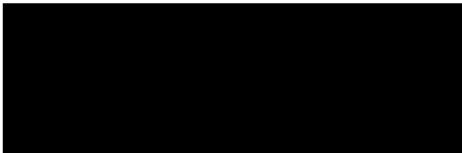


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BY

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, D.C. 20536



File: EAC 01 108 50665 Office: VERMONT SERVICE CENTER

Date: **JUN 19 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)

ON BEHALF OF PETITIONER:



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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is engaged in business involving the printing and advertising industry. It seeks to employ the beneficiary as its vice-president. Accordingly, it 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's foreign employer and the United States petitioner enjoyed a qualifying relationship as defined by the regulations. The director also determined that the petitioner had not established that the beneficiary had been or would be employed in a managerial or executive capacity for the United States employer.

The AAO notes that the petitioner also filed a nonimmigrant worker petition pursuant to section 101(a)(15)(L) for this same beneficiary, receipt number EAC 02 176 51197. The Director, Vermont Service Center denied that petition on August 8, 2002 on the grounds that the petitioner had not established the beneficiary's position as a managerial or executive position. The petitioner appealed the decision and the appeal was dismissed.

On appeal, counsel for the petitioner submits a brief and asserts the information in the brief more accurately reflects the beneficiary's employment with the petitioner. Counsel asserts that the beneficiary should be approved as a multi-national manager.

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 petitioner has established a qualifying relationship between the United States petitioner and the beneficiary's overseas employer. 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 regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

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.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

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 petitioner initially stated that it was a wholly owned subsidiary of the beneficiary's overseas employer. The petitioner also provided a copy of its Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation for the year 1999. The IRS Form 1120S indicated that an individual owned the United States petitioner.

The director requested documentary evidence to establish the ownership and control of the petitioner.

In response, the petitioner submitted a copy of its minutes of the organizational meeting held on January 4, 1999. The board of directors at the organizational meeting resolved to operate the petitioner as a small business corporation pursuant to Internal Revenue Code § 1244(c)(1), as amended, but then issued its stock to the beneficiary's overseas employer.

As noted by the director, only United States residents and partnerships may hold ownership in subchapter S corporations. The director also noted the lack of explanation by the petitioner regarding its tax status and the evidence that one individual owned 100 percent of its shares. The director determined, based on the conflicting information in the record regarding the ownership and control of the petitioner, that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer.

On appeal, counsel for the petitioner explains that the foreign entity initially appointed an individual to start up the subsidiary. Counsel indicates that proper research regarding the United States tax laws was not done and that the appointed individual inadvertently established a subchapter S corporation. Counsel also asserts that the internal corporate structure is currently being re-organized to address the relevant corporate ownership issues. Counsel requests that the petitioner's oversight regarding its ownership not prejudice the petition.

Counsel's request cannot be granted. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Currently the record does not contain consistent evidence that the petitioner is a subsidiary of the beneficiary's overseas employer. The petitioner has not submitted amended tax returns or other documentation providing a consistent record regarding its ownership and control. Counsel's explanation and assertion that the corporation is currently undergoing re-organization is not sufficient to establish the petitioner's qualifying relationship at the time the petition was filed.

The second 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 initially stated that the beneficiary would be responsible for supervising project development, managing the daily operations in connection with marketing and distribution, and developing and implementing company policy in connection with customer relations, product development and distribution. The petitioner concluded that the beneficiary would be "responsible for supervising and monitoring all aspects of operations including but not limited to marketing and advertising, through subordinate manager and staff."

The director requested complete position descriptions for all of the petitioner's employees, including a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis. The director also requested a copy of the petitioner's IRS Forms 941, Employer's Quarterly Tax Returns including the page listing the employee's names, and copies of the IRS Forms W-2, Wage and Tax Statement and Forms 1099, Miscellaneous Income issued for the year 2000.

In response, the petitioner stated that the president's position involved responsibility for "establishing and implementing corporate goal and direction," and "overseeing the duties of the Vice President," and "coordinating company objectives with parent company." The petitioner stated that the beneficiary as vice-president was responsible for the "daily activities of the corporation, including but not limited to, implementing President's directives of company polices [sic] and objectives." The petitioner also stated that the beneficiary assisted the president in establishing company sales objectives and strategies, supervised and managed both the operations and administration departments, reviewed the performance of the operation and administrative staff, and coordinated company strategies with the parent company.

The petitioner further provided brief position descriptions for an operations manager, office staff, and three sales representatives. The petitioner indicated that the operations manager was responsible for the technical aspect of the company's activities. The petitioner indicated that the office staff person was responsible for general office administration including transactional activities involving sales, billing, shopping, accounts receivable and payable. The petitioner indicated the independent sales representatives were responsible for obtaining and coordinating sales from customers.

The petitioner provided a copy of IRS Forms W-2 for the beneficiary and the petitioner's president, issued in the year 2000. The petitioner also provided a copy of an IRS Form 1099 issued in 2000 to the individual identified as the operations manager. The petitioner provided a second IRS Form 1099 issued in 2000 to an individual whose position was not identified. The petitioner's IRS Form 941 for the quarter ending in the period in which the petition was filed did not include a page listing employees by name. The IRS Form 941 indicated that the

petitioner employed two individuals for the quarter and that salaries in the amount of \$25,800 had been paid.

The director determined from the documentary evidence submitted that the petitioner employed two individuals directly and had paid two contract employees. The director determined that the petitioner had not substantiated the employment of seven individuals through documentary evidence. The director noted that the petitioner had not provided comprehensive position descriptions for its staff and that the position descriptions for the president and vice-president were duplicative. The director concluded that the record did not demonstrate that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner implies that the beneficiary's position as vice-president of the corporation indicates that his duties are managerial and executive. Counsel also asserts that the beneficiary is responsible for establishing company objectives, policies, and strategies. Counsel further asserts that the petitioner provided position descriptions for all its employees and that the beneficiary is responsible for supervision and management of all employees, except the president.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). The descriptions of the beneficiary's job duties are vague and general and do not convey an understanding of the beneficiary's actual daily duties. The petitioner's initial description indicated that the beneficiary would be supervising project development, handling the daily operations of marketing and distribution, and implementing company policies. It is not possible to determine from this information whether the beneficiary will be performing executive or managerial duties relating to these tasks or whether the beneficiary will be actually performing the tasks. 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).

In addition, the director noted, the petitioner did not provide documentary evidence substantiating the employment of personnel other than the beneficiary, the president, the operations manager as an independent contractor, and one other contractor whose position was not identified. The record does not contain independent documentation of the employment of the sales representatives or the administrative person. The position descriptions associated with the three verifiable staff members (the president, vice-president, and operations manager) do not allow a conclusion that the beneficiary is primarily performing executive or managerial duties for the petitioner. The

petitioner has not provided sufficient supporting information to establish that the beneficiary is supervising all aspects of the petitioner's operations through a subordinate manager and staff. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). At most, it appears that the beneficiary is a first-line supervisor over a non-professional, non-managerial, and non-supervisory employee.

In sum, the record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a managerial or executive capacity. The descriptions of the beneficiary's job duties are vague and general and do not convey an understanding of the beneficiary's actual daily activities. 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 Bureau is not compelled to deem the beneficiary to be a manager simply because the beneficiary possesses a managerial title. The petitioner has not established that the beneficiary has been or will be employed primarily in a managerial capacity.

ORDER: The appeal is dismissed.