

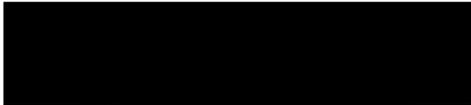


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U.S. Department of Justice
Immigration and Naturalization Service

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



File:

Office: VERMONT SERVICE CENTER

Date:

FEB 06 2003

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 employment-based visa petition was initially approved by the Director, Vermont Service Center. Upon subsequent review, the director properly issued a notice of intent to revoke, and ultimately revoked the approval of the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of West Virginia in 1993. At the time of filing the petition it claimed to be engaged in the investment business. It seeks to employ the beneficiary as its president. 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 petition was filed in October of 1998. The director initially approved the petition on January 28, 1999. Upon subsequent review of the record, the director issued a notice of intent to revoke the petition on October 23, 2000. The director determined that the beneficiary had not been employed in a managerial or executive capacity by the beneficiary's claimed overseas employer and would not be employed in a managerial or executive capacity by the petitioner. The director requested that the petitioner provide additional information to overcome the Service's intention to revoke the approval for these reasons. After receiving no response, the director revoked the approval on March 31, 2001.

On April 30, 2001, the petitioner submitted a motion to reopen and reconsider the revocation decision by the director. The director granted the motion and reviewed the motion and evidence submitted with the motion. The director affirmed the Service decision to revoke the approval on September 23, 2001. The director determined that the record did not contain a comprehensive description of the beneficiary's duties and that the record did not clearly establish that the beneficiary would be employed in a primarily executive or managerial capacity or that the petitioner could support such a position. The director stated that it appeared that the petitioner was merely an office with the beneficiary acting as an agent. The director also determined that the record did not establish that the petitioner had been doing business as defined by regulation. The director further determined that the beneficiary's overseas employment was not classified as managerial or executive in nature under the Act.

On appeal, counsel for the petitioner asserts that "the record contains voluminous evidence that the petitioner has been continuously providing services to its client, a Holiday Inn Express motel, for which it is providing complete staffing services." Counsel also asserts that the Service is wrong in determining that the beneficiary does not supervise and control the work of supervisory, professional or managerial employees. Counsel submits an affidavit from the beneficiary describing his

managerial capacity and also provides an opinion from a professor of management asserting that the opinion provides a reasoned basis for concluding that each of the beneficiary's duties are managerial in nature. Counsel also submits a detailed description of the beneficiary's duties for his previous overseas employer and asserts that the evidence now clearly demonstrates that the beneficiary was employed in a managerial position prior to entering the United States. Counsel finally notes that the director did not respond to its request for an explanation regarding the three previous L-1A approvals of the beneficiary as a multinational manager and why, absent gross error, the beneficiary was now denied classification as a multinational manager.

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 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.

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 that 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. 8 C.F.R. 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has

established that it has been doing business in a regular, systematic and continuous manner.

8 C.F.R. 204.5(j)(2) states in pertinent part:

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 director does not clearly detail his reasoning for determining that the petitioner had not established that it had been doing business for the year prior to filing the petition, nor does the director clearly describe how he reached his conclusion that the petitioner appeared to be merely an office with the beneficiary its agent.

However, a close examination of the record reveals that the petitioner is a corporation organized in West Virginia. The record also reveals that the beneficiary's United States employer is an entity identified as M & B of Hillsborough Inc. The record reveals that M & B Hillsborough, Inc. was incorporated in the State of North Carolina. The petitioner submits Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 1998 for M & B Hillsborough, Inc. Holiday Inn Express of Hillsborough. The several IRS Forms 941, Employer's Quarterly Federal Tax Returns are all issued by Holiday Inn Express - Hillsborough. Counsel in a letter to support the petition states that the petitioner "has been engaged in overseeing first the construction, and now the management of a Holiday Inn Express motel in Hillsborough North Carolina which has been in active operation since April, 1997." In a general description of the beneficiary's duties for the proposed United States entity, counsel also states that the beneficiary "is primarily responsible for managing the operations of a Holiday Inn Express hotel pursuant to a management contract between the petitioner (d/b/a M & B Inc., of Hillsborough) and MBL & RJ Associates, LLC, the owner of the hotel."

The petitioner has not provided independent evidence that it is doing business as another corporate entity. The record does not reveal who owns the corporate entity M & B Inc. of Hillsborough. The record does not contain a management contract between the petitioner and the hotel. The record is bereft of evidence showing that the petitioner is a viable business. The information submitted relates to a separate corporate entity with only counsel's assertion that the petitioner is doing business as the separate corporate entity. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec.533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980). The record does not reveal that the petitioner has assets or more importantly is providing services on a regular, systematic, and continuous basis. Counsel's assertion that the

record contains voluminous evidence that the petitioner has been continuously providing services to its client, a hotel, is not persuasive. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). The record only contains evidence that another corporate entity has been providing services to the hotel that may employ the beneficiary. The petitioner has not established that it is doing business as required by the regulation. The record does not contain evidence that establishes a legitimate relationship between the petitioner and the separate corporate entity. The petitioner has not established that it is doing business in the United States.

On a related note, the IRS Form 1120 submitted by the petitioner for the separate corporate entity reveals at Schedule K, Lines 5 and 10 that no corporation, partnership or foreign entity or person owns a percentage of the filing entity. This information undermines any claim that the entity filing the IRS Form 1120 has a qualifying relationship with either the petitioner or the beneficiary's overseas employer.

The second issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the petitioner.

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.

The petitioner through its attorney initially submitted a description of the beneficiary's duties as follows:

[The beneficiary] is and will continue to be employed in a position in which he is primarily responsible for managing the operations of a Holiday Inn Express hotel pursuant to a management contract between M & B Inc., (d/b/a M & B Inc., of Hillsborough) and MBL & RJ Associates, LLC, the owner of the hotel. In this position he supervises, directly or indirectly, a total of 20 employees, including 4 supervisors. He will oversee the day to day decision making of the entire company and exercise complete discretion over all company activities. In addition, [the beneficiary] has complete authority to hire and fire all employees of the company and make decisions regarding other personnel activities, including leave recommendation and performance review.

As noted above, the director initially approved the petition but upon further review issued a notice of intent to revoke. The director requested additional information on the staffing of the petitioner, including the number of employees, their duties, as well as the management structure of the organization. After receiving no response, the director revoked the petition. Counsel and petitioner on motion, provided the job description previously submitted for the beneficiary, and also added a list of employees, their titles, and job descriptions. The job titles for the

various positions included front desk, night audit, housekeeping supervisor, assistant housekeeping supervisor, housekeeping maid, laundry attendant, and breakfast bar person.

The director determined that the petitioner had not provided a comprehensive description of the beneficiary's duties for the petitioner and that re-stating portions of the definition of managerial capacity was not sufficient to establish the beneficiary's duties as managerial. The director also questioned the payment of wages and other compensation as revealed on the IRS Form 1120 submitted on motion. The director determined that the money paid in and the money paid out for contracted labor did not contribute to a finding that the beneficiary had or would have any managerial duties.

On appeal, counsel for the petitioner submits the beneficiary's affidavit detailing his duties as a manager for a hotel and a management consultant's opinion that these duties are managerial in nature.

Although the director did not explicitly state the underlying problem with the petitioner's explanation of the beneficiary's duties and his work for the hotel, the director sufficiently placed the petitioner on notice of the lack of evidence supporting the beneficiary's classification as a manager for the petitioner. Again, the underlying problem with the petitioner's record is that the petitioner does not appear to be the beneficiary's employer. The beneficiary is employed by a separate corporate entity and is apparently subject to a management contract. The management contract allegedly with the owners of the hotel has not been provided. Whether the management contract would clarify the discrepancies in the record or would further undermine the petitioner's claim to employ the beneficiary is unknown.

Regardless, the beneficiary's duties as more comprehensively described on appeal do not support the petitioner's claim that the beneficiary's position or duties are managerial in nature. The first requirement to qualify as a manager is to "manage the organization, or a department, subdivision, function, or component of the organization." It appears from the description provided that the beneficiary is claiming to manage the operations of a hotel owned by an unrelated entity and is not claiming to manage the petitioner. For example, the beneficiary states that it is his responsibility to perform ceremonial duties such as greeting guests and company representatives and acting as the spokesperson for the "organization" when dealing with customers, vendors and other organizations. In addition, the description of the majority of the beneficiary's duties is indicative of an individual providing basic operational services rather than managing an organization. The beneficiary determines shift schedules, prepares the annual budget, monitors changes in the hospitality industry, monitors group sales and guest reservations, maintains and improves customer relations, and negotiates service contracts.

An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988).¹

The beneficiary also states that he supervises thirteen employees including three supervisors. As noted above, it is not clear that the petitioner employs these individuals. Furthermore, it appears that the beneficiary would be serving as a first-line supervisor of non-professional, non-managerial, and non-supervisory personnel. The positions of head housekeeper, front desk manager, and night audit supervisor appear to be senior employees in their respective positions rather than managers or supervisors.

The record does not support a finding that the beneficiary manages the organization or a subdivision, department, or function of the organization as defined by the Act.

The third issue in this proceeding is whether the beneficiary's position for his overseas employer was a managerial or executive position.

The petitioner's overseas employer is engaged in the business of operating a service station. The beneficiary was the senior partner and majority owner of the overseas employer. The description of the beneficiary's job duties for the overseas employer made clear that the beneficiary did not pump the gas, take the cash, or otherwise perform duties associated with physically operating the gas station. However the beneficiary states that he negotiated contracts, monitored and tested the product, determined schedules for the staff as well as controlled the work of two managerial employees and five additional employees. Upon close examination, the duties of the two managerial employees do not appear to be managerial in nature as defined by the Act. The two managers are performing operational tasks that perhaps require more experience but do not rise to the level of managing an organization, subdivision, function or department of the overseas employer. The beneficiary again is performing the function of a first-line supervisor over non-professional, non-supervisory, and non-managerial employees.

The director did not address the petitioner's question regarding the past approvals of the beneficiary's classification as an L-1A immigrant. Although not required to do so we will address the issue briefly here. Counsel for the petitioner has provided the documents submitted in support of the petitioner's previous L-1A petitions. Upon review, the same issues of the beneficiary's United States employer, the lack of a comprehensive description of the beneficiary's duties for the overseas employer, and the lack

¹ We note the opinion of petitioner's management consultant but for immigration purposes, an individual who performs operational tasks is not acting in a managerial or executive position.

of description of the beneficiary's duties for the United States employer arise. The prior approvals constitute clear and gross error on the part of the Service. As established in numerous decisions, the Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g., Sussex Enqq. Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988); Matter of Church Scientology Int'l., 19 I&N Dec. 593, 597 (BIA 1988). Further, the Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the rulings of service centers that are contradictory. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.