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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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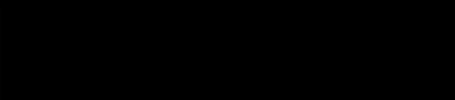
File:



Office: TEXAS SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:



MAR 19 2003

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:



Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

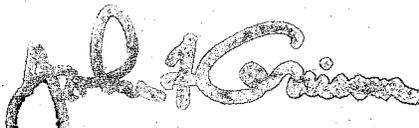
INSTRUCTIONS:

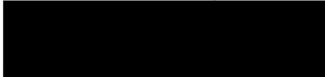
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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, Director
Administrative Appeals Office



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

The petitioner is a corporation organized in the State of Florida in September 1998. It is engaged in importing and exporting computer products. It seeks to employ the beneficiary as its import and export manager. 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 would be performing in a managerial or executive capacity. The director also 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 Bureau erred in its decision.

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 initially set forth the beneficiary's proposed responsibilities as import/export manager as follows:

- setting [sic] policies, objectives, and goals for his department;
- reviewing [sic] activity reports, financial records, and sales forecasts, as well as information on merchandise;
- making [sic] decisions regarding the selection of products to be imported and distributed.
- preparing [sic] reports and forecasts for the company's directors to examine, which will be used to set and revise objectives and coordinate functions and operations of the company.
- negotiating [sic] contracts with major distributors, customers, and shippers and otherwise representing the company both legally and commercially.
- directing [sic] and supervising the staff responsible for the ordering and receiving of merchandise, preparation and examination of shipping and customs documents, and the preparation of activity reports.
- He will have full authority over personnel matters, including hiring and dismissals, and will rely on reports and recommendations from the department's supervisors to make personnel decisions.

The petitioner also indicated that the beneficiary would supervise three employees currently in his department and would oversee the hiring of additional staff as the company's activities expanded.

The director requested evidence of the number of departments in the company, the number of supervisors, and other personnel. The director also requested payroll information for all personnel and a description of their job duties.

In the response to the director's request for evidence dated February 4, 2002, the petitioner stated that the beneficiary had just begun working for the petitioner pursuant to an approved L-1A visa classification. The petitioner also indicated that the petitioner employed two individuals, an administrator and a purchasing and distribution manager. The petitioner indicated

that both of these employees were under the beneficiary's supervision. The petitioner also provided a copy of its Florida Form UCT-6, Employer's Quarterly Return for the quarter ending December 31, 2001. The Florida Form UCT-6 listed only the two employees holding the administrator and purchasing and distribution manager positions.

The petitioner also provided its organizational chart. The chart showed the purchasing and distribution manager's position and the beneficiary's position of import/export manager on the same tier in the organizational hierarchy. The organizational chart also reflected a number of positions in the organizational hierarchy were not yet filled or were filled by independent contractors.

The director determined that the beneficiary supervised two non-professional, non-managerial employees. The director determined, based on the record, that the beneficiary would not be primarily performing executive or managerial duties.

On appeal, counsel asserts that a sales and marketing manager, a warehouse supervisor, an administrator, and a secretary report to the beneficiary. Counsel also cites several unpublished decisions in support of his claim that a general sales manager and a sales manager could be managers. Counsel concludes from these unpublished decisions that the sales and marketing manager is clearly a professional position. Counsel asserts that the beneficiary is directing the management of the import and export of computers, the heart of the petitioner's business. Counsel asserts that the beneficiary manages the sales and warehouse departments, also the heart of the business. Counsel finally asserts that the beneficiary is a functional manager and cites an unpublished decision in support of his claim.

Counsel's assertions are not persuasive. In 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 petitioner has not provided sufficient evidence that it actually employed individuals that would enable the beneficiary to carry out the duties outlined in the petitioner's job description. 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 the time the petition was filed, the petitioner apparently employed two individuals.¹ The petitioner provided contradictory

¹ The petitioner has not provided independent evidence, in the

information regarding the beneficiary's purported supervisory duties of these two individuals. On one hand, the petitioner stated that the beneficiary was responsible for supervising both of these individuals; however, on the other hand, the petitioner provided an organizational chart contradicting this statement. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

On appeal, counsel for the petitioner further asserts that the beneficiary is supervising the individuals reflected as subordinate to the beneficiary on the organizational chart but notes that some of the positions have not been yet been filled. A petitioner must, however, 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 Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel's assertions that the beneficiary directs the management of the import and export of computers and manages the sales and warehouse departments are also not persuasive. First, 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). Second, the petitioner provided no evidence that employees present when the petition was filed actually performed the day-to-day tasks associated with the import, export, sales, and warehousing of computers. The petitioner references the use of independent contractors but does not provide supporting evidence that independent contractors were employed. The petitioner has not provided evidence that the beneficiary will be relieved from the operational tasks associated with these duties. 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).

Counsel's assertion that the beneficiary is a functional manager and a citation to an unpublished decision in support of this assertion is not persuasive. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the unpublished decision cited. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. § 103.3(c).

In sum, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial

form of government reports, that it employed any staff in January 2001, the month the petition was filed.

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 are general and are not supported by the record. 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 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 will 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 of \$25,000 per year.

In pertinent part, 8 C.F.R. § 204.5(g)(2) states:

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 evidence of record does not overcome the director's determination on this issue.

The petitioner has submitted a copy of its Internal Revenue Service (IRS) Form 1120 for the year 2000. The IRS Form 1120 reveals gross receipts of \$1,938,212, salaries paid of \$59,900, and total taxable income of \$12,297. The petitioner submits on appeal, a statement of income and expenses for the year 2001. Counsel asserts that, when reviewed together, these documents demonstrate that the petitioner can support the addition of an import/export manager.

In determining the petitioner's ability to pay the proffered wage, the Service will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647

(N.D.Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). The Form I-140 states that the petitioner proffered the beneficiary a wage of \$25,000 per year; however, the tax return filed for the year 2000 reported total taxable income of \$12,297. The petitioner has not submitted sufficient independent evidence, in the form of tax returns or audited financial statements, to overcome the director's decision on this issue.

Beyond the decision of the director, the record does not contain sufficient evidence to establish that the petitioner was engaged in doing business for one year prior to the filing of the petition as required by regulation. See 8 C.F.R. § 204.5(j)(3)(i)(D).

In pertinent part 8 C.F.R. § 204.5(j)(2) states:

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.

The petition was filed in January 2001. The petitioner has provided copies of invoices to demonstrate its ongoing business. However, the earliest invoice is for sales made in April of 2000. It is not apparent from the record that the petitioner was actually engaged in the regular and systematic provision of goods or services for one year prior to the filing of the petition. Because the appeal is dismissed for the reasons stated above, this issue is not 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.