

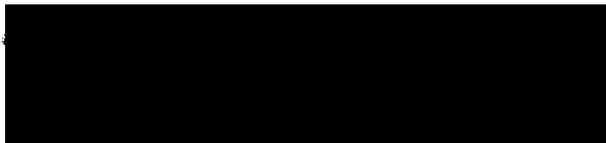
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U.S. Department of Homeland Security
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U.S. Citizenship
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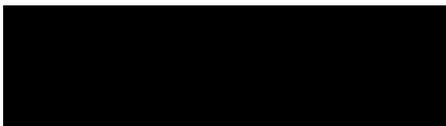
B4

FILE: WAC 03 216 51505 Office: CALIFORNIA SERVICE CENTER Date: JUL 22 2005

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

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 sole proprietorship operating as a medical practice. It seeks to employ the beneficiary as its 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 beneficiary would not be employed in a managerial or executive capacity. He also concluded that the petitioner failed to establish that it has a qualifying relationship with a foreign entity.

On appeal, counsel disputes the director's conclusions and submits a brief in support of her arguments.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 employed in a capacity that is managerial or executive.

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.

In Part 6 of the Form I-140, the petitioner stated that the beneficiary's primary responsibility would be to manage an existing medical practice. No additional information was submitted regarding the beneficiary's duties.

On July 16, 2004, the director issued a request for additional evidence (RFE). The petitioner was instructed to provide a detailed description of the beneficiary's proposed job duties and an organizational chart that reflects the petitioner's personnel structure as of the date the petition was filed.

The petitioner responded indicating that the beneficiary's duties would consist of two hours of in-patient hospital rounds and eight hours of seeing patients in the medical office. The petitioner also indicated that the beneficiary would be on-call six nights every month.

Although the petitioner provided an organizational chart, it does not appear that the chart reflects the petitioner's organizational hierarchy at the time the petition was filed. Based on information provided in Part 5 of the petition, the petitioner employed two people at the time the petition was filed. This information is supported by the petitioner's third quarterly wage and withholding report for 2003. However, the organizational chart submitted in response to the RFE names the beneficiary, three salaried employees, one non-salaried employee, two interns, and an individual contracted to provide bookkeeping services.

On December 21, 2004, the director denied the petition noting that the description of the beneficiary's duties suggests that the beneficiary would directly perform the petitioner's daily operational tasks and, therefore, could not be deemed a manager or executive. The director properly cited the case of *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988), which established that 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.

On appeal, counsel asserts that "[t]he definition of manager or executive must be read in the context of the type and size of the petitioning business and not in the abstract." While counsel properly implies that petitioners vary in size and type, a beneficiary cannot actually perform a petitioner's daily operational tasks and still be deemed a manager or executive. Regardless of the reasonable needs of the petitioner, such needs will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. In the instant matter, the beneficiary readily admits that the beneficiary's primary responsibility is providing medical services as part of in-patient and outpatient care. Thus, it is clear that the beneficiary's time would primarily be consumed with actually providing a service.

Counsel disputes the director's statement that "a small business does not necessarily establish eligibility for classification as an intracompany transferee" Counsel claims that this "conclusion is not only erroneous but discriminatory" claiming that "it was not [c]ongress [sic] intent to limit visa availability based upon the size of the investing foreign business." The AAO disagrees with counsel's interpretation of the director's statement. The "small business" to which the director referred in his statement can apply either to the petitioning entity or foreign entity. Furthermore, it appears that the director's goal in making the statement was to clarify to the petitioner that the small size of a petitioning entity, where a beneficiary may hold the highest position, does not automatically establish that the beneficiary has been or would be primarily engaged in managerial or executive tasks. The most accurate indicator of the beneficiary's past or future employment capacity is the beneficiary's actual duties. *See* 8 C.F.R. § 204.5(j)(5). 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). As previously stated, the beneficiary in the instant matter would be employed primarily as a doctor and, therefore, would actually perform the petitioner's essential task of providing medical services on a daily basis. As such, the AAO cannot conclude that the beneficiary would be employed in a qualifying managerial or executive capacity. For this initial reason this 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;

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

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 instant matter, the petitioner claims to be an affiliate of Clinica Pediatrica ABC, S.A. De Cv., located in San Salvador. The record shows that the beneficiary owns 75% of the foreign entity and 100% of the U.S. petitioner, which the beneficiary owns in the capacity of a sole proprietor.

A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). The director made this very distinction in the denial and further stated that a sole proprietorship is not a separate legal entity that can continue in the absence of its owner, who in the instant matter is also the beneficiary.

Counsel disputes the director's conclusion and his reference to the case of *Matter of United Investment Group* stating that the cited case is factually distinct from the instant matter and, therefore, cannot be used to support the director's conclusion on the issue of qualifying relationship. However, the director's focus was on the legal distinction between a corporation and sole proprietorship, a distinction that can easily be applied to a variety of cases, regardless of the difference in fact patterns. Thus, the director's reference to a general legal principal established by *Matter of United Investment Group* does not discredit the basis for the director's conclusion in regard to the issue of a qualifying relationship.

Furthermore, first-preference immigrant status under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), requires that the beneficiary have a permanent employment offer from the petitioner. A petitioner who is a nonimmigrant temporary worker is not competent to offer permanent employment to an alien beneficiary for the purpose of obtaining an immigrant visa for the beneficiary under section 203(b)(1)(C) of the Act. *Matter of Thornhill*, 18 I&N Dec. 34 (Comm. 1981). In the instant matter, the beneficiary, who is the sole owner of the petitioning business, is essentially petitioning for an immigrant visa on his own behalf. Thus, even though the foreign entity and the U.S. petitioner may be owned and controlled by the same individual, the precedent set by *Matter of Thornhill* precludes the petitioner in this matter from petitioning on the beneficiary's behalf. For this additional reason, this petition cannot be approved. *Id.*

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.