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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: WAC 02 065 52313 Office: CALIFORNIA SERVICE CENTER

Date:

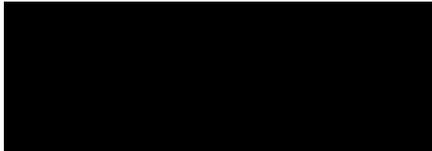
MAY 16 2003

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:



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

The petitioner is a corporation organized in the State of California in November 1993. It is engaged in the courier business. It seeks to employ the beneficiary as its president. 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 a qualifying relationship with the beneficiary's foreign employer. The director also determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity for either the petitioner or the foreign entity.

On appeal, counsel for the petitioner asserts that the director erred in concluding that the beneficiary was not eligible for this visa classification.

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 first issue in this proceeding is whether the petitioner established a qualifying relationship with the beneficiary's foreign 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 petitioner provided three stock certificates issued by it in December 1993. Stock certificate number one is issued to the beneficiary in the amount of 1,500 shares. Stock certificate number two is issued to the beneficiary's wife in the amount of 1,125 shares. The third stock certificate is issued to the beneficiary's son in the amount of 1,125 shares. The petitioner claims that these three individuals also hold shares in the foreign entity in this same proportion. To support this claim, the petitioner submitted a statement signed by the beneficiary as the general manager of the foreign entity indicating that the foreign entity had issued 100 shares to the beneficiary, 75 shares to the beneficiary's wife, and 75 shares to the beneficiary's minor son.

The petitioner also provided its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the years 1999, 2000, and 2001. The petitioner, on each IRS Form 1120 on Schedule K, Line 10, stated that no foreign person owned directly or indirectly 25 percent or more of the its "stock." On the petitioner's IRS Form 1120 for the year 2000, the petitioner indicated that the beneficiary owned 100 percent of the petitioner's common stock. The petitioner further provided untranslated documents that may or may not relate to the organization of the foreign entity.

The director requested evidence demonstrating that the beneficiary had actually provided capital for the stock issued to him. The director specifically requested copies of wire transfers, bank statements, and deposit slips to demonstrate the capitalization. The director also requested additional documentation, in the form of minutes of meetings, stock ledgers, annual reports, and detailed lists of owners of the petitioner.

In response the petitioner referred to the previously submitted documents, stated that the beneficiary had brought cash into the United States to capitalize the petitioner, and claimed that the petitioner and the foreign entity were affiliates under immigration law.

The director determined that the record contained conflicting information regarding the ownership of the petitioner. The director also noted that the petitioner had failed to provide evidence to substantiate the petitioner's capitalization. The director also noted the lack of evidence, save for the beneficiary's statement, regarding the ownership of the foreign entity. The director determined that while some commonality of ownership might exist between the two companies, common control must also exist for a qualifying relationship to be established. The director concluded that the petitioner had not provided sufficient evidence to establish the affiliate relationship.

On appeal, counsel for the petitioner asserts that the petitioner and the foreign entity are affiliates and repeats that the shares

of the two entities were allocated as previously stated. Counsel also asserts that the three shareholders of the petitioner and the foreign entity retain the same ownership interest and right to control both entities.

Counsel's assertions are not persuasive. 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). As observed by the director, the record contains contradictory information regarding the ownership and control of the petitioner. The information on the petitioner's IRS Forms 1120 conflict with the stock certificates issued by the petitioner. 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). Neither counsel nor the petitioner has offered explanations regarding this conflicting evidence on appeal. Moreover, the petitioner has not provided independent documentation detailing the ownership of the foreign entity. The beneficiary's statement alone is not sufficient. Whether the untranslated documents would provide some independent documentary evidence of the foreign entity's ownership and control is unknown. The regulation at 8 C.F.R. § 103.2(b)(3) requires any document containing foreign language to be accompanied by a full English translation that has been certified by a competent translator. The petitioner has not provided this necessary information. 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).

The petitioner has not provided evidence on appeal sufficient to overcome the director's decision on this issue.

The second issue in this proceeding is whether the petitioner has established that the beneficiary's duties have been and will be primarily managerial or executive duties.

The petitioner initially stated that the beneficiary "is required to direct the management of the U.S. affiliate and establish corporate organizational goals and policies." The petitioner indicated further that the beneficiary "exercises a wide latitude of discretionary decision-making." The petitioner also noted that the beneficiary "hires/fires personnel and have complete autonomy regarding personnel matters." The petitioner also stated that the beneficiary "formulates company financial and business goals and develops business strategies" and "develops marketing strategies to

increase business, investigate new markets and acts as a liaison with the home company."

The petitioner also stated that it employed 11 individuals in the positions of president, manager (2), office clerk (5), security guard (1), shipping supervisor (1), and administrator (1). The duties for the positions of manager and office clerk involved customer relations, receiving documents and packages, and preparing shipments to El Salvador. The two managers had the additional duty of each managing an office. The shipping supervisor traveled between Los Angeles and El Salvador supervising delivery of shipments and the administrator was responsible for bookkeeping and income and expenses.

The director requested a more detailed description of the beneficiary's duties including the percentage of time spent in each of the duties.

In response, the petitioner through its counsel, indicated that the beneficiary spent 10 percent of his time assuring the company's successful commencement of operations and continued operation on a sound financial footing; 15 percent of his time directing the management of the companies and establishing corporate goals and policies; 12.5 percent of his time exercising wide latitude in decision-making and hiring and firing managerial personnel; 12.5 percent of his time formulating financial and business goals and developing business strategies; 25 percent of his time developing marketing strategies to increase business, investigating new markets and acting as a liaison with the home company; and, 20 percent of his time negotiating contracts with transport services and obtaining lines of credit.

The director determined that the petitioner had described the beneficiary's duties in broad and general terms. The director concluded that at least three of the employees, including the administrator appeared to be employed on a part-time basis. The director also concluded that the record reflected that a majority of the beneficiary's duties would be directly providing the services of the business. The director also stated that the record of the previously approved classification of the beneficiary as an intracompany transferee (L-1A) had not been reviewed and that, if the previous approval was based on the same unsupported assertions found in this petition, the approval would constitute gross error.

On appeal, counsel for the petitioner repeats the job descriptions previously provided and states that these job descriptions were sufficient for the Bureau to grant the beneficiary L-1A status as a nonimmigrant intracompany transferee. Counsel asserts that it is inherently implied that a person will be performing in an executive capacity when the person is appointed or elected as an officer of a corporation.

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). In the instant case, the description of the beneficiary's duties is general and essentially paraphrases elements of the statutory definitions of executive and managerial capacity. See section 101(a)(44)(A)(iii) and 101(a)(B)(i), (ii), and (iii). These statements do not convey an understanding of the beneficiary's duties on a daily basis.

In addition, the petitioner indicates that the beneficiary spends 45 percent of his time developing marketing strategies, negotiating contracts, and obtaining lines of credit. These duties appear to relate to the performance of operational tasks of the petitioner rather than to the management or direction of these 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). The petitioner has not provided evidence to indicate that the beneficiary directs or manages the marketing tasks or negotiation of contracts through the work of others. Rather, the job descriptions for the petitioner's other employees relate to the performance of receiving and preparing documents and packages for shipment. The Bureau must conclude that the beneficiary is primarily responsible for marketing the petitioner's service as well as negotiating contracts and lines of credit to continue the petitioner's existence.

The record does not support a conclusion that the beneficiary has been or will be employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive 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. A comprehensive description of the beneficiary's actual duties supported by evidence in the record is necessary to establish eligibility for this visa classification.

Counsel's reference to the previously approved intracompany transferee nonimmigrant petitions is without merit. The director has determined that the approval of the petitions for nonimmigrant intracompany transferee L-1A status for the beneficiary constituted gross error. In addition, the AAO's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Just as district court decisions do not bind the court of appeals, service center decisions do not control the AAO. The AAO is not bound to follow the rulings of service centers that are contradictory. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The petitioner has not provided evidence on appeal that overcomes the director's decision on this issue.

The third issue in this proceeding is whether the petitioner has established that the beneficiary's duties for the foreign entity were in a managerial or executive capacity. The petitioner also has provided vague and general descriptions of the beneficiary's duties for the foreign entity. Counsel, on appeal, states that the beneficiary is at the top of the organizational chain and again borrows phrases from the managerial and executive statutory definitions to describe the beneficiary's duties. As stated previously, such general descriptions do not convey an understanding of the beneficiary's actual duties. The petitioner has not provided evidence on appeal to overcome the director's decision on this issue.

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, the burden has not been met.

ORDER: The appeal is dismissed.