

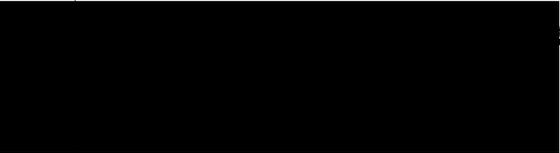


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U.S. Department of Justice
Immigration and Naturalization Service

PUBLIC COPY

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



JAN 30 2003

File: WAC 01 130 54650 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)

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 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, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner claims to be a branch office of a company organized and existing under the laws of England. The petitioner filed a certificate of qualification with the California Secretary of State in April of 1999 to conduct business in the State of California as an entity identified as GISL. The petitioner claims to be involved in the import, export, business development, and consulting business. It seeks to employ the beneficiary as its managing director. 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 had been or would be employed in a primarily executive or managerial 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 Service's decision does not comply with the statute.

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. 8 C.F.R. 204.5(j)(5).

The first issue in this proceeding is whether the beneficiary will perform 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 through its counsel initially stated that the beneficiary had established a presence in the United States for the overseas company by obtaining office space, creating and maintaining contacts, and investigating and overseeing beneficial partnerships and investments for the overseas company. Counsel indicated that the beneficiary started his position in earnest in July of 2000 and that the petitioner wished to retain the services of the beneficiary due to the company's ambitious expansion plans. Counsel also submitted a business plan for the claimed California branch of the company, dated November of 1998. Counsel further submitted copies of agreements appointing either the beneficiary or the petitioner as agent for several companies.

The director requested additional detail on the beneficiary's proposed duties for the petitioner and a list of employees under the beneficiary's supervision.

In response, the petitioner in a letter signed by the beneficiary as president provided the beneficiary's job description stating that the job position included the following duties:

- To find the need for a specific product
- To locate the need
- To approach the end users
- To look for a potential USA company/manufacturer
- To convince the company, now so called Principal to supply
- To provide consultancy services and representations
- To protect Principal's interest in the buying country

The petitioner also noted that it had hired an assistant for the beneficiary in November of 2000 and used the secretarial services of its landlord. The petitioner also noted that it had made contacts with several international companies and had signed agency agreements with several of the companies.

The director determined that the beneficiary's duties were indicative of an individual performing the job functions of the organization rather than managing the functions. The director further determined that the petitioner's employment of one

additional employee indicated that the beneficiary would be serving as a first-line supervisor. The director concluded that the petitioner had not established that the beneficiary's duties had been or would be primarily executive or managerial in nature.

On appeal, counsel for the petitioner asserts that the initial petition specifically states that the beneficiary would be responsible for managing and directing the entire U.S. operation. Counsel also asserts that the beneficiary establishes the goals and policies of the organization as well as implementing the policies per his ability to hire various level employees. Counsel further asserts that the beneficiary has wide latitude in discretion in that he has prepared a business plan and has full authority to hire or terminate staff, and set local policies and procedures. Counsel finally asserts that "the beneficiary's duties are primarily executive in nature given his supervision over other employees, his ability to terminate them at will and acting as a liaison and representative for the foreign company, marketing the services of the U.S. company."

It is noted that the petitioner never specifically clarifies whether the beneficiary is claiming 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. It appears that the beneficiary may be claiming to be employed as both a manager and an executive. However, 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 beneficiary is representing he or she is both an executive and a manager.

Counsel's assertions are without merit. 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 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 is vague and general in nature. The most that can be gleaned from the petitioner's job description, the various agency agreements entered into by the petitioner and the beneficiary, and the petitioner's business plan is that the beneficiary will be performing the operational duties of an agent or representative of the overseas entity. 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). Managers and executives plan, organize, direct, and control an organization's major functions and work through other employees to achieve the organization's goals. The petitioner has only one other employee and the

petitioner has elected not to provide a detailed description of this second employee's duties. It is not possible for the Service to discern from the limited information in the record that the beneficiary will be primarily engaged in duties that relate to operational or policy management rather than 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 will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties indicate that a majority of his duties relate to the performance of basic operational tasks for the petitioner. 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 at the time of filing the petition had been or would be 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.

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 indicated on the Form I-140 that it intended to pay the beneficiary a salary of \$50,000 per year. The priority date for this petition is March 9, 2001. The petitioner provided an Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement for 2000 issued to the beneficiary in the amount of \$36,000. The petitioner also provided its California Form DE-6, Quarterly Wage and Withholding Report for the quarter ending March 31, 2001. The

DE-6 Form revealed compensation paid to the beneficiary in the amount of \$12,000 and compensation paid to a second individual in the amount of \$12,000. The petitioner's IRS Form 1120, U.S. Corporation Income Tax Return for 2000 reveals gross receipts in the amount of \$86,973, compensation paid to officers in the amount of \$36,000, salaries paid in the amount of \$8,000, and net taxable income in the amount of \$15,062. The director noted that the compensation for the additional employee hired in November of 2000 was to be \$48,000. The director reasoned from this information that the petitioner had not established its ability to pay the beneficiary the proffered wage as of the priority date in March of 2001.

On appeal, counsel for the petitioner submits its California Form DE-6, Quarterly Wage and Withholding Report for the quarters ending in June of 2001 and September of 2001. Both DE-6 Forms reveal compensation paid to the beneficiary in the amount of \$12,000 and compensation paid to a second individual in the amount of \$12,000. Counsel also submits several bank statements including one dated in November of 2001 that shows a balance of \$24,517.44. Counsel asserts that the evidence provided is sufficient to show that the petitioner has the ability to pay the beneficiary the proffered wage.

Counsel's assertion is not persuasive. The information in the record is not sufficient to demonstrate that the petitioner has the ability to pay the proffered wage. It is speculative to assume that the monies contained in the petitioner's bank account will be used solely for the purpose of paying the beneficiary and the additional employee the salaries previously paid. It is noted further that based on the monies paid the beneficiary in the previous three quarters, the Service could only speculate that the beneficiary would be paid \$48,000 rather than the \$50,000 salary proffered in the initial petition.

Beyond the decision of the director, the petitioner has not established a qualifying relationship exists between the petitioner and the claimed foreign affiliate.

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 foreign entity.

The petitioner claims that it is a branch office of a foreign entity organized under the laws of England. The petitioner's IRS Form 1120 at Schedule K, Lines 5 and 10 and the accompanying explanatory statement indicate that the beneficiary is the 100 percent owner of the petitioner. The corporate documents submitted for the claimed overseas office of the petitioner reveal that two shares have been issued by the overseas entity. The latest financial statement for the overseas entity provided by the

petitioner reveals that the ultimate parent company and controlling entity of the overseas entity is a company incorporated in Switzerland. The petitioner provides no evidence that relates its ownership by the beneficiary to the ownership of the overseas entity. The petitioner has not established that a qualifying relationship exists between it and the beneficiary's overseas employer.

In addition, the petitioner has not established that it has been doing business for at least one year prior to filing the petition as required by 8 C.F.R. 204.5(j) (3) (i) (D).

8 C.F.R. 204.5(j) (2) defines the phrase "doing business" as follows:

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.

Counsel for the petitioner states that the beneficiary started his position with the petitioner in earnest in July of 2000. The earliest agreement entered into by the petitioner is dated November 1, 2000. The only other activity of the petitioner appears to be an investment in a soccer institute in June of 2000. The petitioner has not demonstrated that it began actual operations before March 10, 2000. In addition, the petitioner has not demonstrated that it is engaged in the actual provision of goods and/or services rather than being an agent of the claimed overseas entity.

Finally, the petitioner has not established that the beneficiary was engaged in managerial or executive duties for his previous overseas employer. The petitioner's response to the director's request for evidence on this issue does not provide a comprehensive description of the beneficiary's duties for the overseas employer. The petitioner indicates that the beneficiary trained the new owners and directors and that an organizational chart could not be expected for a company the size of the petitioner but that "all staff were [sic] busy doing a part to settle the teething problems." The petitioner also indicated that the beneficiary was involved in procurement and promotion for the overseas employer. The beneficiary thus appears to be involved in providing operational services for the overseas entity rather than providing managerial or executive services for the overseas entity.

For these additional reasons, the petition may 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.