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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
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Washington, DC 20536

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

JUL 03 2003

FILE: [redacted] OFFICE: TEXAS SERVICE CENTER DATE:

IN RE: Petitioner: [redacted]
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)

ON 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 Bureau of Citizenship and Immigration Services (Bureau) 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 Director of the Texas Service Center denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a Florida corporation that seeks to employ the beneficiary as its president. The petitioner, 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 because: (1) the proffered position is not in an executive or managerial capacity; and (2) the petitioner has not been "doing business" as that term is defined at 8 C.F.R. § 204.5(j)(2).

On appeal, counsel submits a brief. Counsel requests oral argument before the Administrative Appeals Office to "clarify the special circumstances in this case . . . ." He states that the director misinterpreted the description of the beneficiary's daily activities.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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):
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> * * *
>
> (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, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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 an executive or managerial capacity. Such a

statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is affiliated with the Serbian entity, Indantren; (2) sells and repairs boats; and (3) employs three persons, including the beneficiary, who is currently occupying the proffered position as a nonimmigrant intracompany transferee (L-1A). The petitioner is offering to employ the beneficiary permanently at a salary of $500 per week.

The first issue to be discussed in this proceeding is whether the proffered position of president is in an executive or managerial capacity.

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-
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> (i) manages the organization, or a department, subdivision, function, or component of the organization;
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> (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.

At the time of filing the petition with the Texas Service Center on July 5, 2001, the petitioner stated that the beneficiary had been employed as its president since July 2000, and that, upon approval of this petition, the beneficiary would continue:

1. Drafting and adhering to [an] annual operating budget projecting alternative revenues and expenses under varying assumptions;

2. Projecting and managing the company's cash flow under varying conditions, including negotiation of short and long term credit with our banker as deemed necessary;

3. Negotiation [sic] with suppliers to contract for the most advantageous purchase terms;

4. Set[ting] company policy for employment of personnel to be carried out by the Director of Purchasing and Sales. Hire [sic] and terminate [sic] the Director of Purchasing and Sales who hires and terminates other employees; [and]

5. Preparation [sic] of sale projections and analysis of success of company's marketing efforts in terms of expenditures compared to revenues.

The petitioner also stated that it employed a director of purchasing and sales, as well as a sales representative. The petitioner asserted that these individuals managed the purchase and sales of boats, while outside contractors performed the boat repair and maintenance. The petitioner also submitted an organizational chart, which showed the beneficiary as the president of the company.

The director was not satisfied with the petitioner's initial evidence. Therefore, on March 19, 2002, the director requested the petitioner to submit: (1) a list of the employees by name and title, and a brief description of their duties; (2) additional

details regarding the proffered position, including a list of the beneficiary's daily duties and the percentage of time he spends on these duties; and (3) evidence of employment contracts with outside contractors.

In response, counsel stated that the petitioner employed one sales manager and one sales associate. According to counsel, the sales manager is responsible for sales in the United States, and the sales associate assists the sales manager with researching potential sales opportunities and contacting clients. Regarding the beneficiary's job duties, counsel stated:

> On a daily basis, [the beneficiary] looks to source/purchase yachts . . . . As such, he often visits the yacht auctions that are held in Southern Florida on a weekly basis. . . . [H]e enthusiastically performs the restoration and repair of [the petitioner's yachts]. For the past year, he has personally devoted most of his time to the restoration of [a yacht]. . . . For repairs that he is unable to perform himself, . . . he supervises the outsourced mechanical work. (Percentage = 70%)
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> Also, [the beneficiary] is currently devoting some of his time on [sic] the design and development of [the petitioner's] . . . website. . . . (Percentage 5%). . . .

The director determined that that the proffered position was not in an executive or managerial capacity because the beneficiary spends 70 percent of his time restoring and repairing boats. According to the director, the beneficiary performs the services of the petitioner's company.

On appeal, counsel states that, when responding to the director's request for evidence, he was not clear when describing the nature of the beneficiary's duties. Counsel states that the beneficiary does not personally restore or repair boats; he hires independent contractors to do this work. In support of his claim, counsel submits copies of invoices of these contractors' services. Counsel also states: "The beneficiary's enthusiasm and personal devotion should not be misinterpreted to infer the labor onto him but should rather demonstrate the beneficiary's direction and supervision of independent contractors performing and repairs and restorations." Counsel also asserts that the petitioner failed to previously submit evidence showing that the beneficiary was involved in the negotiation and execution of a contract with a Spanish yacht supplier. Counsel maintains that the beneficiary sets the petitioner's sales goals, and has complete control over the petitioner's operations.

Counsel does not present a persuasive claim for classifying the proffered position as managerial or executive according to the definition of managerial or executive capacity. In his prior correspondence with the director, counsel stated that the beneficiary was restoring and repairing a yacht; he also stated that outside contractors performed any work the beneficiary could not handle. On appeal, however, counsel now claims that the beneficiary does not perform any restoration or repair work, and he submits copies of invoices to establish that this type of work is accomplished by outside contractors.

A review of the invoices submitted on appeal, however, reveals that they are identical to the invoices that were previously submitted to support counsel's claim that the petitioner contracted with outside personnel for any "repairs that [the beneficiary] is unable to perform himself . . . ." The submission of the same invoices to prove now that the beneficiary does not perform any of the repair and restoration work is inconsistent. Counsel clearly stated in his prior correspondence with the Bureau that the beneficiary "performs the restoration and repairs of [the petitioner's] yachts" and "has personally devoted most of his time to the restoration of [a yacht] . . . ." The director, in concluding that these duties were not indicative of a manager or an executive, did not misinterpret the terms "enthusiastically" and "personally" as counsel now states on appeal. The petitioner has not resolved these inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Additionally, the petitioner has not established that it employs the sales manager and sales associate it claims. Although the petitioner claims that the sales manager and sales associate relieve the beneficiary from performing any sales activities, the petitioner's 2001 corporate income tax return shows that it paid $10,070 in wages only and $16,784 in compensation to officers.[1] There is no documentary evidence, such as a copy of a Form W-2, wage and tax statement, to show to whom the petitioner paid these wages and compensation. Failing to submit 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).

Fundamental to the definitions of managerial and executive capacity found at section 101(a)(44)(A) and (B), 8 U.S.C. §§ 1101(a)(44)(A) and (B), is the term "primarily." A petitioner must not only establish that the beneficiary executes the high level responsibilities specified in one of the definitions; it must also establish that the beneficiary primarily performs these specified

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[1] The Bureau notes that the petitioner failed to indicate the name of the officer to whom it paid the $16,784. On Schedule E, line 1, the petitioner indicated "Officers' [sic] Compensation" instead of the name of individual.

responsibilities and does not spend a majority of his or her time either producing the petitioner's product or providing the petitioner's services. Although counsel maintains that the beneficiary sets the petitioner's sales goals and oversees its operations, the evidence shows that these duties are secondary to the beneficiary's principal job of restoring and repairing boats. Similarly, the beneficiary's other job responsibility of setting up the petitioner's website, would also diminish the time he could devote to performing the duties listed in the definitions of managerial or executive capacity.

Based upon the above discussion, the petitioner has not demonstrated that the position offered to the beneficiary is in an executive or managerial capacity. Therefore, the director's decision to deny the petition shall not be disturbed.

The second issue to be discussed is whether the petitioner had been doing business at the time the petition was filed.

A petitioner must demonstrate that it had been doing business for at least one year at the time it filed the petition. 8 C.F.R. § 204.5(j)(3)(i)(D). The term *doing business* is defined as "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)(2).

As stated previously, the petitioner filed the I-140 petition on July 5, 2001. Therefore, the petitioner must establish that, on or before July 5, 2000, it had been regularly, systematically, and continuously providing goods and/or services.

In a letter that accompanied the filing of the petition, the petitioner stated: "[The petitioner] has just commenced its first year of operation. [The petitioner] was not able to begin its operations until its long awaited first boat purchase in May 2001. . . . [The petitioner] has now been operating its boat repair and sales business . . . for the past two months."

In her March 19, 2002 request for evidence, the director asked the petitioner to submit documentary evidence that it had been engaged in the regular, systematic and continuous provision of goods and/or services since July 2000. In response, the petitioner submitted: an offer from the petitioner to purchase a yacht from Woldwide Yacht Sales, Inc.; a cashier's check towards the purchase of the yacht; and several invoices for yacht repair work done by outside contractors. The director denied the petition because the submitted evidence failed to "clearly establish" that the petitioner had been doing business for at least one year.

On appeal, counsel claims that the petitioner was formed and became operational on June 2, 2000, which is more than one year prior to the filing of the petition. As evidence to support his claims, counsel submits a letter from the petitioner's bank, which indicates that the beneficiary opened a corporate account on June 8, 2000 and deposited $45,000 in the account. Counsel also submits a copy of the petitioner's lease for office space. According to counsel, the petitioner purchased one yacht, attempted to purchase several other yachts, and prepared a business plan. Counsel states that these activities indicate that the petitioner had been doing business for the requisite period of time.

The evidence in the record fails to establish that the petitioner was engaged in the regular, systematic and continuous provision of goods and/or service on or before July 5, 2000. In the initial petition filing, the petitioner indicated clearly that it had not begun operating until approximately May 2001, and the petitioner's 2001 corporate income tax return does not show that the petitioner had any gross sales or receipts in the 2001 calendar year. Establishing a bank account and leasing office space have no relationship to providing goods and/or services on a regular, systematic and continuous basis. 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 director's decision on this issue shall also not be disturbed.

Beyond the decision of the director, there is insufficient evidence of the petitioner's ability to pay the proffered wage of $500 per week.

Pursuant to 8 C.F.R. § 204.5(g)(2):

> *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 I-140 petition was filed on July 5, 2002 and, therefore, the petitioner must establish that it had the ability to pay the proffered wage as of this date. Accordingly, the petitioner's financial position during the 2000 and 2001 calendar years is relevant to this proceeding.

The record does not contain any evidence regarding the petitioner's financial position for the six months in 2000 that it had been incorporated. Regarding its financial position for the year 2001, the petitioner submitted a copy of its 2001 corporate income tax return. This return showed a loss in income of $32,245, and net assets of $2,382 (assets minus liabilities). Additionally, the return showed that the petitioner paid $16,784 in compensation to officers and $10,070 in wages; however, no information was provided regarding to whom these monies were paid.

The petitioner is offering a salary to the beneficiary of $500 per week, which is $26,000 per year. The petitioner, at the time of filing, did not have the net income or assets to pay the proffered wage, and it did not show that it paid this wage to the beneficiary in the 2001 calendar year. As the appeal is dismissed on other grounds, however, this issue will not be examined further.

Finally, the petitioner requests oral argument. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, the Bureau has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings fully represents the facts and issues in this case. Consequently, the request for oral argument is denied.

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. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.