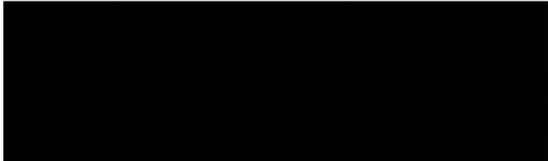




U.S. Department of Justice
Immigration and Naturalization Service

B4

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



ORIGINAL COPY

File: [Redacted] Office: VERMONT SERVICE CENTER Date:

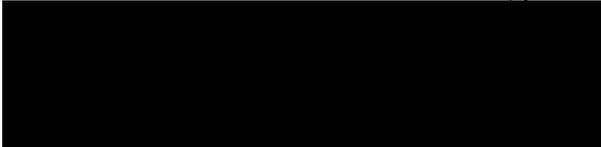
SEP 11 2000

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:



Identifying data needed to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, Vermont Service Center. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the preference visa petition, and his reasons therefore, and ultimately revoked the approval of the petition on September 30, 1999. The Associate Commissioner for Examinations subsequently dismissed the appeal.

In his decision, the Associate Commissioner for Examinations found that counsel had neglected to submit a brief on appeal. However, the record shows that the brief was timely received on November 24, 1999. Accordingly, the Service will reopen the proceedings on its own motion. The previous decision of the Associate Commissioner will be affirmed.

The petitioner sells men's, women's and children's footwear. It seeks classification of 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, to perform services as its general manager. The director determined that the petitioner had not established that the beneficiary had been or will be employed in an executive or managerial capacity.

On appeal, counsel argues that the U.S. entity is a relatively new operation, "experiencing normal growing pains," and that the beneficiary has and will be employed in a primarily managerial or executive capacity.

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 the alien 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.

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 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.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

"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:

"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.

At issue in this case is the nature of the work to be performed for the petitioning company by the beneficiary.

The petitioner indicates that the beneficiary is to be the general manager. It describes the beneficiary's duties as follows:

Oversight and management of the departments of the [redacted] Daily discretionary leadership of all company business activities. Hiring/firing of all company employees and determining performance reviews. Sets present and future company business goals, such as expansion planning and makes sure that all lower [sic] staff follow his goals. Negotiates with lending institutes, shipping companies, confirms that the company comply with necessary laws and regulations. Deals with company lawyers, accountants[,] etc. Sets company work rules and regulations and ensures proper implementation.

In a letter dated April 29, 1998, the petitioner described the beneficiary's duties with the U.S. entity as follows:

In this executive position [redacted] has been in charge of the corporation's entire international business activities. [redacted] directs the discretionary daily business activities of [redacted] including the hiring and firing of all employees as well as governing their performance review and salaries. As General Manager of the company in the United States, [redacted] directly oversees each department of the company and makes the final decision in all relevant business matters. Therefore he confirms each sale made by the sales personnel and all advertising/marketing made by the public relations personnel.

In addition, as General Manager, [REDACTED] sets the present and prospective corporation goals for [REDACTED] including the plan to expand product lines, negotiates with local and overseas banking institutions on Letter of Credit issues, confirms that all U.S. Customs laws are complied with for importation of merchandise, and hires other professionals, such as attorney's customs brokers and accountants, to work for the U.S. company. As General Manager, [REDACTED] will also set forth all United States company policies and procedures for the present and the future, including the creation of company guidelines and rules.

The director stated in the revocation that:

You have alluded to the beneficiary's managerial oversight and promotion of the United States entity's business. However, the record contains no evidence that would show that you currently employ individuals who would remove the beneficiary from performing the mundane, non-qualifying duties of the organization.

On appeal, counsel states, in pertinent part:

INS also states that the job duties listed for the beneficiary are not managerial/executive primarily and therefore the application is improperly filed and approved. The INS[,] however, failed to consider that some of the listed duties, including attending trade shows and conveying customer specifications for production, while maybe not executive in nature, were imperative to maintain the business operations and more importantly were just a few of the job duties he performs.

Counsel states that the beneficiary's "critical duty" is to cultivate and maintain relationships with U.S. customers. Other duties include determining which customers to pursue and negotiate deals with, deciding which shoe product lines to discontinue and promote, designating which shoes may be "special ordered," taking sales and market trend data from the sales associate, hiring and consulting with accountants, legal advisors, and financial advisors, and assisting in occasional sales or other tasks, such as attending trade shows.

Counsel further argues that the U.S. entity does not require a large staff, and that the Service failed to consider that the "purpose and development of the company precludes the need for higher staffing levels." Counsel argues that the vice president assists the sales employee to sell the leather shoe lines, and that the sales associate is not the only employee engaged in sales.

The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. There is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Duties described as oversight and management of the U.S. entity's departments, having discretionary leadership of all business activities, hiring and firing of all employees, setting business goals, and setting company work rules, are without any context in which to reach a determination as to whether they would be qualifying. Other duties such as confirming each sale, negotiating with lending institutes and shipping companies, assisting the sales employee in making sales, designating which shoe lines to sell, and attending trade shows, have not been demonstrated to be managerial or executive in nature. The use of the position title of "general manager" is not sufficient.

Further, counsel argues on appeal that while the beneficiary performs some sales services, his primary function is to cultivate and maintain customer relations. However, in a letter dated May 10, 1999, the petitioner stated that the beneficiary does not provide sales services since he does not speak English, and "therefore cannot correspond with U.S. customers concerning the products." Instead, the petitioner explains, the beneficiary "communicates with the undersigned as V.P./Administrator, the Sales Associate and the secretaries when needed." However, if the beneficiary is unable to communicate with U.S. customers except through the subordinate employees, it is unclear how he can be performing any sale services with U.S. customers, much less the stated "critical duty" of cultivating and maintaining relationships with U.S. customers.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (Comm. 1988).

The record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy other than in position title. In fact, the beneficiary's position title within the U.S. entity has not been established. The petitioner claims that the beneficiary has been and will be employed as its general manager.

However, federal income tax returns are signed by the beneficiary in the position of president.

Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing nonqualifying duties. The beneficiary and the vice president perform the duties of a sales associate. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has submitted insufficient evidence to establish that the U.S. entity is doing business. The petitioner claims that the U.S. entity has gross receipts of \$1,019,059 for the year ending on November 30, 1997, but submits no invoices, bills of sale, or shipping records showing that it had purchased or sold goods for that year. The petitioner submitted documentation showing that it had imported two shipments of 253 cartons of ladies shoes in December of 1997. There is no documentation showing that the foreign entity is doing business. As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will be affirmed, and the petition will be denied.

ORDER: The appeal is dismissed.