

PUBLIC COPY

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services



File:

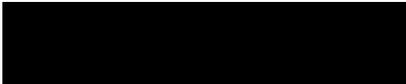


Office: CALIFORNIA SERVICE CENTER

Date: **MAR 08 2004**

IN RE:

Petitioner:



Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a branch office of a foreign entity. It is the official travel and tourist association of the Fiji Islands government. It seeks to employ the beneficiary as its marketing 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 had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity. The director also determined that the petitioner had not established its ability to pay the beneficiary the proffered wage. The director finally determined that the petitioner had not established that it was doing business in the United States.

On appeal, counsel for the petitioner asserts that the evidence in the record clearly established that:

- (1) The beneficiary functions primarily as a manager;
- (2) The petitioner has the ability to pay the proffered wage; and
- (3) The petitioner has been doing business in the United States.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial capacity. Counsel and the petitioner clearly state that the petition is based solely on the beneficiary's managerial capacity.

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.

The petitioner set out a detailed list of the beneficiary's duties indicating that the beneficiary would plan, implement, and control cost-effective marketing projects and develop regional objectives, strategies, and resource requirements. The petitioner stated that the beneficiary would collect and evaluate market intelligence, meet with international airlines and public relations representatives, supervise the creation and updating of mailing lists, and manage resources allocated to projects. The petitioner indicated further that the beneficiary would develop proposals for marketing, coordinate the supply of literature, and coordinate road and trade shows with hotels, rental car companies, and domestic airlines. The petitioner finally indicated that the beneficiary would relieve the director during his absences from the office.

The petitioner noted on the Form I-140, Immigrant Petition for Alien Worker, that the petitioner employed five individuals.

The director determined that the beneficiary would not be managing any of the petitioner's personnel and would necessarily be performing numerous tasks involved in the business because of the lack of other employees. The director concluded that the beneficiary would be, in essence, a first-line "manager" of non-professional employees. Finally, the director determined that the petitioner had not established that the beneficiary would manage or direct a function of the petitioner but would primarily perform the petitioner's routine operational activities.

On appeal, counsel for the petitioner takes issue with the director's conclusion that the beneficiary would be performing the petitioner's tasks because the petitioner lacked other employees to perform these tasks. Counsel references the Form I-140 that states the petitioner employs five individuals. On appeal, counsel submits the petitioner's statement that the beneficiary plans and directs projects, strategies, goals, or events and that other employees implement the day-to-day requirements of the project, strategy, goal, or event. The petitioner also claims that it employs two full-time individuals and one independent contractor who are subordinate to the beneficiary's marketing manager position. Counsel further includes a statement of federal deposits and filings for the first quarter of 2003. The statement confirms the employment of four individuals in that quarter.

Counsel asserts that the beneficiary manages the marketing function of the organization. Counsel claims that the petitioner is essentially a marketing organization and that its fundamental purpose is to attract tourists to Fiji. Counsel contends that it is the beneficiary in her position of marketing manager who keeps the petitioner in business. Counsel also claims that the beneficiary functions at a senior level noting that the beneficiary fills in for the head of the company when he is away and is solely responsible for directing marketing within the organization. Counsel again references the petitioner's attached statement that indicates the beneficiary has the authority to direct the day-to-day operations of the organization. Counsel indicates that the director's conclusion that the beneficiary is a first-line "manager" not only is inapposite of the director's determination that the beneficiary is not a manager, but is inappropriately applied because the petitioner is not claiming the beneficiary's primary assignment is to supervise employees. Counsel also asserts that the director improperly considered staffing levels in his decision without taking into account the reasonable needs of the petitioner.

Finally, counsel refers to previously approved nonimmigrant L-1A intracompany transferee petitions filed on the beneficiary's behalf and cites unpublished decisions to support the various contentions outlined above.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(I)(3)(ii). It is not possible to discern from the initial description provided whether the beneficiary would be performing managerial duties for the petitioner or whether the beneficiary would be performing the petitioner's operational tasks. 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).

However, the record also contains a statement signed by the beneficiary stating that she regularly responds to questions and inquiries from consumers, travel agents, wholesalers, media and airline personnel. The statement further indicates that she travels to seminars and marketing road shows targeting consumers and

travel agents. The beneficiary also includes sample presentations made to the public and to travel agents. This statement undermines the petitioner's claim that the beneficiary's assignment is primarily managerial, instead of performing the actual marketing duties. 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).

In addition, the record does not sufficiently substantiate counsel and the petitioner's claim that two other full-time employees and an independent contractor carry out the beneficiary's marketing plans and strategies. The petitioner does not list the other employees by name or job title and does not provide a description of the other employees' duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Moreover, the petitioner does not provide supporting evidence of the number and salaries of the petitioner's employees when the petition was filed. Further, it is not possible to verify the employment of these individuals when reviewing the petitioner's statement of federal deposits and filings.

The AAO notes that counsel and the petitioner are claiming that the beneficiary manages the petitioner's essential function of marketing tourism to Fiji. The AAO concedes that the record suggests that the petitioner's primary purpose is to market tourism to Fiji and that this appears to be the organization's essential function. However, the petitioner must provide a comprehensive description of the beneficiary's duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. As stated above, the petitioner has not provided evidence of this essential element of eligibility. The petitioner has not provided sufficient evidence that the beneficiary manages an essential function.

Counsel correctly points out that if the director considers staffing levels the director must take into account the reasonable needs of the petitioner. As noted above, the petitioner has not provided independent evidence of its number of employees, their salaries, number of hours worked, or descriptions of duties. The record is insufficient to substantiate that the beneficiary is relieved from performing primarily non-qualifying duties.

Finally, counsel's reference to previously approved nonimmigrant L-1A intracompany transferee petitions filed on the beneficiary's behalf is not persuasive. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F. 2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988). Counsel's citation to various unpublished decisions carries little probative value. Unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c).

In sum, the petitioner has not provided sufficient documentary evidence that the beneficiary manages the organization or an essential function of the organization, rather than performs the petitioner's essential operational tasks. The petitioner has not established that the beneficiary's assignment is primarily managerial.

The second issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered wage of \$50,000 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner has not established that it previously paid the beneficiary the proffered wage.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). The petitioner has not provided any Internal Revenue Service (IRS) Forms 1120-F, U.S. Income Tax Return of a Foreign Corporation or the foreign entity's audited financial statements and agreements, supporting the petitioner's claim that the foreign entity in this matter will continue to fund the petitioner. The record does not sufficiently demonstrate the petitioner's ability to pay the proffered wage.

The third issue in this proceeding is whether the petitioner has established that it is doing business in the United States and is not a mere agent or office in the United States.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*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."

The critical focus in the definition of "doing business" is not whether the petitioner is an agent or representative office, but whether the entity constitutes the "mere presence of an agent or office" without conducting any business activities. The proper focus on this issue, thus, is the nature and conduct of the petitioner's business activities, if any.

On appeal, the petitioner provided a flyer advertising its 2001 USA Roadshow to demonstrate that it had presented information on travel to Fiji. The petitioner also provided an invoice from 2000 showing that it had

rented an exhibit booth. The petitioner further provided a partnership plan for 2000 between itself and an airline. The petitioner also submitted an agreement appointing an agency to carry out its advertising plan in 2002. Counsel contends that these documents and the petitioner's staff of four employees and one independent contractor sufficiently establish that the petitioner is doing business in the United States.

The petitioner has not submitted evidence that it is involved in a high number of transactions, both in terms of volume and dollars. The petitioner has not submitted sufficient evidence to establish that it facilitates the annual trade in tourism each year. The petitioner has not adequately established that it is engaged in facilitating the regular, systematic, and continuous provision of services. The record is insufficient in this regard. Employing individuals and occasionally sponsoring trade shows and advertising the benefits of travel to Fiji do not sufficiently establish the regular, systematic, and continuous provision of services.

Beyond the decision of the director, the petitioner has not sufficiently described the beneficiary's duties for the foreign entity prior to her entry into the United States as a nonimmigrant. For this additional reason the petition will not 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.