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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: WAC 01 084 51901

Office: CALIFORNIA SERVICE CENTER

Date: FEB 27 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:



**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 employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office. The appeal will be dismissed.

The petitioner is a non-resident sole proprietorship engaged in the consulting business. It seeks classification of 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 as insufficient evidence had been submitted to demonstrate the claimed affiliated company was doing business. The director also determined that the petitioner had not established that the beneficiary would be performing the duties of an executive or manager for the United States entity. The director further determined that the petitioner had not established its ability to pay the beneficiary the proffered wage.

On appeal, counsel for the petitioner contends that the claimed foreign entity is currently conducting business. Counsel also asserts that the beneficiary is an executive even though he is the sole proprietor of the petitioning entity. Counsel cites both published and unpublished case law in support of this assertion. Counsel further asserts that the petitioner is partly supported by the claimed foreign entity and the claimed foreign entity and the United States petitioner together have the ability to pay the proffered wage.

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.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

(i) Required evidence. A petition for a multinational

executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

The first issue in this proceeding is whether the claimed foreign entity continues to do business, thus, maintaining a qualifying relationship with the United States enterprise.<sup>1</sup>

The petitioner submitted a statement indicating the foreign entity had registered as a sole proprietorship in Germany in 1994. The petitioner also submitted a letter from a German tax consultant stating that the claimed foreign entity had income and expenses in 1999 and 2000, a statement to demonstrate disbursements made by the claimed foreign entity in the first quarter of 2001, and a letter appointing another individual to act on behalf of the foreign entity in place of the beneficiary upon his transfer to the United States. Counsel asserts that these documents show that the claimed foreign entity is doing business.

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

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<sup>1</sup> The petitioner has not established it is a multinational company as is further discussed below.

the mere presence of an agent or office.

The petitioner has not provided sufficient independent documentation demonstrating that the claimed foreign entity actually provides goods or services. A bank account with income and disbursements does not establish that a company is providing goods or services. Likewise, an individual appointed to act on behalf of the claimed foreign entity does not demonstrate that the claimed foreign entity is conducting business. There is nothing in the record to show that the appointed individual is anything other than an agent of the claimed foreign entity. The petitioner has not submitted any documentation to show that the claimed foreign entity continues to conduct business as defined by Service regulation. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has not met its burden of proof in overcoming the director's conclusion on this issue.

The second issue in this proceeding is whether the beneficiary will be performing executive or managerial duties for the United States enterprise.

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 I-140 petition indicated that the beneficiary would perform the duties of an executive manager. The petitioner's non-technical job description indicated that the beneficiary would supervise the United States branch in all aspects of import and export consulting for international clients.

The director requested additional documentation to establish that the beneficiary had been employed in an executive or managerial position in the United States. The director specifically requested a more detailed description of the beneficiary's duties in the United States.

In response, the petitioner described the beneficiary's duties as follows:

As mentioned before, the US company only consists on [sic] the beneficiary who performs the duty in an executive capacity as defined under § 203(b)(1)(C) without any employees. The beneficiary is the sole owner of the Company and therefore he directs both businesses with wide latitude in discretion in any aspect and without any supervision. The beneficiary defines, establishes and executes the policy goals based on the submitted business plan. Since he is the sole owner, he doesn't receive supervision from a higher-level executive.

The director determined that the beneficiary would be performing day-to-day non-supervisory services for the petitioner. The director concluded that the record did not establish that the beneficiary would be performing duties in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that a sole proprietor is a valid employee and that a person may be deemed an executive even if he is the sole employee of the company if the company utilizes outside independent contractors. Counsel states that the petitioner employs a secretarial service to answer calls, take messages, type, copy, and sort mail. Counsel cites an unpublished decision in support of the assertion that a sole employee may be an executive with the use of independent contractors.

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). In the case at hand, the petitioner submits a broad position description that borrows liberally from portions of the statutory definition of executive capacity. The petitioner's business plan indicates that the beneficiary will be its key employee and that the beneficiary's areas of expertise are in "product development, servicing customers, marketing and sales." The limited information regarding the beneficiary's actual day-to-day duties indicates that the beneficiary will primarily be engaged in providing consulting services. 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).

Counsel, on appeal, refers to the petitioner's outsourcing administrative functions and the petitioner's business plan that indicates the petitioner will employ an attorney and accountant for assistance. However, this information does not contribute to a finding that the beneficiary is either an executive or a manager. Outsourcing receptionist duties to an answering service does not relieve the beneficiary from performing the everyday consulting services of the enterprise. Further, the petitioner has not provided evidence supporting the full-time use of an attorney and an accountant to perform services that relieve the beneficiary from performing consulting services. 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, supra*. Counsel's use of an unpublished decision to support the assertion that a sole employee may be deemed an executive is without merit. First, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. § 103.3(c). Second, the petitioner has provided no independent evidence that it employs the use of independent contractors who relieve the beneficiary from

performing the basic operational tasks of the petitioner. The Service is not compelled to deem the beneficiary to be an executive or manager solely because the beneficiary possesses the title "executive manager."

Upon review, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are vague and general. In addition, a portion of the position description merely paraphrases the statutory definitions of executive capacity. The limited information regarding the beneficiary's duties is indicative of an individual performing the primary service of the petitioner. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity for the United States entity. The petitioner has not overcome the director's determination on this issue.

The third issue in the proceeding is whether the petitioner has the ability to pay the beneficiary the proffered wage.

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.

In response to the director's request for verifiable evidence on this issue, the petitioner indicated that the Internal Revenue Service accepts losses of a brand new business. The petitioner also noted that the claimed affiliated company would ensure the beneficiary's paycheck until the petitioner was sufficiently established. The director determined that the petitioner had not established its ability to pay the proffered wage.

On appeal, counsel for the petitioner asserts that influxes of capital investments made by the claimed foreign affiliate to the petitioner will be the source of the beneficiary's wage. Counsel asserts that the proffered wage could conceivably be from income generated by the United States entity or liquid assets.

Counsel's assertion is not persuasive. The regulation clearly requires that the *prospective United States employer* have the

ability to pay the proffered wage. In addition, the petitioner has not provided any agreement that the claimed foreign entity is obligated to pay the beneficiary the proffered wage. The Service declines to speculate on whether the claimed foreign entity will continue to support the petitioner or will terminate its support. Further, in determining the petitioner's ability to pay the proffered wage, the Service will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D. N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D. N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Federal tax returns provide an independent assessment of the solvency or insolvency of an entity. The petitioner has not overcome the director's determination on this issue.

Finally, counsel's reliance on a previously approved petition for the beneficiary's L-1A status is not persuasive. 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 that 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). It would be absurd to suggest that the Service or any agency must treat acknowledged errors as binding precedent. *Sussex Enqq. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988). Further, the Administrative Appeals Office is not bound to follow the contradictory decisions of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Further, if the previous L-1A petition was based on the same unsupported evidence that is contained in this petition, the approval would constitute clear and gross error on the part of the Service.

Beyond the decision of the director, the petitioner has not established that it is doing business in the United States for one year. In the petitioner's business plan dated December 2000, the petitioner stated that "we have not generated any income yet," and "[i]t was part of our milestones to begin service in February or March 2000. We started our service in October but we have not generated any sales yet." The regulations require that the petitioner submit evidence that the prospective United States employer has been doing business for one year. In this case, the petitioning entity indicates that it had begun providing services in October of 2000 only a few months prior to filing the petition.

In addition, the very nature of the petitioner's business presents an obstacle to the petition's approval. As a matter of law, there is no prospective United States employer that could be considered the "same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas." 8 C.F.R. § 204.5(j)(3)(i)(C). The petitioner is a sole proprietorship and is not a corporation, partnership, or other legal entity that has a separate legal identity separate and apart from the owner, since, in a sole proprietorship, "[t]he business and the proprietor are one." *In re Drimmel*, 108 Bankr. 284, 286-87 (Bankr. D. Kan. 1989). Thus the beneficiary is self-petitioning because there is no separate legal entity that can employ him. Further, there is no United States entity, because the beneficiary who is self-petitioning is an alien. For these reasons, the petitioner cannot be defined as a multinational company. See 8 C.F.R. § 204.5(j)(2).

Further, the petitioner has not submitted a comprehensive description of the beneficiary's duties for the claimed foreign entity. The record does not contain sufficient evidence to conclude that the beneficiary's duties overseas were managerial or executive in nature.

For these additional reasons, 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.