



U.S. Citizenship
and Immigration
Services

By

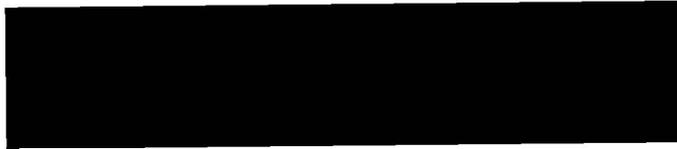
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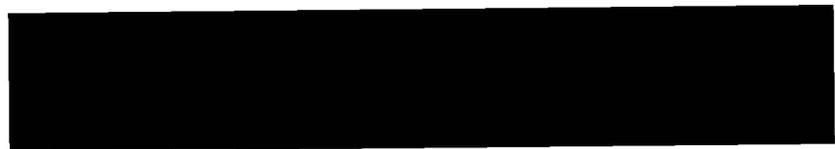
File: WAC 02045 56164 Office: CALIFORNIA SERVICE CENTER Date: MAR 08 2006

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)

IN 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.

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 case will be remanded for further consideration and a new decision.

The petitioner was incorporated in 1998 in the State of California and is claimed to be a subsidiary of [REDACTED], located in China. The petitioner is engaged in the business of importing chucks and other machine tool supplies to the United States. It seeks to employ the beneficiary as its deputy 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 first issue the director addressed was that of qualifying employment. Namely, the director denied the petition concluding, in part, that “[i]t is contrary to common business practice and defies standard business logic for such a company to have another executive, as such a business does not possess the organizational complexity to warrant having another employee as such.”

The above comment suggests that director based his decision, in part, on an improper standard. The director's above comments are inappropriate. The director should not hold a petitioner to his undefined and unsupported view of "common business practice" or "standard business logic." The director should, instead, focus on applying the statute and regulations to the facts presented by the record of proceeding. Although CIS must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some reasonable basis for finding a petitioner's staff or structure to be unreasonable. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in sales or services will not preclude the petitioner from qualifying for an immigrant visa classification under section 203(b)(1)(C) of the Act.

The director also concluded that the petitioner's description of the beneficiary's duties is not sufficient to establish that such duties will be primarily of a managerial or executive nature. However, as properly pointed out by counsel, the director did not include a discussion of the beneficiary's duties even though he previously listed them in his decision. Nor did he specify which of the duties he found to be non-qualifying. The director merely concluded that because the petitioning organization has “only” six employees the beneficiary would have to be involved in performing non-qualifying duties.

Although the director may and should consider the size of the petitioner's work force, such consideration should be made only for the sake of determining whether the petitioner employs enough people to relieve the beneficiary from having to perform non-qualifying duties. In the instant case, there is little evidence to suggest that the director actually analyzed the beneficiary's list of duties. Therefore, it is impossible to determine whether the director's conclusion was based only on the number of the petitioner's personnel, or whether it was based on the determination that the beneficiary's duties indicate that the size of the work force prevents him from focusing primarily on managerial or executive duties. The director must include a full analysis of the beneficiary's duties rather than generally stating that the duties performed are not qualifying.

The director further concluded that the beneficiary would not qualify as a personnel manager because the petitioner the employees supervised are neither professional nor managerial. Although the director provided the petitioner with the definition of "professional," he failed to indicate how he arrived at the conclusion that the beneficiary's subordinates did not fit that definition. That determination could have been made with relative ease as the petitioner provided both an organizational chart illustrating its organization's hierarchy, as well as detailed job descriptions of the beneficiary's immediate subordinates. However, the denial does not indicate that the director gave due consideration to either of the submitted documents, both of which are crucial to a determination regarding the employees' status as professionals.

Similarly, the director's determination that the beneficiary's subordinates are not managers is based on an improper interpretation of the law. Contrary to the director's interpretation, the definition of managerial capacity contained in section 101(a)(44)(A) of the Act applies to the beneficiary of the present petition and not to his subordinate employees. Based on the director's reasoning, no beneficiary would qualify as a manager if the organization's ultimate, lower tier subordinate was not a managerial employee, regardless of how many layers of management lay between the beneficiary and the non-managerial employee. According to the director, each tier of management would be disqualified as the first-line supervisor of non-managerial staff. The director must base his conclusion only on the second tier of employees who work directly under the beneficiary. Consequently, the beneficiary may not be disqualified based on the conclusion that he does not manage professional employees where the sole basis for such reasoning is that the second tier of managers supervises the petitioner's non-professional employees.

Finally, in determining whether the beneficiary is a functional manager, the director shall first look to see whether the petitioner has established which function the beneficiary claims to manage and whether that function is essential to the petitioning organization. Only if the petitioner successfully meets this initial evidentiary burden does the director need to go into a full discussion of whether the beneficiary's duties are those of a function manager. In the instant case, the petitioner has not clearly established which function(s) the beneficiary manages and whether it/they are essential. Although the petitioner appears to infer that the beneficiary is a functional manager, the documents submitted suggest that the beneficiary's duties are those of a personnel manager. The director must address this issue and request any additional documentation in order to clarify whether the petitioner is making the claim of a functional manager. If the petitioner is, in fact, making that claim, the director must establish whether the initial evidentiary burden is met, as described above.

The other issue addressed in the denial was that of a qualifying relationship between the petitioner and a foreign entity. The director determined that the petitioner failed to submit sufficient evidence that the named foreign entity actually paid for its portion of the petitioner's stock. The director based his determination, in part, on item no. 4 of Schedule K of the petitioner's 2000 income tax return in which the petitioner indicated that it is not a subsidiary in an affiliated group or parent-subsidiary relationship.

However, the petitioner has overcome this issue on appeal by submitting the Internal Revenue Service's (IRS) definition of a parent-subsidiary controlled group. The definition suggests that the parent must own at least 80% of the petitioner's voting stock in order to be considered a subsidiary in a controlled group. The petitioner has maintained, since the date it filed the petition, that it's foreign parent has only 70% of its shares.

In light of IRS's definition, the petitioner properly filled out the Schedule K portion of its tax return and has not compromised its claim of a qualifying parent/subsidiary relationship with the foreign entity. Furthermore, careful review of the same schedule of the same tax return indicates that the petitioner specified that it is majority owned by a foreign corporation.

Finally, the director determined that the petitioner failed to establish that it is owned and controlled by a qualifying foreign entity because it did not submit original wire transfers from the parent company documenting that company's purchase of the petitioner's stock.

However, the petitioner's response to the director's request indicates that the foreign entity did not directly offer monetary consideration in exchange for the petitioner's stock. Instead, the petitioner claims that the parent corporation contributed \$140,000 worth of tools and equipment in exchange for the petitioner's stock.

A review of the documents submitted in response to the director's request for additional evidence indicates that the petitioner submitted a number of invoices and shipping documents enumerating the type and monetary value of the equipment bought and sent by the foreign entity to the petitioner in the United States. The director, therefore, was incorrect in determining that the petitioner failed to establish the foreign entity's ownership and control over the U.S. entity. While the director's request for evidence on this point was reasonable and relevant to the petitioner's eligibility, there is no statute or regulation that specifically requires a petitioner to transfer monetary funds in exchange of ownership. A petitioner may also exchange an ownership interest in the company for goods, services, or "sweat equity." However, if a petitioner claims that goods or services were contributed by the claimed overseas owner, the petitioner should submit evidence of this transfer. In the instant case, stock in the petitioning entity was purchased with equipment rather than with a direct money transfer. The petitioner, therefore, has overcome this portion of the director's objection.

Accordingly, this case will be remanded for the purpose of determining whether the beneficiary has been and will be employed by the U.S. petitioner in a managerial or executive capacity. The director shall ask for any additional evidence deemed necessary in making such a determination and render a decision accordingly.

ORDER: The decision of the director, dated September 20, 2002, is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision which, if adverse to the petitioner, shall be certified to the AAO for review.