

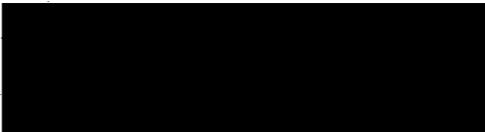


U.S. Department of Justice

Immigration and Naturalization Service

B4

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



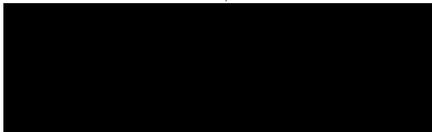
File: [Redacted] Office: Texas Service Center Date:

SEP 19 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
Terrance M. O'Reilly, Director
Administrative Appeals Office

Releasing data needed to
prevent clearly unwarranted
invasion of personal privacy

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

The petitioner is a North Carolina corporation that claims to be an art gallery. The petitioner further claims to be a subsidiary of Landcom, Ltd., located in Ukraine. 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 the president. The director determined that the petitioner had not established 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.

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 the petitioner has established that it was doing business for at least one year. The petition was filed on April 7, 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."

In a letter dated August 15, 1997, the petitioner stated that it "is not, at this time, a profitable business . . . [it] is, nonetheless, functioning and 'doing business'." The petitioner

submitted: photocopied agreements between the petitioning organization and individuals to provide services for the First International Gallery in 1995; photocopies of several bills and bank statements which indicate that Konaco, Ltd. is doing business as First International Gallery; a photocopied business license bill that was due July 31, 1997; a photocopied business license issued to Konaco, Ltd. by the city of Charlotte; a photocopied business license issued to the First International Gallery by the town of Pineville; a photocopy of a shopping center lease between the petitioner and Tower Place Joint Venture for the First International Gallery to do business there from August 1995 to August 1998; a photocopied magazine article dated July 1996 describing the First International Gallery; a photocopy of an advertisement for the First International Gallery; photocopies of advertisements for the First International Gallery dated in 1995 and 1996; and photocopies of customs forms and order forms dated in 1995. Counsel stated that the "First International Gallery is principally owned and controlled by Konaco, Ltd. with a minority interest owned by a former Ukrainian." The petitioner also submitted photocopies of its 1994, 1995, and 1996 state and federal income tax returns. According to the 1996 tax return, the petitioner engaged in over \$17,000 in sales of artwork that year.

The director determined that the petitioner had not established a relationship between it and the First International Gallery and denied the petition. On appeal, counsel argues that the Service "overlooked the evidence of doing business . . . [the petitioner] has been doing business as First International Gallery." A review of the evidence does demonstrate that the petitioner has been doing business as the First International Gallery. The evidence further establishes that the First International Gallery was doing business during the year preceding the filing of the petition.

The next issue to be examined 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 its letter dated March 25, 1997, the petitioner stated that the beneficiary "has been functioning as an Executive for the past five years. He has been CEO and President of Landcome, Ltd. since April, 1992. He has been responsible for hiring and firing personnel and for developing long range plans for the organization."

On June 24, 1997, the director requested that the petitioner submit additional information. In response, the petitioner stated that the beneficiary:

has been the principle planner and visionary behind the parent company's decision to establish a business operation in the United States . . . In addition to overseeing the management of Konaco's First International Gallery, the Beneficiary manages and directs other activities of Konaco, Ltd.

On appeal, counsel argues that the beneficiary has "performed executive and/or managerial functions since [1994]." Counsel's argument is not persuasive. 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 by the beneficiary in the proposed position 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. Based on the evidence of record, it appears that the beneficiary is part-owner of an art gallery in a shopping mall. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity. Accordingly, the petition may not be approved.

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.