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U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: AUG 22 2005

WAC 03 256 55096

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:



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

The petitioner is a company organized in the State of California in July 2001. It imports, exports, and wholesales electronics. 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.

On November 18, 2004, the director determined that the petitioner had not submitted sufficient evidence to establish that the beneficiary would be employed in a managerial or executive capacity for the United States entity or a qualifying relationship with the beneficiary's foreign employer.

On the issue of the beneficiary's managerial or executive capacity, the director specifically observed that: (1) the description of the beneficiary's job duties was broad and general and did not provide sufficient detail regarding the beneficiary's actual duties and the percentage of time devoted to those duties; (2) the beneficiary's job duties largely comprised duties for which the beneficiary primarily performs rather than manages, operational tasks; (3) the petitioner did not possess the organizational complexity to warrant an executive position; (4) the record suggested that a preponderance of the beneficiary's duties would be directly providing the services of the business; and, (5) the petitioner's evidence did not persuasively establish that the beneficiary would be managing a subordinate staff of professional, managerial, or supervisory personnel who would relieve her from performing primarily non-qualifying duties.

On the issue of the petitioner's qualifying relationship with the beneficiary's foreign employer, the director specifically observed that: (1) the petitioner's Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, Schedule E, showed that the beneficiary owned 100 percent of the petitioner's stock; (2) the petitioner had submitted a copy of a wire transfer from the beneficiary showing that the beneficiary had transferred \$300,000 to the petitioner; and (3) the wire transfer and the petitioner's IRS Forms 1120 cast doubt on the paper stock certificates and stock ledger showing the foreign entity owned 300,000 of the petitioner's shares.

The regulation at 8 C.F.R. §103.3(a)(1)(v) states, in pertinent part: "An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal."

On the Form I-290B Notice of Appeal, filed on December 17, 2004, counsel for the petitioner indicates that a brief and/or evidence would be submitted within 30 days. As of this date, the record does not contain a supplemental appellate brief or evidence.

Counsel attaches a list of reasons indicating that Citizenship and Immigration Services (CIS) erred in denying the petition:

- 1.) By concluding that "the beneficiary has been and/or will be performing many aspects of the day-to-day operations of the business."
- 2.) By incorrectly concluding that the beneficiary manages and directs only 3 other employees of the organization, when the record contains evidence the company employs 4 "contract employers" in consulting and sales positions who also report to the beneficiary.
- 3.) By concluding that the beneficiary's job duties are not primarily involved in the management of the organization.
- 4.) By concluding that the petitioning entity does not possess the organizational complexity to warrant having an executive.
- 5.) By concluding that the petitioner has not established that a qualifying relationship exists between itself and the foreign parent.
- 6.) Relying on information in Schedule E of the petitioner's IRS Form 1120, which incorrectly states that the beneficiary owns 100% of the U.S. company. The petitioner's certified public accountant has acknowledged it made an error in the preparation of the corporate tax return and has therefore filed an amended return.
- 7.) The petitioner has provided additional evidence herewith establishing that the beneficiary owns no shares of the U.S. company, and that it is, in fact, 100% owned by the foreign parent company reflected on the stock certificate(s).

The petitioner did not attach further information or evidence.

Counsel has not provided evidence or argument to demonstrate that the director's conclusions regarding the beneficiary's managerial or executive capacity were in error. The petition was filed September 12, 2003. The AAO acknowledges that the record contains three IRS Forms 1099, Miscellaneous Income, issued by the petitioner in the year 2003. The IRS Forms 1099 were issued to: (1) an individual purportedly contracted as a marketing and business strategy consultant who was paid \$5,000 for his services; (2) an individual whose company was used as the petitioner's sales representative and who was paid \$6,671.06 for his services; and (3) an individual who performed sales duties and who was paid \$2,950.69 for her services. Although the director did not specifically include these three individuals in his analysis of the beneficiary's managerial or executive capacity, the AAO observes, that the petitioner did not provide evidence that these three individuals who performed part-time or intermittent services relieved the beneficiary from performing primarily non-qualifying duties when the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Moreover, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner in this matter, in addition to paraphrasing elements of the definitions of managerial and executive capacity, depicts the beneficiary as the individual who is performing operational tasks including marketing, promotion, preparation of tax returns and financial reports, negotiation of business contracts, and purchasing materials. The petitioner has not

explained how the performance of these duties elevates the beneficiary's position to that of a manager or executive as defined in sections 101(a)(44)(A) and (B) of the Act. 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 has not submitted evidence or argument demonstrating that the director's conclusion was in error. Counsel's interpretation of the beneficiary's position is not supported in the record. Counsel does not identify specifically an erroneous conclusion of law or a statement of fact¹ as a basis for the appeal on this issue.

Counsel's claims regarding the petitioner's qualifying relationship with the beneficiary's foreign employer are not persuasive. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). First, the petitioner has not submitted evidence that it has filed amended IRS Forms 1120 deleting the beneficiary's ownership of the petitioner. Moreover, counsel has not addressed the wire transfer from the beneficiary to the petitioner in the amount of \$300,000. The record does not include any substantive evidence that the foreign entity, rather than the beneficiary, actually purchased 300,000 of the petitioner's shares. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In this matter counsel has not provided evidence or persuasive argument that the director erred in denying the petition for the reasons stated above. Counsel has not identified specific erroneous conclusions of law or probative statements of fact, thus the regulations mandate the summary dismissal of the appeal.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 summarily dismissed.

¹ The director's omission in analyzing the duties of three intermittent contractual employees does not alter the ultimate conclusion that the beneficiary's position is not managerial or executive.