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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: WAC 01 216 52482 Office: CALIFORNIA SERVICE CENTER Date: FEB 13 2003

IN RE: Petitioner:
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:

[redacted]

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 denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a limited liability company organized in Delaware in May of 2000. It is engaged in the import, export, and distribution of telecommunication equipment, devices and services in the North America marketplace. It seeks to employ the beneficiary as its president and chief executive officer. Accordingly, the petitioner seeks 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 director determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner submits a copy of a limited liability company operating agreement. Counsel asserts this document shows that the petitioner is owned and controlled by exactly the same two individuals that own and control the foreign entity.

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.

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.

The issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioner and the beneficiary's overseas employer.

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.
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *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 petitioner submitted documentation showing that it was originally organized in the State of California in October of 1999 as a limited partnership. The petitioner provided its limited partnership agreement that reflected the general partner as USA EMC, Inc., and two individuals as the limited partners. The agreement set out the interest of the general partner and the limited partners as follows:

The limited partnership agreement provides that "[e]xcept as otherwise provided in this Agreement, the General Partner shall have exclusive control over the Partnership's business."

The petitioner also stated that in June of 2000 the company underwent restructuring and changed from a limited partnership to a limited liability company organized pursuant to the laws of Delaware. The petitioner provided a certificate of formation of the petitioner as a limited liability company dated May 23, 2000.

The petitioner also provided its certificate of registration registering the limited liability company in California on November 27, 2000. The petitioner further provided its Internal Revenue Service (IRS) Form 1065, U.S. Return of Partnership Income for the calendar year of 2000. The petitioner also submitted an organizational chart depicting its ownership as well as the ownership of the beneficiary's overseas employer. The chart set out the ownership of the limited partnership as provided above. The chart depicted a box for the petitioner as a limited liability company directly beneath the box designated for the limited partnership. No change in ownership from the percentages set out for the limited partnership was noted on the chart. The petitioner also provided documentation that the foreign entity was owned in fifty percent portions by the two individuals noted above.

The director determined from the information in the record that the percentage ownership in the limited liability company was the same as that for the limited partnership. As the petitioner had not provided further documentation transferring control of the petitioner to the two claimed owners of the limited liability company and because of the difference in ownership between the foreign entity and the petitioner, the director concluded that the petitioner had not established a qualifying relationship.

On appeal, counsel submits a limited liability agreement for the petitioner that was entered into sometime in 1999. The exhibit to the operating agreement sets out the capital contributions and percentage interest of the members as of April 5, 2000. The exhibit identifies the two individuals stated above as each contributing $20,000 to the capital of the company and each holding a fifty percent interest in the company. Counsel asserts that this information documents the qualifying affiliate relationship.

Counsel's assertion is not persuasive. The record provides inconsistent information relating to the ownership and control of the petitioner. The limited liability agreement is dated in 1999 with an exhibit setting out ownership as of April of 2000. The IRS Form 1065 for 2000, dated April 12, 2001 continues to identify the petitioner as a partnership and does not indicate any change in ownership occurring in the year 2000. The organizational chart submitted by the petitioner in April of 2001 indicates that the petitioner as a limited liability company is owned in the same percentages as the partnership. It is incumbent upon 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 (BIA 1988). The petitioner has not provided independent documentation that the limited liability company is now owned and controlled by the same group of individuals, each individual owning and controlling

approximately the same share or proportion of each entity. The limited liability operating agreement that is dated 1999 is superseded by the partnership agreement and the IRS Form 1065 for the year 2000.

Beyond the decision of the director, the petitioner has not provided adequate evidence that the beneficiary's duties for the petitioner are executive or managerial in nature. The initial job description for the beneficiary's position essentially paraphrased elements of the definition of "executive capacity" without conveying an understanding of the beneficiary's daily duties. *See* section 101(a)(44)(B)(i), (ii), and (iii) of the Act. The three sentences used by the petitioner to describe the beneficiary's duties indicate that he will negotiate contracts, develop and manage business relations, and oversee fiscal operations. It is not clear from this information whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities. 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).

The director requested further information on this issue and in response counsel for the petitioner indicated that the beneficiary's job position had not changed since the prior L-1A petitions. Counsel found the request for this information improper and a waste of time and resources as the information was already part of the record. However, for this job classification the petitioner must clearly describe the beneficiary's duties for the petitioner. As the director noted prior petitions and their supporting documentation may or may not be reviewed. Each petition and its supporting documentation must stand on its own taking into account any change in circumstances that the petitioner might have experienced from the date of approval of one type of classification to the request for approval of another type of classification. The petitioner has not established that the beneficiary will be employed in a managerial or executive capacity based on the evidence of record of this proceeding. For this additional reason the petition may not be approved.

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.