invoices, and business correspondence.

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

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.

8 C.F.R. 204.5(j)(3)(i)(D) stipulates that the petitioner must establish that it has been doing business for at least one year at the time the petition is filed. While the petitioner's income tax returns show that it had a gross annual income of \$1,921,004 in the 2001 calendar year, and gross sales of \$807,000 in the year 2000, there is no evidence that such income was derived from the regular, systematic and continuous provision of goods and/or services. The reported income could have been derived from one or two transactions during each calendar year. The petitioner submits copies of email correspondences, which appear to be orders of computers; however, these email messages are undated. Furthermore, neither copies of wire transfers for monies nor untranslated letters in Russian between the petitioner and the overseas entity establish that the petitioner was engaged in the regular, systematic and continuous provision of goods and/or services for at least one year prior to the filing of the petition. Accordingly, the petitioner has not met its burden of proving that it has been doing business, as that term is defined in the regulations. The petitioner has not overcome this basis of the director's objections to the approval of the petition.

III. QUALIFYING RELATIONSHIP BETWEEN THE UNITED STATES AND OVERSEAS ENTITIES

The director determined that a qualifying relationship did not exist between the petitioner and the overseas entity because the petitioner failed to submit requested evidence of the overseas entity's purchase of the petitioner's outstanding shares of stock, and because the petitioner's federal income tax return for the 2000 and 2001 calendar years did not support the petitioner's claim that the overseas entity owned 51% of the petitioner's outstanding shares of stock.

On appeal, counsel submits a letter from the petitioner's CPA, who states that he erred in his preparation of the petitioner's 2000 and 2001 federal income tax returns. The CPA claims that he relied upon incorrect information in preparing the returns and he submits copies of amended returns. The CPA also states that the director erred in forming some conclusions about information in the tax returns such as the \$14,165 that the petitioner received for its shares of common stock.

Pursuant to 8.C.F.R 204.5(j) (3) (i) (C), a petitioner 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 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.

The CPA's letter regarding his preparation of the petitioner's tax returns does not overcome the director's conclusion that insufficient evidence exists of a qualifying relationship. The director specifically requested evidence of the overseas entity's purchase of the petitioner's outstanding shares of stock. The petitioner did not, however, submit such evidence either in its response to the director's request for evidence or on appeal.

The regulation at 8 C.F.R. 204.5(j) (3) (ii) specifically allows the director to request additional evidence in appropriate cases, as the Service may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. This is particularly relevant if the evidence the petitioner submits as part of the petition, such as copies of its corporate tax return, shows that it received monies for the shares

of stock or shows a different ownership structure than that claimed by the petitioner.

The petitioner simply presents copies of stock certificates and stock ledgers as evidence that the overseas entity owns the petitioner, as well as statements from its CPA that the petitioner is a subsidiary of the overseas entity. Neither the documentary evidence of ownership nor the CPA's statements establish a qualifying relationship between the two entities. The petitioner's CPA states that he relied upon incorrect information to prepare the income tax returns for the 2000 and 2001 calendar years. However, he does not explain from where this allegedly erroneous information came, or identify the evidence he relied upon to amend the tax returns. Furthermore, the CPA does not present evidence that he filed these amended returns with the Internal Revenue Service. Again, simply 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, supra. The director's decision to deny the petition on this basis will also not be disturbed.

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 its burden of showing that the proffered position merits classification as a multinational executive or managerial position. For these reasons, the petition must be denied.

ORDER: The appeal is dismissed.