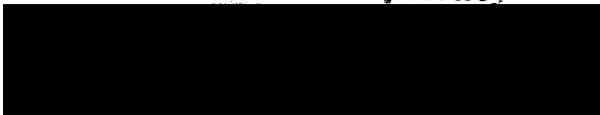


B4

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

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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

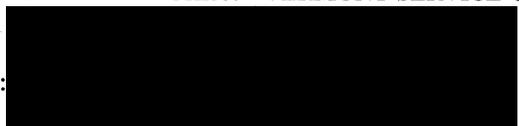


File: EAC 01 004 51257

Office: VERMONT SERVICE CENTER

Date: OCT 23 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)

IN BEHALF OF PETITIONER:



PUBLIC COPY

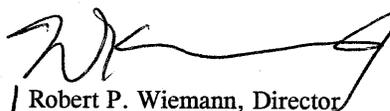
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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 preference visa petition was denied by the Director, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the state of New York and is engaged in the import, export, and international trade business. It seeks to employ the beneficiary as its executive 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 a qualifying relationship between itself and a foreign entity. 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.

On appeal, counsel for the petitioner asserts that the Service is incorrect in its denial of the petition.

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 to be examined is whether the petitioner has established a qualifying relationship with the foreign entity in this matter.

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 overseas company.

The petitioner initially submitted its certificate of incorporation showing that it was incorporated in the State of New York in November of 1995. The petitioner also submitted two share certificates. Share certificate number one was issued to the beneficiary in the amount of 100 shares. Share certificate number two was issued to Sky International, the claimed parent company, in the amount of 100 shares. Both certificates bear the notation that the petitioner is authorized to issue 200 shares.

The petitioner also submitted its 1998 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return. The form 1120 at Schedule K, Line 5 along with the accompanying explanatory statement indicates that the beneficiary owns 100 percent of the corporation.

The director requested clarification of the ownership and control of the petitioner.

In response, the petitioner submitted an unrelated share certificate of a New Jersey corporation identified as Northridge Tenants Corp. The petitioner's 1999 IRS Form 1120 at Schedule K, Line 5 along with the accompanying explanatory statement continued to identify the beneficiary as the 100 percent owner of the corporation.

The director determined that the petitioner had not submitted sufficient evidence to demonstrate that a qualifying relationship existed between the petitioner and a foreign entity.

Counsel for the petitioner does not specify how the director's reasoning on this issue is flawed. The petitioner merely states that the Service's decision is incorrect and that the decision does not encourage business and trade.

Case law confirms that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and a foreign entity for purposes of an immigrant visa classification. *Matter of Church of Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant proceedings). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church of Scientology International*, at 595.

The petitioner has submitted inconsistent documentation regarding its ownership and control. It submits share certificates that indicate it is owned equally by the beneficiary and a claimed foreign entity. However, the petitioner's IRS Forms 1120 for

1998 and 1999 both reveal that the petitioner is 100 percent owned by the beneficiary. 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). Moreover, the petitioner has not submitted any information revealing who or what exercises control of the petitioner. With the inconsistent information provided regarding the issue of ownership and control the Service is unable to determine the elements of ownership and control in the present petition. Upon review, the petitioner has not established that a qualifying relationship exists between the petitioner and the claimed foreign company.

The second issue to be examined is whether the beneficiary has been and will be employed in a primarily executive or managerial capacity with the United States entity.

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 submitted a description for the position of executive manager and chief operating officer as follows:

Duties include assigning and directing work, manage and organize company's functions, work with the U.S. companies and help them to develop products in Pakistan and overseas for US market, attending trade fairs, entering into contracts of sale of merchandise, directing and obtaining reprocessing of the merchandise to conform needs and specification of the US consumers, supervising the purchase orders, obtaining service of US companies, making decisions regarding promotion of the business in US, travelling, hire and terminate employees.

The petitioner also provided brief job descriptions for an assistant manager and a secretary/clerk. The petitioner noted adjacent to each of the job descriptions, the salaries for the individuals employed by the petitioner. The beneficiary's salary was noted as \$600 per week plus house rent, the assistant manager's salary was noted as \$400 per week, and the secretary/clerk's salary was noted as \$300 per week. The petitioner further provided its 1999 IRS Form 940-EZ, Employer's Annual Federal Unemployment (FUTA) Tax Return. The IRS 940-EZ Form revealed taxable wages for services of employees in the amount of \$25,000.

The petitioner also provided a copy of a sublease agreement for 600 square feet in the rear portion of a showroom.

The director requested additional information regarding the number of employees and any plans the petitioner had to hire additional employees. The director also requested evidence that the petitioner had sufficient space to conduct its business.

In response, the petitioner stated that it had no plans to hire additional employees due to weak economic conditions. The petitioner's IRS Form 1120 for the years 1998 and 1999 did not reveal that salaries were paid or that compensation was made to officers. The petitioner also provided a copy of an assignment of proprietary lease for apartment premises located in New York.

The director determined that the leases entered into by the petitioner did not appear large enough to accommodate a garment import and export business. The director concluded that the level of business activity as reported by the petitioner and the lack of adequate office or warehouse space did not support a finding that the petitioner was of a size or scope to support a managerial or executive position. The director also determined that the beneficiary would spend a portion of his time in non-managerial and non-executive duties.

On appeal, counsel for the petitioner asserts that CIS is wrong to question the beneficiary's executive status because he attends trade shows and signs contracts. Counsel also asserts that the CIS is wrong to base its decision on the lack of the petitioner's warehouse space.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the service will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the initial petition, the petitioner submitted a broad position description that vaguely refer, in part, to duties such as "assigning and directing work," "manage[ing] and organize[ing] company's functions with the U.S. companies," work[ing] with the U.S. companies and help[ing] them to develop products in Pakistan and overseas for US market," and "obtaining service of US companies." These job duties are too vague to convey an understanding of exactly what the beneficiary is doing on a daily basis. In addition, the petitioner's description of the beneficiary's duties including the beneficiary's "attending trade fairs," and "entering into contracts of sale of merchandise," does not clearly reveal whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities. Further, the petitioner's statement that the beneficiary supervises the purchase orders and directs the reprocessing of the merchandise is disingenuous when the petitioner does not provide position descriptions of employees other than the beneficiary to do these operational 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 director did focus on the lack of business activity and lack of office space to conclude that the petitioner could not support a managerial or executive position. To be prudent the director

should also have considered the reasonable needs of the enterprise. At the time of filing, the petitioner was a five-year-old import and export company that claimed to have a gross annual income of \$81,664. The firm employed the beneficiary as its executive manager, an assistant manager and a secretary/clerk. It is noted that two of the petitioner's three employees possessed managerial titles and the third employee provided a clerical service. The petitioner did not submit evidence that it employed any subordinate staff members that would perform the actual day-to-day non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as executive manager and an assistant manager and a clerk. Regardless, the reasonable needs of the petitioner service only as a factor in evaluating the beneficiary's claimed managerial or executive capacity. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The description of the duties to be performed by the beneficiary in the proposed position 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 petitioner has not submitted sufficient evidence with the petition and the appeal to overcome the director's decision on this issue.

Beyond the decision of the director, the petitioner has provided insufficient evidence to establish that the beneficiary was employed by the purported foreign entity in a managerial or executive position. The petitioner did not provide a comprehensive description of the beneficiary's job duties for the claimed foreign entity. Also beyond the decision of the director, the petitioner has not demonstrated its ability to pay the beneficiary the proffered wage. The petitioner has provided inconsistent documentation regarding the payment of salaries to its employees, stating on its FUTA tax return that it had paid \$25,000 in salary in 1999 but not showing any salaries paid on its IRS Form 1120 for 1999. The petitioner must resolve any inconsistencies in the record by independent objective evidence, *Matter of Ho, supra*.

Because the appeal will be dismissed for the reasons stated above, these issues are 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.