

Identifying data deleted to
prevent disclosure of unwarranted
invasion of personal privacy

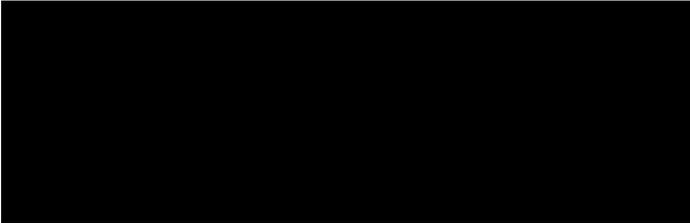
U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

PUBLIC COPY

34



U.S. Citizenship
and Immigration
Services



FILE: EAC 02 145 52959 Office: VERMONT SERVICE CENTER Date: SEP 22 2014

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

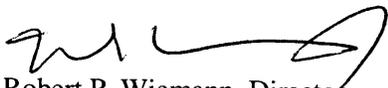
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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

DISCUSSION: The director denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a Maryland limited liability company (LLC) that seeks to employ the beneficiary as its chief executive officer (CEO). The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition because: (1) the petitioner had not been doing business for at least one year at the time of filing the petition; (2) the beneficiary was not employed in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States in a nonimmigrant status; and (3) the proffered position in the United States is not in an executive or managerial capacity.

On appeal, counsel submits a brief statement. Counsel had indicated on the Form I-290B that he would be submitting brief and/or additional evidence by February 17, 2003. As of this date, however, the record does not contain the additional evidence. Therefore, the AAO considers the record complete.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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.

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, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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 an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it is affiliated with Riverside Leather and Footwear Industries (PVT) Ltd. of Bangladesh and was organized to import footwear. The petitioner also asserts that it was formed in March 2001 and does not have any employees. The petitioner is offering to employ the beneficiary permanently, but fails to disclose the amount of the beneficiary's proposed compensation.

The first issue to be discussed in this proceeding is whether the petitioner had been doing business for at least one year at the time it filed the I-140 petition. 8 C.F.R. § 204.5(j)(3)(i)(D). The term *doing business* is defined as “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.” 8 C.F.R. § 204.5(j)(2).

When filing the petition in March 2002, the petitioner presented little information regarding its operations. Therefore, on June 27, 2002, the director requested that the petitioner submit detailed information about its organization, particularly the type and amount of business that it had been transacting. In response, counsel stated that the petitioner did not have any employees and that the beneficiary had been working on securing contracts. The petitioner did not present any evidence to show that it had transacted any business in the United States.

When denying the petition, in part, because the petitioner had not been doing business for at least one year at the time it filed the petition, the director noted the lack of evidence concerning any clients/customers that the petitioner had acquired. The director further noted the petitioner’s statements regarding the speculative nature of the beneficiary’s job duties. On appeal, counsel states the following in response to the director’s assertions:

[T]he petitioner has submitted evidence that demonstrates [the beneficiary’s] attempt to commence operation in the United States. . . . Despite the fact that operations have begun slower than [the] petitioner had anticipated, this does not mean that [the] petitioner has not taken steps toward the establishment of this corporation. Moreover, this certainly does not imply that simply because an abundance of contracts have not been acquired that its managers have not been engaged in negotiations for the acquisition of these contracts.

There is no evidence in the record to establish that the petitioner had been engaged in the regular, systematic, and continuous provision of goods and/or services for at least one year when it filed the I-140 petition. The AAO notes that the petitioner formed itself in the State of Maryland on March 9, 2001 and it filed the I-140 petition one year later on March 27, 2002. No documents exist to show that the petitioner has ever engaged in business. In fact, counsel asserts on appeal that the beneficiary continues his *attempts* to start the petitioner’s operations. A visa petition may not be approved based on speculation of future eligibility. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Without documentary evidence that the petitioner had been regularly, systematically and continuously providing goods for services for at least one year prior to filing the petition, the AAO will not overturn the director’s decision on this issue.

The second issue to be discussed in this proceeding is whether the beneficiary’s job with the foreign entity is in a managerial or executive capacity. Pursuant to 8 C.F.R § 204.5(j)(3)(i)(B), the beneficiary must have been employed by a qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States in a nonimmigrant status.¹

¹ The I-140 petition indicates that the beneficiary entered the United States in either B-1 or B-2 status on January 29, 2000. The AAO notes that neither status permits the beneficiary to work for the petitioner in the proffered position.

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.

At the time of filing the petition, the petitioner included the beneficiary's resume. According to the resume, the beneficiary "organiz[ed] a small company from scratch," "set-up long term goals and decided on strategic priorities," and "navigated the company to its desired goal." In a June 2002 request for evidence, the director requested clarifying information regarding the beneficiary's foreign employment. Among other items, the director asked the petitioner to provide a detailed list of the beneficiary's responsibilities and information about the staff that the beneficiary supervised.

The petitioner did not provide any of the evidence that the director requested regarding the beneficiary's foreign employment. Therefore, the director denied the petition, in part, because the beneficiary was not employed in a managerial or executive capacity for the requisite period of time. On appeal, neither the petitioner nor counsel addresses the director's findings. As the petitioner fails to present any evidence in rebuttal to the director's conclusions, the AAO will not disturb the prior finding that the beneficiary's foreign employment does not conform to the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B).

The third and final issue to be discussed is whether the proffered position of CEO is in a managerial or executive capacity. The AAO notes that in his brief statement accompanying the appeal, counsel asserts that the proffered position is executive, not managerial.

When filing the I-140 petition, the petitioner failed to describe the beneficiary's job with the U.S. entity. Therefore, in a June 2002 request for evidence, the director asked the petitioner to submit evidence relating to the beneficiary's proposed duties, including a brief description of his actual job responsibilities as well as information about the petitioner's staffing level.

In response, the petitioner submitted a letter, which stated that the beneficiary's job duties would be in the following areas: market and fashion forecasting; distribution; finance and banking; and international trade and customs. The petitioner stated that the petitioner did not employ anyone but the beneficiary, as it was in the process of studying the market.

The director denied the petition because the proffered position is not in a managerial or executive capacity. The director noted that the beneficiary would be working as a market researcher rather than a manager of supervisory, managerial or professional employees. The director concluded that the petitioner did not have the level of business that would require a managerial or executive employee.

On appeal, counsel reiterates the definition of executive capacity and states that the petitioner has demonstrated that the beneficiary's job is in an executive capacity. However, counsel does not elaborate on his assertion by explaining how the beneficiary functions as an executive.

The evidence in the record fails to establish that the proffered position is in a managerial or executive capacity. As stated previously, the petitioner is required to furnish a job offer in the form of a statement that clearly describes the duties to be performed by the beneficiary. 8 C.F.R. § 204.5(j)(5). The only description of the beneficiary's job with the U.S. entity was submitted in response to the director's request for evidence. This description is rather vague, as it breaks down the beneficiary's job duties into generalized areas. This description also indicates that the beneficiary is the only employee of the company and that he is working to secure business, not that the petitioner has already been conducting business.

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 Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive

operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The job description merely speculates on the duties that the beneficiary would perform because the petitioner is not a viable business entity that has been and is currently doing business. Nothing in the evidence indicates that the beneficiary would primarily direct the management of the organization, as there is no business for the petitioner to conduct. Accordingly, the position offered to the beneficiary is not in an executive or managerial capacity, and director's decision to deny the petition on this basis shall not be disturbed.

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 met that burden.

ORDER: The appeal is dismissed. The petition is denied.