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

[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 27 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further consideration.

The petitioner is a corporation organized in the State of Illinois in 1996. It is engaged in the import, wholesale, and retail of fabrics and garments. 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 director determined without requesting additional evidence that the petitioner had not established that the beneficiary had been or would be employed in a primarily executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the Service denied the petition without giving the petitioner an opportunity to supplement the record with additional evidence or clarify the information provided in the initial filing. Counsel also asserts that the beneficiary is clearly acting as an executive within the meaning of the regulations.

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).

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 director issued his decision on February 8, 2001. The petitioner through its counsel filed a Form I-290B, Notice of Appeal on March 5, 2001 accompanied by counsel's signed G-28, Notice of Entry of Appearance as Attorney or Representative. Counsel noted on the Form I-290B that an appeal brief would be sent to the Administrative Appeals Unit within 30 days. The director, noting that the Form I-290 did not possess the signature of counsel, rejected the appeal. Counsel subsequently provided a Form I-290B with signature that was received by the Service on March 20, 2001. The director determined that the appeal was untimely filed and treated the notice of appeal as a motion. The

director dismissed the motion on July 6, 2001 as not containing any new facts. This timely appeal followed.

The primary issue in this proceeding is whether the Service erred in denying the petition without providing the petitioner an opportunity to supplement the record with additional evidence and/or clarify the information provided in the initial filing.

8 C.F.R 103.2(b)(8) states in pertinent part:

> *Request for evidence.* If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. If the application or petition was pre-screened by the Service prior to filing and was filed even though the applicant or petitioner was informed that the required initial evidence was missing, the application or petition shall be denied for failure to contain the necessary evidence. Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence, including blood tests.

The director's decision stated the following:

> [c]ounsel has submitted evidence, which is comprehensive in effect and includes a properly filed petition and supporting documentation for consideration by the Service. All necessary evidence has been submitted and no underlying questions need resolved. Counsel has shown that he is fully informed. Therefore, the Service will render a decision in this case.

The director did not address the possible ineligibility of the petitioner or the beneficiary for this classification. The director apparently believed that the petitioner had submitted all the initial evidence as required by 8 C.F.R. 204.5(j)(3)(i) and 204.5(j)(5) and that the evidence was sufficiently clear that no further evidence was necessary for the director to make an informed decision.

The director based his decision on the issue of the petitioner's proposed employment for the petitioner and whether the beneficiary would be performing duties in a managerial or executive capacity. The director made his determination without requesting further evidence on this issue. The regulation at 8 C.F.R. 204.5(j)(5) requires the prospective employer in the United States to 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. The statement must clearly describe the duties to be performed by the alien. The required initial evidence thus, is a statement that clearly describes the beneficiary's intended duties. In this case, the only description of the beneficiary's proposed duties for the petitioner is found in the petitioner's offer of employment as follows:

> In his capacity as President, [the beneficiary] is responsible for directing the management and administration of our company. He establishes goals and policies relating to investments, structure organization, distributions of assignments, creation of new projects and plan development. He also implements strategies to increase our productivity and reduce our operation costs.

The question before the AAO then is whether the above statement clearly describes the beneficiary's intended duties for the petitioner.

The director did not address the description of the beneficiary's duties but based his decision on the petitioner's 1998 and 1999 Internal Revenue Service (IRS) Forms 1120-A, U.S. Corporation Short-Form Income Tax Return.

The petitioner's description of the beneficiary's proposed duties for the United States entity primarily paraphrases elements of the statutory definition of managerial and executive capacity. See 101(a)(44)(A)(i) and 101(a)(4)(B)(ii). The description provides a general overview of the beneficiary's duties without conveying an understanding of the beneficiary's daily duties. The fact that the director did not base his decision on the description provided but relied instead on other information found in the record, implies that the description was not sufficient in clearly stating the beneficiary's intended duties. If the director believed that the description provided by the petitioner somehow clearly stated the beneficiary's duties, the director should have addressed how the clearly stated duties failed to establish the beneficiary's managerial or executive capacity. The failure of the director to address the petitioner's description of the beneficiary's duties requires the remand of this case. The AAO finds that the petitioner's description of the beneficiary's duties did not clearly state those duties and should have resulted in a request for further evidence on this issue.

We note also that the director relied on IRS Forms 1120-A for the years 1998 and 1999 in making his decision. The petition was filed in December of 2000. Although the IRS Form 1120 or 1120-A for 2000 would not have been available at the time of filing, it may very well have been available at the time a response for further evidence was due. The director's decision based on the

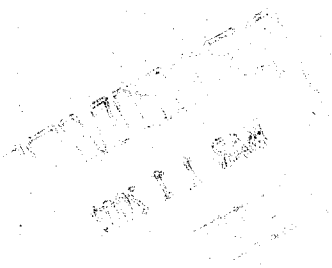
petitioner's apparent lack of adequate staff to relieve the beneficiary from performing non-qualifying duties may also have been assisted with a review of the IRS W-2 Forms, Wage and Tax Statements issued by the petitioner for the year 2000.

Although the petition will be remanded, examination of the record reveals additional issues that must be addressed at this time.

The record contains information that the beneficiary's foreign employer is a sole proprietorship. For immigration purposes, a sole proprietorship is not a legal entity separate and apart from its owner. Matter of United Investment Group, 19 I&N Dec. 248 (Comm. 1984). The petitioner stated in its letter supporting the petition that the foreign employer was registered under the laws of Pakistan and the beneficiary had been the sole proprietor since March of 1990. The underlying documentation provided by the petitioner was comprised of a certificate showing that the foreign employer was registered with the Karachi Chamber of Commerce and had been issued an export registration number. The petitioner also provided a document showing that the Pakistani government had issued the beneficiary a national tax certificate. This information is insufficient to establish that the foreign employer is a legal entity, or an affiliate or subsidiary of a legal entity. The record also contains insufficient information to establish that the foreign sole proprietorship would survive the beneficiary's transfer and thus continue the multinational nature of the petitioner. The director should address the lack of information on this issue in a request for further evidence.

In addition, the director did not address the issue of the beneficiary's employment abroad for the overseas entity. The initial documentation submitted by the petitioner did not fully establish that the beneficiary was employed abroad in a managerial or executive capacity as required by 8 C.F.R. 204.5(j)(3)(i)(B). The description provided is indicative of an individual performing the basic operational functions of a sole proprietorship. 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). At most, the beneficiary appeared to be performing the duties of a first-line supervisor of six non-managerial, non-professional, and non-supervisory employees. However, the petitioner appears to have complied with the requirement of providing initial evidence albeit inadequate evidence to establish eligibility or lack of eligibility on this issue. The director may exercise his discretion in requesting additional evidence on this issue as the petitioner has provided the required initial evidence.

Accordingly, this matter will be remanded for the purpose of a new decision. The director must afford the petitioner reasonable time to provide evidence that is pertinent to the above issues, and any other evidence the director may deem necessary. The

director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility.

ORDER: The director's decision of February 8, 2001 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.