



U.S. Department of Justice
Immigration and Naturalization Service

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



File: [Redacted] Office: Texas Service Center Date:

SEP 14 2000

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



Public Copy

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

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a Wyoming corporation that claims to be engaged in the motel and car rental business. The petitioner further claims to be a subsidiary [REDACTED] located in Great Britain. The petitioner seeks to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), to serve as a general manager. The director determined that the petitioner had not established that a qualifying relationship exists between it and the claimed parent company, or that it is doing business in a regular, systematic, and continuous manner, or that the beneficiary had been employed in a managerial or executive capacity, or that it has the ability to pay the proffered wage.

On appeal, counsel argues that the beneficiary is eligible for the benefit sought.

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 first issue to be examined is whether a qualifying relationship exists between the petitioner and the claimed parent company.

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;

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.

The visa classification that the petitioner seeks is intended for multinational executives and managers. The language of the statute specifically limits this visa classification to those executives and managers who have previously worked abroad for at least one year in the preceding three for the overseas entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary. In order to qualify for this visa classification, the petitioner must establish that there is a qualifying relationship between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas company.

In a letter dated July 31, 1997, counsel stated that "the original Members [of the petitioning organization] were [redacted] and Shila Patel that was on September 1, 1994. [redacted] sold 51% of his membership interest to [redacted]." The petitioner submitted a photocopy of a "sale and purchase agreement" between [redacted] and [redacted] and General Stores suggesting that [redacted] owned 100% of the shares of the petitioning organization and that he was selling 51% of these shares to the foreign entity. The petitioner also submitted a photocopy of a certificate which indicated that [redacted] owned fifty one percent of the share interests of the petitioning organization. The petitioner submitted a photocopy of its 1996 Internal Revenue Service ("IRS") Form 1065, U.S. Partnership Return of Income. According to question 6 of Schedule B of this return, the petitioning organization did not have any foreign partners. In addition to these documents, the petitioner submitted a photocopy of the articles of organization filed on September 6, 1994. According to the articles, [redacted] and [redacted] each invested \$28,570.00 into the organization.

On October 15, 1997, the director requested that the petitioner submit additional information. In response, counsel stated that [redacted] and his wife, [redacted] . . . reaffirm that they sold a total of 51% of their membership interest to Jayanti Patel." The petitioner submitted the minutes of a meeting that purportedly

occurred on September 8, 1994 which indicated that [REDACTED] and [REDACTED]

voted that Kalpesh Newsagents be admitted as a new member. His capital contribution would be \$66,772 representing 51% of all of the membership interests in the Company . . . At the request of [REDACTED] his membership interest would be held in the name of Shila Patel.

The petitioner also submitted a photocopy of an "operating agreement" purportedly completed on September 10, 1994. According to this document, [REDACTED] owned \$28,570.00 and [REDACTED] as a trustee, owned \$66,772.00, of undivided interest in the business and company.

On appeal, counsel argues that the relationship between the petitioning organization and the foreign entity has been "proven by all of the . . . official company documents." Counsel submits a photocopy of the petitioner's 1997 IRS Form 1065, U.S. Partnership Return of Income. According to question 6 of Schedule B of this return, the petitioning organization did not have any foreign partners.

The evidence submitted does not establish that a qualifying relationship exists between R&S Hospitality and [REDACTED]. Evidence submitted has been contradictory and incomplete. The petitioner claims that a representative of [REDACTED] Newsagents invested over \$66,000.00 into R&S Hospitality; however, the petitioner did not submit any documentary evidence (such as monetary wire transfers) to support this statement. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). Further, the petitioner's income tax returns clearly reflect that it does not have any foreign partners. The petitioner has not explained this discrepancy between its statements and its supporting documents. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Matter of Ho, 19 I&N Dec. 582 (BIA 1988). Accordingly, the petition may not be approved.

The next issue to be examined is whether the petitioner has established that it was doing business for at least one year. The petition was filed on August 4, 1997.

The phrase "doing business" is defined at 8 C.F.R. 204.5(j)(2) as follows: "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 petitioner submitted a photocopy of its 1996 federal income tax return. The petitioning organization also submitted photocopies of bank statements indicating that it was doing business as The Royal Inn. On appeal, the petitioner submits a photocopy of its 1997 income tax return and payroll analyses for its employees. Counsel argues that the petitioner has submitted sufficient evidence to establish that it was doing business. A review of the evidence does indicate that R&S Hospitality was doing business as The Royal Inn during the one-year period prior to filing.

The next issue in this proceeding is whether the beneficiary has been and will be performing managerial or executive duties.

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.

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.

In a letter dated July 31, 1997, counsel stated that the beneficiary:

is the General Manager of a company that owns two motels and a car rental agency. He is not a manager who directs the day to day operations of a motel. He is the Chief Operating Officer of a company . . . The beneficiary functions at the highest level of this company. He presides over management staff meeting, he determines company policy in consultation with the parent company owner in Great Britain. He has an expertise which goes beyond the overall management of the company. He finds, negotiates and consummates the purchase of new motels. In essence he is the only company employee in the United States or in England that knows how to evaluate motels and hotels.

In a letter dated December 26, 1996, the petitioner stated that the beneficiary's duties are:

to direct the two motel Manager in the overall operations of the company. The managers supervise the other employee in the day to day operations of the business. [The beneficiary's] time is spent in two areas of operations. First, directing the daily operations of our company this is achieved by supervising the managers of the motels and presiding over management staff meeting. The second area of operations which [he] has exclusive responsibility is the locating of our motels within the United States.

The petitioner submitted a photocopy of the beneficiary's 1996 federal income tax return. According to this return, the beneficiary received \$13,000.00 working as a "motel manager."

On appeal, counsel states that the beneficiary "holds an exalted executive position with the petitioner because he has the sole responsibility for the growth of the petitioner." The record is not convincing in demonstrating that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The description of the duties to be performed and that were performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. 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 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. Rather, the evidence suggests that the beneficiary is the manager of a motel.

The next issue to be examined is whether the petitioner has the ability to pay the proffered wage.

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 . . . Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petition, filed on August 4, 1997, indicated that the beneficiary will receive an annual salary of \$31,200.00. The petitioner submitted photocopies of its 1996 tax return. According to this tax return, the petitioner ended with \$69,192.00 in ordinary income. The petitioner also submitted a photocopy of the beneficiary's 1996 income tax return and Form W-2. These documents indicated that the beneficiary received \$13,000.00 in 1996. The petitioner also provided photocopies of bank statements. On appeal, the petitioner submits a photocopy of its 1997 tax return. According to this return, the petitioner ended with \$14,415.00 in ordinary income. Counsel argues that the petitioner has shown that it has more than enough cash flow to pay the beneficiary "whatever salary it wishes." Counsel's argument is unpersuasive. The evidence submitted in support of this petition does not establish the petitioner's ability to pay the beneficiary an annual salary of \$31,200.00 as of August 4, 1997. Accordingly, the petitioner has not established its ability to pay the proffered wage in accordance with 8 C.F.R. 204.5(g)(2).

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.