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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

PUBLIC COPY

[Redacted]

JUL 03 2003

FILE: [Redacted] OFFICE: NEBRASKA SERVICE CENTER DATE:

IN RE: Petitioner: [Redacted]
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)

ON BEHALF OF PETITIONER:

[Redacted]

**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 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Nebraska 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 an Ohio 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 on the ground that the proffered position is not in an executive or managerial capacity.

On appeal, counsel submits a brief. Counsel states, in part, that the petitioner employs a sufficient number of individuals so the beneficiary can devote his time to managing the petitioner. Counsel submits copies of the petitioner's income tax returns and payroll records, as well as a letter from one of the petitioner's clients.

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):

* * *

- (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 a subsidiary of Constructii-Finisaj "Nicula" SRL of Romania; (2) is a construction company; and (3) employs the beneficiary, who is currently occupying the proffered position as a nonimmigrant intracompany transferee (L-1A), as well as a varying number of persons depending upon the particular construction project. The petitioner is offering to employ the beneficiary permanently at a salary of \$35,000 per year.

The issue to be discussed in this proceeding is whether the proffered position of president is in a managerial or executive 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-

- (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.

At the time of filing the petition with the Nebraska Service Center on October 16, 2001, the petitioner stated:

[The beneficiary's] duties shall continue to be that he will be responsible for the entire business operation of said company, including analyzing the construction industry in the United States, establish[ing] company business and marketing plans and policies to effectuate a greater share of the construction market in the Cleveland metropolitan area, achiev[ing] a niche for "European-styles" [sic] finishings, implement[ing] said plans and policies to institute a viable business enterprise, negotiat[ing], bid[ding] and enter[ing] into construction contracts, secur[ing] financing for construction projects, interview[ing], hir[ing], supervis[ing], disciplin[ing] and fir[ing], if necessary, employees, artisans, and sub-contractors, oversee[ing] construction projects and exercis[ing] complete discretion with regard to all aspects of the business operations of our American subsidiary.

The petitioner failed to indicate on the I-140 petition its current number of employees. Therefore, on January 8, 2002, the director requested a description of the beneficiary's intended employment in the United States to include, the number of employees to be supervised, along with these employees' job titles and position descriptions. Additionally, the director requested an organizational chart.

In response, the petitioner submitted a letter from its certified public accountant (CPA), who stated that, because the beneficiary is the sole owner and president of the petitioner, the beneficiary necessarily directs the management of the organization, among other duties. The petitioner also submitted: copies of its 1998, 1999, and 2000 corporate income tax returns; a list of its employees during the past three years; and a mission statement. Although the petitioner stated that it was submitting an organizational chart, this chart does not appear in the record of proceeding.

The director denied the petition because the petitioner failed to demonstrate that the beneficiary would manage a subordinate staff of professional, supervisory, or managerial employees who would relieve him from performing nonqualifying duties. The director noted that the petitioner's corporate income tax returns indicated that no salaries or wages were paid in the 2000 calendar year. The director concluded from this information that the beneficiary was personally performing the tasks necessary for the petitioner to continue its operations, instead of directing the performance of these tasks.

On appeal, counsel submits copies of payroll records for the 1999 through 2001 years, and states that this evidence establishes that employees provide the petitioner's services while the beneficiary oversees the management of the company. Counsel states that the beneficiary maintains personal contact with his clients only to give them the "European touch."

Counsel's statements on appeal do not merit a withdrawal of the director's decision to deny the petition. The evidence of record fails to establish that the beneficiary would primarily execute the high level responsibilities specified in the definition of managerial or executive capacity.

When determining how a beneficiary functions within a petitioner's operations, the Bureau looks first to the beneficiary's job description. See 8 C.F.R. § 204.5(j)(5). The beneficiary's job description indicates that he performs both managerial/executive and nonmanagerial/nonexecutive duties. Although establishing goals and policies could be considered responsibilities of a manager or executive, duties that include negotiating contracts, bidding on projects, securing financing for projects, and overseeing projects, are not managerial or executive. The petitioner does not document what proportion of the beneficiary's duties are managerial/executive functions and what proportion are nonmanagerial/nonexecutive functions. Therefore, the petitioner fails to establish that the position fits the definition of managerial or executive capacity. *IKEA US, Inc., v. U.S. Dept. of Justice I.N.S.*, 48 F.Supp. 2d 22 (D.D.C. 1999), *aff'd*, 1999 WL 825420 (D.C. Cir. 1999).

Regarding the petitioner's staffing levels, the petitioner has failed to show that the beneficiary manages or directs the provision of its services rather than performs the tasks necessary for the petitioner to provide its services in the construction industry. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988). Counsel's submission of the petitioner's payroll records does not clarify how the employment of these individuals allows the beneficiary to primarily execute managerial or executive responsibilities. The payroll records show only that the petitioner paid individuals for their services; the evidence does

not, however, describe the services that these individuals provided. The absence of evidence to illustrate how the beneficiary primarily performs the tasks outlined in the definition of managerial or executive capacity in light of the petitioner's fluctuating staffing levels precludes the Bureau from finding that the beneficiary works in a managerial or executive capacity. In particular, the CPA's letter, in which he certifies that the beneficiary qualifies as a multinational executive or manager, is not persuasive. See *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Although the CPA attests that, among other duties, the beneficiary establishes goals and polices, no evidence in the record shows that these duties are the beneficiary's primary responsibility. Sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B).

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

Beyond the decision of the director, there is insufficient evidence that: (1) a qualifying relationship exists between the foreign and U.S. entities; (2) the beneficiary was employed in a managerial or executive capacity by a qualifying foreign entity for the required period of time; and (3) the petitioner had been doing business for at least one year at the time the petition was filed.

Regarding its relationship as a subsidiary to the Romanian entity, Constructii-Finisaj "Nicula" SRL, the petitioner submitted copies of U.S. Income Tax Returns for an S Corporation (Form 1120S). To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any non-resident alien shareholders. See Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a foreign corporation owns it in any part. Accordingly, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity. This conflicting information has not been resolved by competent objective evidence. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988). Therefore, the record cannot establish the existence of a qualifying relationship.

In turn, because the petitioner has not established the existence of a qualifying foreign entity, the beneficiary cannot meet the requirement of 8 C.F.R. § 204.5(j)(3)(i)(B). The regulation states that the beneficiary must have been employed by the qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States in a nonimmigrant status. Additionally, even if the petitioner had established a qualifying relationship with the Romanian entity, the beneficiary's job

description for his foreign employment mirrors his job description for the U.S. entity. As the beneficiary's job description does not establish that he is employed in a managerial or executive capacity in the United States, it also would not show his employment as a manager or executive with the foreign entity.

Finally, 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). Although the petitioner's 2000 income tax returns show that it had gross receipts/sales of \$90,355, the petitioner did not show from where this income was derived. The petitioner did not submit copies of construction contracts or any other documentary evidence to show that this income was derived from regularly, systematically and continuously providing its services; this income could have come from just one short-term project during the year. Accordingly, the petitioner has not met its burden of proving that it has been doing business, as the regulations define that term.

Although the director did not address these issues in the denial letter, they are, nevertheless, essential to establishing eligibility for this immigrant visa classification. However, as the appeal is being dismissed on another ground, these issues will not be examined further.

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.