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U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 14 2003

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Nebraska Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action.

The petitioner is a corporation engaged in the production of cylinder head castings. 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 that the beneficiary had been or would be employed in an executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the Service has improperly re-adjudicated the managerial nature of the beneficiary's position and ignores or mischaracterizes significant evidence submitted by the petitioner.

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 petitioner, in its 1995 company brochure, states that it is a United States corporation wholly owned by an Italian company, since 1995.[1] Teksid SpA also owns a majority of formerly known as the previous foreign employer of the beneficiary.

The first issue in this proceeding is whether the beneficiary has been and will be performing managerial or executive duties.

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

[1]As will be discussed, the documents supporting this ownership have not been provided. In addition, the president of the petitioner states in a letter dated September 1998 that the petitioner is 20 percent owned by and 80 percent owned by Fiat USA. 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).

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.

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).

In a letter submitted with the initial petition, the position to be held by the beneficiary was described in general terms and did

not specifically address the managerial nature of the beneficiary's duties. The petitioner also submitted an approval notice, approving the beneficiary's classification as an L-1A nonimmigrant valid to July 29, 2000.

In response to the director's request for a statement describing in more detail the beneficiary's intended employment in the United States, the petitioner submitted a more detailed description of the beneficiary's actual duties outlining the managerial time allotted to each of the activities.

The petitioner also submitted its organizational chart showing that the design support manager (the beneficiary's position) worked with its resident engineers, account managers and iron and aluminum components.

The director determined that the evidence submitted indicated that the beneficiary had been involved in routine daily functions associated with running the business and the performance of these duties was unrelated to definitions of executive or manager.

On appeal, counsel for the petitioner asserts that the beneficiary's time is exclusively allotted to the management of the design support function, not to the performance of each of the components of the function. Counsel asserts that the director's denial mischaracterizes the facts presented in the petition and the subsequent response to the request for evidence. Counsel also asserts that the director's denial is an improper re-adjudication of manager or executive status following a prior determination of that issue by the Service.

Upon review, the petitioner has persuasively established that the beneficiary has managed and will continue to manage an essential function of the petitioner. 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 initial petition, the petitioner submitted a broad position description that included words like "resolve" and "analyze" issues, words that could be construed as indicative of an individual actually performing the described function. In the response to the director's request for evidence, however, the petitioner outlined the various components of the essential function of the design manager and stated that these were the specific managerial responsibilities of the design support manager for each of the components. The petitioner also clarified who performed the work of the design support function thereby relieving the design support manager to primarily manage the function. Upon review of the nature of each component, the work performed as it relates to each component, and the amount of time spent by the design support manager managing each component, the petitioner has established that the beneficiary is primarily managing the design support function through the work of others.

Beyond the decision of the director, the petitioner has not established that a qualifying relationship exists between the petitioner and the claimed foreign company.

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:
>
> *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.

In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas company.

As noted above, the president of the petitioner states in a letter dated September 1998 that the petitioner is 20 percent owned by Teksid SpA and 80 percent owned by Fiat USA. The petitioner's 1995 company brochure indicates that it is 100% owned by [redacted] and that this was accomplished by canceling Fiat USA's stock. No supporting documents have been submitted for this record of proceeding that establishes the ownership and control of the petitioner and the foreign entity. The director did not address this issue in either the request for additional evidence or in his decision. As the record does not establish that the petitioner maintains a qualifying relationship with the claimed overseas affiliated company, the petition may not be approved. The matter is remanded to the director for entry of a new decision in accordance with the above discussion.

ORDER: The director's decision is withdrawn as it relates to the issue of the beneficiary's managerial capacity. The petition is remanded to the director for a determination on the issue of qualifying relationship.