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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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Washington, D.C. 20536



File:



Office: NEBRASKA SERVICE CENTER

Date:

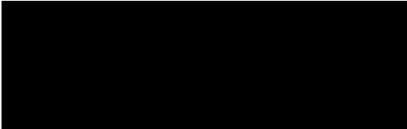
11 JAN 2002

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:



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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Nebraska Service Center denied the immigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an Oregon corporation that is engaged in the import and export of wood products. It seeks to employ the beneficiary as its commercial director and, therefore, endeavors to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C).

The director denied the petition because the petitioner did not establish that it (1) currently employs and would continue to employ the beneficiary in a primarily executive or managerial capacity, or (2) had the ability to pay the proffered wage of \$36,000 per year. On appeal, counsel submits a brief and additional evidence. Counsel states, in part, that the beneficiary is a "key executive" and manager for the petitioning entity, and that the petitioner has the ability to pay the beneficiary's salary.

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.

I. EMPLOYMENT OF THE BENEFICIARY BY THE PETITIONER

The director found that the beneficiary did not merit classification as an executive or manager because the petitioner experienced a decline in its business operations, which indicated to the director that the petitioner did not have a need for an executive-level employee. On appeal, counsel states that the decline in revenues that the petitioner experienced only bolstered its need to employ an individual like the beneficiary, who would

make the executive decisions necessary to improve the company's profitability. According to counsel:

Mr. PANTIOUKHIN clearly performs the duties of an executive or manager. He supervises the activities of two workers located in Russia at the wood mill that is owned by the parent company Mayak. He negotiates contracts and makes deals with American and other distributors. He makes decisions as to which companies to pursue and what deals to make. He provides valuable information and services that only a high level executive can provide.

Counsel's statements on appeal do not persuade the Service that the director's decision to deny the petition was in error. As shall be discussed, the beneficiary's duties as described by the petitioner are neither primarily managerial nor primarily executive in nature.

A. EXECUTIVE CAPACITY

In order to be found eligible for this immigrant visa classification as an executive, the record must clearly show that the beneficiary *primarily*:

- (A) Directs the management of the organization or a major component or function of the organization;
- (B) Establishes the goals and policies of the organization, component, or function;
- (C) Exercises wide latitude in discretionary decision-making; and
- (D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

See. 8 C.F.R. 204.5(j)(2).

The petitioner claims that the beneficiary directs the management of a major component of the organization. The major component to which the petitioner refers is the commercial component, which includes commercial activities, contracts, marketing and sales. In order to find that the beneficiary directs the management of a major component as a primary duty, the petitioner must establish that the beneficiary would plan, organize, direct and control its operations through other individuals who are either on the company payroll or employed on a contractual basis.

According to the I-140 petition, the petitioner employs the beneficiary and a general manager. The petitioner states that the

general manager has been in Europe for the past year, leaving the beneficiary as the sole employee within the petitioning entity. The petitioner does not explain who performs the daily administrative and clerical tasks that are vital for its continued operation, or otherwise explain how the day-to-day operational tasks are executed. The petitioner's organizational structure, with the beneficiary as the company's sole employee in the United States, leads to a conclusion that the beneficiary, himself, performs the day-to-day functions of the company and, therefore, does not direct the management of the organization as a primary job responsibility. Therefore, the petitioner fails to show that the beneficiary merits classification as a multinational executive.

B. MANAGERIAL CAPACITY

In order to be found eligible for this immigrant visa classification as a manager, the record must clearly show that the beneficiary *primarily*:

- (A) Manages the organization, or a department, subdivision, function, or component of the organization;
- (B) 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;
- (C) 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
- (D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

See. 8 C.F.R. 204.5(j) (2).

The Service is also not satisfied that the beneficiary works primarily as a manager because the petitioner fails to establish that the beneficiary manages the organization or a department, subdivision, function, or component of the organization.

In its job description for the beneficiary, the petitioner states that the beneficiary is "in charge of our Sales and Marketing

(Commercial) Department." However, the petitioner does not employ individuals to staff this department and the organizational chart for the petitioning entity does not include either a sales or a marketing department. Although the petitioner states that the beneficiary supervises two salespersons within the overseas entity, this job responsibility is not tied to the U.S. entity's operations. Simply making conclusions about the beneficiary's responsibilities does not satisfy the burden of proof in these proceedings. The petitioner does not state how the beneficiary manages the operations or an essential function of the operations with any degree of detail that would enable the Service to find that he works as a manager on a primary basis. As previously stated, it appears that the beneficiary performs the day-to-day functions of the petitioning entity's operations, rather than managing those activities, as the regulation requires.

Based on the above discussion, the director's denial on the basis that beneficiary is not currently working and would not continue to work for the petitioner in a primarily executive or managerial capacity is affirmed.

II. ABILITY TO PAY THE PROFFERED WAGE

The final issue to be examined is the director's finding that the petitioner does not have the ability to pay the beneficiary a proffered wage of \$36,000 per year.

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.

On appeal, counsel states that the petitioner is conducting substantial business in the United States and submits a copy of a contract between the petitioner and the James Group, which relates to the purchase of wood products from the petitioner. The petitioner has also asserted in previous correspondence with the Service that its revenues have increased and it expects to see profits of over \$1 million.

The regulation at 8 C.F.R. 204.5(g)(2) specifically requires the petitioner to submit copies of annual reports, federal tax returns, or audited financial statements to show a petitioner's

ability to pay. The petitioner only submitted copies of its federal tax returns, which the director found were not sufficient evidence of the petitioner's ability to pay the proffered wage. Copies of contracts and mere statements by a petitioner about the company's expected profits are not sufficient evidence of the petitioner's ability to pay the beneficiary's wages. Therefore, the director's objections have not been overcome on this issue, as well.

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 met that burden.

ORDER: The appeal is dismissed.