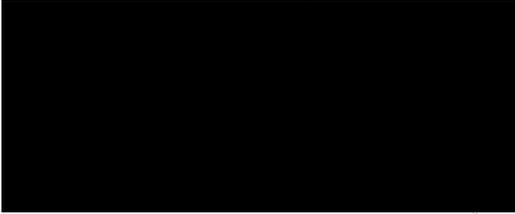


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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



FILE: WAC 02 078 50954 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



AUG 10 2004

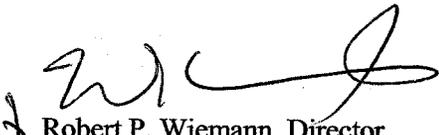
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The preference 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 California corporation claiming to be engaged in the restaurant and franchise business. It claims to be an affiliate of Match Box Agency Co., Ltd., the beneficiary's overseas employer, which is located in Japan. The petitioner seeks to employ the beneficiary as its vice president and general 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 failed to establish that the beneficiary would be employed in a managerial or executive capacity or that it has a qualifying relationship with a foreign entity. On appeal, counsel disputes the director's findings and submits a brief in support of his assertions.

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 which 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.

The first issue in this proceeding is whether the beneficiary would be performing 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.

The petitioner failed to submit a description of the beneficiary's proposed job duties with the initial filing. Consequently, the director requested that the petitioner submit additional evidence, including job descriptions for the beneficiary and his subordinates, to establish that the beneficiary would be employed in a managerial or executive capacity.

Although the petitioner submitted its organizational chart and a description of the beneficiary's prior duties abroad, it failed to provide the requested descriptions of the beneficiary's proposed duties and the duties of his subordinate(s) in the United States. The petitioner merely stated that all 14 of the petitioner's restaurant employees report directly to the beneficiary and that the restaurant manager handles most of the day-to-day duties. It is noted that the regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The purpose of the request for

evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8).

In the instant case, the petitioner was put on notice of the required description of the beneficiary's duties and given a reasonable opportunity to provide such information for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

On appeal, counsel states that the director's focus on the petitioner's small number of full-time employees is erroneous and contrary to the law. Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider such relevant factors as a company's small personnel size and the absence of employees who would perform the non-managerial or non-executive operations of the company. See, e.g. *Systonics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Therefore, the director's reference to personnel size was reasonable, particularly in light of the petitioner's failure to submit the requested description of the beneficiary's proposed job duties. It is noted that when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). In the instant case, the petitioner failed to submit this essential information, thereby limiting the scope of the director's analysis.

A review of the record suggests that the beneficiary would not be employed in a managerial or executive capacity as claimed. Counsel states that as a result of an "economic slow down" the beneficiary made an "executive decision" to lay off the general manager and to assume the general manager's duties. However, due to the petitioner's reluctance to provide the requested position description for the beneficiary, the AAO is unable to ascertain what the beneficiary would actually be doing on a daily basis. While counsel repeatedly asserts that the beneficiary has been and would continue to act in a managerial capacity, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has not shown that the beneficiary has managed and would continue to manage employees who are either managerial or professional. See 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). CIS is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity. For this initial reason, the petition cannot be approved.

The other issue in this proceeding is whether the petitioner has a qualifying relationship with a 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....

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.

In the petition, the petitioner claimed that it is an affiliate of the foreign company where the beneficiary was employed. The petitioner further explained that the U.S. and foreign employers are effectively owned by the same individual, even though that individual's ownership of the U.S. entity derived from his ownership of the parent company that owned all of the U.S. entity's shares. The petitioner also discussed a franchise agreement it entered into with Pietro Hawaii, Inc. In support of the petition, the petitioner submitted wire transfer documents establishing the U.S. entity's foreign ownership. However, the record does not contain any documentation establishing who owns the beneficiary's foreign employer. Such information is particularly important in the instant case where the beneficiary's foreign employer is not the foreign entity that is claimed to have ownership in the U.S. petitioner.

The director ultimately denied the petition based, in part, on her conclusion that the petitioner is a franchise business, which cannot be deemed a qualifying organization. However, a thorough review of the franchise agreement in question indicates that the petitioner merely entered into a franchise agreement, while remaining an entity separate from the franchise organization. Therefore, the director's determination that the petitioner is a franchise organization is incorrect and is hereby withdrawn.

Nevertheless, the director properly concluded that the petitioner did not establish that the U.S. entity and the beneficiary's foreign employer were similarly owned and controlled. A review of the record indicates that the petitioner has not submitted any documentation regarding the ownership and control of the beneficiary's overseas employer. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). For this additional reason, the petition cannot be approved.

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 sustained that burden.

ORDER: The appeal is dismissed.