



U.S. Department of Justice
Immigration and Naturalization Service

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PUBLIC COPY

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



File: [Redacted] Office: CALIFORNIA SERVICE CENTER

Date: FEB 25 2003

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:



**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was approved by the Director, California 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 Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a company incorporated in the State of California in June of 1987. It is engaged in the import, export, and wholesale of golf apparel. It seeks to employ the beneficiary as its international sales manager. 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 director initially approved the petition. Upon review of the record, the director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity. After properly issuing a preliminary notice of intent to revoke, the director revoked the approval of the petition on April 24, 2002.

On appeal, counsel for the petitioner asserts that the evidence submitted is proof that the beneficiary is the manager of various departments.

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 to be examined in this proceeding is the nature of the beneficiary's employment with the United States entity.

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.

It is noted that the petitioner is claiming the beneficiary is engaged in managerial duties under section 101(a)(44)(A) of the Act.

On a Form ETA 750, Application for Alien Employment Certification, the petitioner stated that the beneficiary would be "in charge of marketing and promoting company products worldwide." The petitioner stated in its letter in support of the petition that the petitioner's sales had grown due in part to the beneficiary's efforts and contributions to the company. The petitioner also provided an organizational chart depicting the president on the

first tier and several departments subordinate to the president. The chart depicted three employees in the international marketing department, including the beneficiary. On the basis of this limited information, the director approved the petition.

Upon review of the record the director properly issued a notice of intent to revoke her approval of the petition. The director stated that the petitioner had not submitted sufficient evidence to establish that the beneficiary had been or would be employed in a primarily managerial capacity.

In rebuttal to the notice of intent to revoke, the petitioner submitted a revised organizational chart depicting the beneficiary as the manager of the international sales and marketing department. The chart reflected two assistant managers reporting directly to the beneficiary and one employee subordinate to both of the assistant managers. The chart also depicted a box for overseas agents and distributors subordinate to the beneficiary's position. The chart also reflected that the beneficiary shared oversight of individuals in the web and design department and the MIS department. The petitioner through its counsel explained that the original organizational chart had been designed for another more simplistic purpose and that the revised chart more accurately reflected the beneficiary's position within the company.

The petitioner also through its counsel indicated that the beneficiary had the authority to enter into distributor agreements with foreign distributors and that the beneficiary's capacity included all the duties described in "section 101(a)(44)."

The director questioned the credibility of the revised organizational chart and ultimately determined that the petitioner had not established that the beneficiary qualified for the classification sought and that the evidence provided did not overcome the grounds of revocation.

On appeal, counsel for the petitioner submits declarations from the president of the petitioner and several of its employees. Counsel asserts that the beneficiary's salary is on the same level as its other managers. Counsel also asserts that the evidence submitted is proof that the beneficiary is the manager of various departments and is involved with the coordination of the functions of other departments.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The petitioner has not provided a comprehensive description of the beneficiary's day-to-day activities. Simply stating that the beneficiary performs all the duties outlined in the statutory definitions of executive and managerial capacity is not sufficient. The petitioner does indicate that the beneficiary has experience in certain areas but

does not relate how this experience translates into an assignment in which the beneficiary primarily performs managerial duties.

The declarations submitted by the petitioner's president and several of its employees do not persuade this office that the beneficiary is primarily supervising managerial, supervisory, or professional employees. The job descriptions for the assistant managers as contained in the various declarations are more indicative of individuals actually performing the tasks pertinent to the respective positions rather than managing tasks relative to the positions. There is nothing in the record that supports a conclusion that the employees subordinate to the beneficiary are primarily managerial, supervisory, or professional employees. The petitioner's evidence demonstrates that at most the beneficiary is a first-line supervisor of non-supervisory, non-managerial, and non-professional employees. The petitioner has not provided sufficient evidence to overcome the director's determination on appeal.

In sum, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial capacity or that the beneficiary's duties in the proposed position will be primarily managerial in nature. The description of the beneficiary's job position is general and fails to describe the actual day-to-day duties of the beneficiary. The description of the duties to be 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 has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not established a qualifying relationship with the beneficiary's foreign employer in this case.

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 asserts that it is wholly-owned by one individual. The record does not reflect the petitioner's stock register and does not reflect evidence of all the transactions transferring one hundred percent of the outstanding stock into the petitioner's claimed sole owner. However, it appears that the share certificates issued to other individuals have been cancelled and the outstanding shares transferred to one individual. The petitioner also asserts that its sole shareholder owns fifty-one percent of the beneficiary's overseas employer. The documentation supporting this assertion is also not clear. The petitioner submitted a document dated in July 1997 that reflects the petitioner's sole shareholder holds fifty percent of the beneficiary's overseas employer and a second document dated in June of 2000 showing that the petitioner's sole shareholder holds fifty-one percent of the beneficiary's overseas employer. The petitioner must provide independent objective evidence to resolve any inconsistencies in the record. Failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-2 (BIA 1988). The documents supporting the transfer of shares of the foreign entity to the petitioner's sole shareholder are not in the record. 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).

However, even if the Service accepts that the petitioner has one sole shareholder and that sole shareholder holds a fifty-one percent interest in the beneficiary's overseas employer, the petitioner still has not established a qualifying relationship as defined by the regulation.

The language of the regulation is clear. The Chinese entity and the United States petitioner are not in a parent-subsidiary relationship based on the above definition. Neither the Chinese company nor the United States petitioner owns a portion of the other thus establishing such a relationship. The petitioner must

establish, therefore, that the Chinese entity and the United States petitioner have an "affiliate" relationship. Subsection A of the definition of affiliate found in 8 C.F.R. § 204.5(j)(2) requires that both of the companies are owned and controlled by the same parent or individual. This subsection specifically excludes plural ownership of the two entities. If either of the two companies has plural ownership, the petitioner must look to the definition supplied in subsection B of the affiliate definition found in 8 C.F.R. § 204.5(j)(2). This subsection requires that the affiliated companies be owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion in each of the companies. The Service cannot extend subsection A of the affiliate definition to the situation at hand where only one of the companies asserting an affiliate relationship has a sole shareholder and the other company is owned by more than one shareholder. To do so, would negate the necessity of subsection B of the affiliate definition. The requirement that both entities must be owned and controlled by the same group of individuals in approximately the same proportion would be subsumed into subsection A without the restriction of proportionality of ownership. The Service looks to the plain meaning of the language in subsection A of the affiliate definition that requires singular ownership of both entities. When multiple owners are involved in one or both of two companies claiming an affiliate relationship, the Service looks to the plain language of subsection B of the affiliate definition that requires the multiple owners to own both entities in the same approximate proportions. The petitioner has provided information that is inconsistent with an affiliate relationship. The petitioner, thus, has not established a qualifying relationship with the beneficiary's overseas employer.

In addition, the petitioner has not provided an adequate description of the beneficiary's duties for his overseas employer. The Service cannot conclude from the description of job duties provided that the beneficiary was employed in a primarily managerial or executive capacity. See 8 C.F.R. § 204.5(j)(3)(B).

For these additional reasons the petition will 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.