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U.S. Citizenship
and Immigration
Services

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JUN 20 2005

FILE:

EAC 03 112 52173

Office: VERMONT SERVICE CENTER

Date:

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.


for
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 Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Connecticut corporation engaged in the manufacture and distribution of light fixtures. It seeks to employ the beneficiary as its vice president and chief operating officer. 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 denied the petition based on two findings: 1) the petitioner failed to establish that it has a qualifying relationship with a foreign entity; and 2) the beneficiary would not be employed in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his 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 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 support of the petition, the petitioner submitted a letter dated September 9, 2002 from [REDACTED] vice president of the foreign entity. The petitioner also provided a copy of the Minutes of Special Meeting, which shows that on March 15, 2002 the petitioner's board of directors resolved to allow the beneficiary and his wife to transfer all of their shares to the foreign entity. That information was accompanied by two stock certificate cancellations showing that the beneficiary and his wife each surrendered their respective shares, followed by a stock certificate showing the issue of the beneficiary and his wife's combined shares in the name of the foreign entity. Additionally, the petitioner submitted its tax returns for 2000 and 2001.

On August 14, 2003, the director issued a request for additional evidence instructing the petitioner to submit its 2002 tax return.

The petitioner complied with the director's request by submitting its 2002 tax return with all schedules and attachments. Schedule E of the tax return showed that the beneficiary and his wife each owned 50% of the petitioner's stock. That information was further corroborated on page 2, Statement 5 of the Federal Statements portion of the tax return.

On January 28, 2004, the director denied the petition concluding that the petitioner failed to establish that it has a qualifying relationship with a foreign entity. The director focused on the discrepancy regarding its ownership, stating that the petitioner's tax returns continue to show equal ownership of the petitioner's stock by the beneficiary and his wife, while the most recently issued stock certificate No. 3 and the Minutes of Special Meeting both indicate that the beneficiary and his wife last transferred their respective ownership shares to the foreign entity. The director further stated that 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).

On appeal, counsel disputes the director's finding and provides a notarized statement from the petitioner's accountant, dated February 24, 2004, in which the accountant claims that she made a mistake in preparing the petitioner's 2002 tax returns by failing to show the change in the petitioner's ownership.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also

Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). 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 Scientology International*, 19 I&N Dec. at 595.

The regulations specifically allow the director to request additional evidence in appropriate cases. See 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

In the instant matter, even though the petitioner submitted documents regarding its ownership, the information in those documents conflicted in that some documents indicated that the petitioner was owned by the beneficiary and his wife while other documents indicated that the couple transferred their ownership interests to the foreign entity. In an effort to explain this significant discrepancy, the petitioner submitted a statement from its accountant suggesting that she mistakenly failed to include information regarding the change in the petitioner's ownership. While the accountant's statement clearly explains the discrepancy regarding the petitioner's ownership, it cannot be deemed "independent objective evidence," as it is merely a third party claim made by an interested party providing a service to the petitioner. The accountant's claim is entirely undocumented and, therefore, cannot be assumed as fact. 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)). The record lacks any evidence to show that the beneficiary and his wife received any monetary consideration from the foreign entity or that the foreign entity, as the purported new owner of the petitioner, made any capital contribution to its purchase of the petitioning entity. Although the beneficiary and his wife's ownership of the petitioner would not automatically preclude the existence of a qualifying relationship, the petitioner would have to establish that it and the foreign entity are similarly owned. However, the fact that the beneficiary and his wife are shareholders of the foreign entity does not indicate that they each have equal and controlling shares of the foreign entity's stock such that the foreign and U.S. entities can be regarded as affiliates. Based on the evidence of record, the AAO concludes that the petitioner failed to establish that it has a qualifying relationship with a foreign entity. For this initial reason, the petition cannot be approved.

The other issue in this proceeding is whether the beneficiary would be performing 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 support of the petition, the petitioner submitted a statement from the vice president who stated that the beneficiary's duties in the United States would be the same as his duties abroad. He described the beneficiary's duties as follows:

[The beneficiary] continues to exercise control of the management of this company and will be using his discretion in most or all of the major executive decision[-]making necessary for us to remain successful. Through his guidance we have turned the corner and now are beginning to enjoy the success we had before the collapse of the Asian market. His expertise will now cause the American subsidiary, [the petitioner], to grow as well. He is opening new markets for us and expanding this company.

In the director's notice requesting additional evidence, the petitioner was asked to verify whether the organizational chart it previously submitted showed the petitioner's current organizational structure. In its response, the petitioner submitted an up-dated organizational chart, which shows that the petitioner filled four

vacant positions between the time the petition was initially filed and the petitioner's response to the request for additional evidence. Specifically, the petitioner filled the positions of engineering product development, sales and customer service, and quality control. The petitioner also added and filled a graphics position. While the petitioner properly responded to the director's request, it is noted that the request was inappropriate in light of the fact that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the director's implication that the petitioner's progress after the filing of the petition is somehow relevant in this proceeding is unfounded and cannot be considered in determining the petitioner's eligibility is erroneous.

Nevertheless, a review of the record suggests that the director accurately concluded that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity. The director properly referred to the petitioner's initial list of employees that was submitted with the petition and stated that a majority of the petitioner's work force was comprised of managerial or executive employees. The director stated that in light of the petitioner's "top-heavy managerial structure" and its failure to specifically define the beneficiary's daily duties the record was not persuasive in establishing that the beneficiary would primarily perform duties of a managerial or executive capacity.

On appeal, the petitioner provides another letter from [REDACTED] vice president of the foreign entity. [REDACTED] states that the beneficiary is not directly involved with the production and sale of the products that are sold and assembled in the United States. He indicates that the beneficiary is "the highest ranking executive" in the U.S. company and claims that the beneficiary has discretionary powers with regard to all matters dealing with human resources and personnel as well as all matters pertaining to the business. [REDACTED] states that the beneficiary does not assist in the sale of the company's products and functions in a supervisory and executive role.

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant case the description of the beneficiary's job duties is too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis. While the petitioner claims that the beneficiary does not help make or sell the petitioner's products, there is no clear definition of what the beneficiary actually does on a daily basis. The only information the petitioner conveys clearly is that the beneficiary has liberal discretionary authority subject only to the foreign entity's board of directors. However, reciting the beneficiary's vague job responsibilities or broadly cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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). In the instant matter, the petitioner provides little more than generalities in describing the beneficiary's duties, focusing mainly on the beneficiary's contribution to the success of the company. Moreover, the only statement made by the petitioner consists of a single short paragraph, which includes a job offer and a proposed salary. The actual job description, no matter how deficient, was actually provided by the foreign entity's vice president, not by any of the petitioner's personnel. It is noted 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. *Matter of Church Scientology International*, 19 I&N Dec. at 604. In the instant case, the record lacks sufficient information to indicate what specific duties the beneficiary would primarily be

performing. As such, the AAO cannot affirmatively conclude that the beneficiary would primarily perform managerial or executive duties.

Furthermore, the record contains discrepancies, which remain unresolved. Namely, while the U.S. entity's organizational chart shows the beneficiary's title as president, his position is referred to elsewhere as vice president and chief operating officer. Also, the letters from [REDACTED] indicate that his position is vice president of the foreign company, while the organizational chart for the U.S. entity shows [REDACTED] as the person in charge of the Department of Sales and Marketing as well as the sole person in charge of marketing. 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). The petitioner in the instant matter has neither acknowledged nor attempted to resolve the above inconsistencies.

Overall, the record lacks sufficient evidence to establish that the beneficiary would be employed in a managerial or executive capacity. 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.