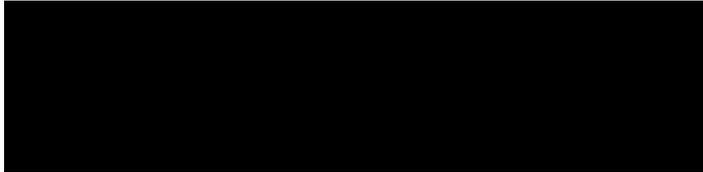




U.S. Citizenship
and Immigration
Services

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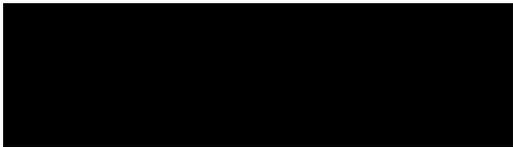
Date: SEP 30 2005

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 preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Delaware limited liability company operating as a retailer of cell phone accessories. It seeks to employ the beneficiary as its executive 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 eligibility to classify the beneficiary as a multinational manager or executive. This decision was based on two independent grounds: 1) the petitioner failed to establish that it had been doing business in the United States for at least one year prior to filing the petition; and 2) the record does not establish that the beneficiary would be employed in a qualifying managerial or executive capacity.

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 petitioner was doing business in the United States for at least one year prior to filing its I-140 petition as required by 8 C.F.R. § 204.5(j)(3)(i)(D).

The regulation at 8 C.F.R. § 204.5(j)(2) states that "doing business" means "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."

In support of the petition, the petitioner submitted a number of documents establishing its formation as a limited liability company in October of 2002. The petitioner also submitted a number of documents as evidence of the foreign entity's business transactions. However, none of the submitted documentation establishes that the petitioner had been engaged in the regular, systematic, and continuous provision of goods and/or services.

On or about November 19, 2004, the director issued a notice of her intent to deny and instructed the petitioner to submit evidence to establish that it had been doing business since April 2002, one year prior to filing the I-140 petition.

In response, the petitioner submitted a letter from counsel dated January 6, 2005. In this letter, counsel claimed that the petitioner was doing business during the requisite time period and stated that the petitioner is now doing business as (DBA) Cell Fashions. Counsel further relayed the petitioner's wish to amend the name of the petitioning entity to include the DBA name. The petitioner's supporting documents include the following:

- a) A state of Texas assumed name certificate indicating the beneficiary's application to do business as Cell Fashions.
- b) A letter dated December 12, 2002 signed by the foreign entity's company secretary indicating that the foreign entity and Cell Fashions "are equal partners." There is no explanation as to the subject matter of the partnership.
- c) Blank checks from Bank of America showing the account holder as the beneficiary DBA Cell Fashions.
- d) An illegible copy of Cell Fashions' application dated June 28, 2002 for a tax identification number. The names and social security numbers do not show up in the photocopy of the application.
- e) An official form canceling Cell Fashions' request for a tax identification number. Item 6 in the form indicates that the reason for the cancellation is Cell Fashions' organization as a limited liability company. Item 6 further indicated that Cell Fashions stopped doing business in New Mexico as of December 31, 2002.
- f) The beneficiary's 2002 Form 1040 tax return identifying Cell Fashions as his business name.
- g) Two Sunset Mall Specialty License Agreements, one dated February 14, 2002 and the other dated July 17, 2002. Although the beneficiary and Cell Fashions are both identified in these agreements with the beneficiary DBA Cell Fashions, the petitioner is not named anywhere in either document.

- h) A lease agreement dated February 13, 2003 showing space rented by the petitioner at Cottonwood Mall. The agreement identifies the petitioner as the legal name of the tenant, but acknowledges Cell Fashions as the assumed name.
- i) A license agreement dated February 25, 2003 showing space rented by the petitioner at Animas Mall. The agreement identifies the petitioner as the legal licensee, but acknowledges Cell Fashions as the licensee's trade name.
- j) The petitioner's bank statement dated August 5, 2004 identifying the petitioner by its own name and by its trade name of Cell Fashions.

On January 24, 2005, the director denied the petition concluding that the submitted documentation does not establish that the petitioner was doing business for one year prior to filing the I-140 petition in April 2003. The director specifically referred to the petitioner's amendment of the name initially provided in the Form I-140 and cited *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971), which states that a petitioner must establish eligibility at the time of filing; not under a new set of facts, which made the petitioner or beneficiary eligible after the petition was filed.

On appeal, counsel disputes the director's citation of the above named case stating that the facts of the case are distinct from those in the instant matter. While counsel may be correct in regard to a fact comparison between the two cases, his argument is irrelevant, as it overlooks the fact that *Matter of Katigbak* established a legal principal that can be applied to any number of fact patterns, including ones where the facts are distinct from those in the precedent case itself. *See id.* The director's use of this established legal principal is properly applied to the instant case, where the petitioner filed an I-140 petition under one name, but later sought to change that name when made aware of an adverse finding.

Contrary to counsel's assertion, the record is void of any evidence that the petitioner was operating and doing business under the trade name of Cell Fashions at least one year prior to the filing of the petition. Although the documents discussed in items c, f, and g above suggest that Cell Fashions existed one year prior to the filing of the I-140 petition and that the beneficiary was conducting business under that assumed name, there is no documentation connecting the petitioner to Cell Fashions prior to February of 2003. (See items h and i). Furthermore, item e above strongly suggests that Cell Fashions continued doing business as a separate entity under its own identification number, which was cancelled, effective December 31, 2002. Thus, even though the AAO believes that the petitioner eventually assumed Cell Fashions as its trade name, this event could not have occurred prior to December 31, 2002, only four months prior to the filing of the petition. The petitioner did not submit evidence to show that it had been engaged in the regular, continuous, and systematic provision of goods and/or services under the name that initially appeared in the Form I-140 at the time of filing. Evidence that Cell Fashions was doing business one year prior to the filing of the I-140 petition is not sufficient in this matter.

Upon review of the record, the AAO determines that the petitioner failed to submit sufficient evidence that it was doing business for one year prior to filing the I-140 petition. Therefore, based on this initial ground the petitioner is ineligible to classify the beneficiary as a multinational manager or executive.

The second 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.

The petitioner failed to submit a statement describing the beneficiary's proposed duties in support of the petition. Accordingly, the director addressed this deficiency in her notice of intent to deny. The petitioner was instructed to submit a more detailed description of the beneficiary's proposed duties, including the percentage of time the beneficiary plans to spend on each of the listed duties. The petitioner was also asked to provide brief job descriptions of the beneficiary's subordinates or, if the beneficiary does not supervise subordinates, to specify the essential function the beneficiary would manage. The petitioner was instructed to clarify the beneficiary's position within the petitioner's organizational structure. Additional documentation was also requested in the form of W-2 statements issued by the petitioner in 2002 and 2003.

The petitioner's response included the following outline of the beneficiary's proposed responsibilities:

- Identify appropriate sellers of [m]etals in [the] U[.]S[.]A[.] & Latin American markets with special importance to local supplying companies, recycling & metals processing groups to interact and negotiate deals.
- Structure the transaction to buy & sell through proper negotiation and contract signing[.]
- Serve as business agent of the group towards generating new business inquiries by self and through web network and render services acting as a bridge & link with the overseas entity.
-] [sic] [I]dentify appropriate transaction mode for buying, procuring, documentation, transporting & shipping of materials for consignments[.]
- To help the overseas entity from [the] U[.]S[.]A[.] by offering strategic alliance towards making available technical services from third parties, know how, marketing support, availability of raw materials (metals) for production, distribution capabilities, identifying new markets & buyers and other business management services.
- Sourcing of compatible business opportunities suiting to the group in the field of metal supply[.]
- Functioning as the primary decision taking [sic] live operational executive head essentially meant to run the organization from the front and handle sum total responsibility relating to implementation of multifarious business policies to realize business objectives of the group.
- To ensure a meaningful presence in [the] U[.]S[.]A[.] by having a person acting as a livewire connection between [the] U[.]S[.]A[.] and the Indian counterpart.
- Facilitate [the] company's entry into export and import of all types of metals via [the] U[.]S[.]A[.] to [the] Indian subcontinent . [sic] Items included [i]ron & [s]teel, cast [i]ron, [s]hredded [s]teel, [c]ast [a]uto parts & [c]omponents containing metallic content . [sic]

The petitioner also submitted the following more detailed list of the beneficiary's proposed duties:

- a) Facilitate [the] company's export and import business through excellent interpretation of strategies and augment fast achievement in adding new clients in the field of metal import ... to ensure [a] continuous production line. Duties include buy[ing], sell[ing,] and negotiat[ing] with prospective sellers Penetration to this regard called for high degree application of marketing & [I]iaison efforts and offering of services as a mandate to carry out all contractual & financial obligations that rests [sic] with the company.
- b) To explore into the prospect of expanding of [s]teel [m]etal [t]rading. The decisions had enough logic in view of existing and forthcoming opportunities

- c) Multiple responsibilities include opening of negotiations, discuss[ing] and act[ing] as buying and indenting agent, ensure[ing] payments collection and forwarding , [sic] procuring of trading materials . . . and forward[ing] the same to respective clients through properly coordinated shipping arrangement[.] Ensuring of proper documentations and ensure timely dispatch of shipments

He succeeded in establishing excellent rapport with high ranking personnel in various shipping companies

- d) Responsibility also includes monitoring of group's financial health and attend to financial matters concerning special arrangement of investment funds by negotiating with respective financial institutions, private funding sources, commercial banks, ensuring L/C based sales and collection of payments thereof.

* * *

- e) During recent time with the successful emergence of [the petitioner,] several new contracts and contractual deeds have got finalized and many new business negotiations are in the quick process of completion. [sic]

* * *

- f) His responsibilities also comprise of resource planning availing of cost cut method towards procuring of materials through economical local transport arrangement . [sic] ...

- g) His duties include tracing of sellers in [the] U[.]S[.]A[.] and Latin America and bring[ing] them on [the] same platform with overseas buyers (in India) for a deal by standing as a mediator and bridge between the prospective parties.

* * *

- h) For a successful deal[,] the beneficiary even allowed subordinate staff to be at the ware house [sic] materials yard in [the] U[.]S[.]A[.] or Latin America for inspection of [the] quality of materials available for [the] deal.

Instead of assigning a percentage of time the beneficiary would spend on each of his respective job duties, the petitioner merely stated that the beneficiary works 8-9 hours per day for an average of 200 hours per month. The petitioner stated that the beneficiary's subordinate staff consists of a manager and a transportation officer.

The director denied the petition noting that the petitioner's description of the beneficiary's duties is broad and fails to identify the specific duties the beneficiary would perform on a day-to-day basis. The director further commented on the beneficiary's subordinates stating that the petitioner's limited number of employees is unlikely to relieve the beneficiary from having to primarily perform nonqualifying tasks.

On appeal, counsel states that the director's conclusion is unwarranted and cites an unpublished AAO decision in an effort to overcome the denial. However, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel further asserts that in addition to a transportation officer and staff manager the petitioner plans to hire contractors as needed in order to relieve the beneficiary from having to perform nonqualifying duties. However, the record lacks evidence that contractors have been hired to perform any of the petitioner's necessary operational tasks. 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 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).

Counsel asserts that the beneficiary would not be performing nonqualifying duties, such as loading materials, or selling and producing the petitioner's product. However, loading materials and selling and producing the petitioner's product are not an exhaustive list of nonqualifying duties. The mere fact that the beneficiary does not perform these particular nonqualifying duties does not mean that the beneficiary does not perform other nonqualifying duties. 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 matter, the petitioner's description of the beneficiary's job duties indicates that the beneficiary buys inventory, seeks out buyers, and negotiates purchase and sales contracts. These duties are repeated throughout the description of the beneficiary's duties, which suggests that they comprise a large part of the beneficiary's day. While these duties may be significant and even crucial for the petitioner's daily operation, they cannot be deemed qualifying. As the petitioner failed to indicate the percentage of time the beneficiary spends carrying out each of his listed duties, the AAO has no way of gauging what portion of the petitioner's typical work day is spent performing these nonqualifying tasks. 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. 593, 604 (Comm. 1988).

Although counsel is correct in stating that the beneficiary does not need to perform in a managerial capacity if it can be established that he performs in an executive capacity, the description of duties in the instant matter strongly suggests that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. While the petitioner may currently have a reasonable need for the beneficiary to carry out its essential functions, its reasonable needs do not override its burden of having to establish that the beneficiary would *primarily* perform managerial or executive duties, not merely duties that are considered essential for the petitioning entity's financial success. Moreover, the fact that the beneficiary is still needed to primarily perform the petitioner's daily operational tasks suggests that the petitioner has not reached a stage of development where it requires the services of a primarily managerial or executive employee, regardless of that individual's position title and discretionary authority. Based on the evidence furnished, it cannot be found that the petitioner would be able to employ the beneficiary in a primarily qualifying managerial or executive capacity.

Beyond the decision of the director, the AAO will address additional factors of the petitioner's ineligibility. First, the petitioner has failed to submit sufficient evidence to establish that it has a qualifying relationship with the foreign entity as required by 8 C.F.R. § 204.5(j)(3)(B).

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. at 595; *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 the 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.

In the instant matter, the petitioner has only submitted documentation establishing the ownership of the foreign entity. No evidence has been submitted to establish that the U.S. petitioner is similarly owned and controlled. As previously stated, 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. at 165.

Second, the petitioner is required to establish its ability to pay the beneficiary's proffered wage at the time the petition is filed. *See* 8 C.F.R. § 204.5(g)(2). In the instant matter, however, the petitioner failed to complete Part 6 of the petition indicating what the beneficiary's proffered wage would be. Thus, the AAO is unable to affirmatively determine that the petitioner has met the requirement discussed in 8 C.F.R. § 204.5(g)(2).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional factors discussed in the above paragraphs, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.