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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: WAC 01 075 56485 Office: CALIFORNIA SERVICE CENTER Date: JAN 30 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)

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

IN BEHALF OF PETITIONER: Self-represented

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 preference visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner claims to be a wholly-owned subsidiary of Changqing Enterprises Group Inc. It seeks to employ the beneficiary as the general 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 determined that the petitioner does not have the ability to pay the beneficiary's proffered wage. The director also concluded that the petitioner failed to establish that beneficiary had been and would be employed in a managerial or executive capacity.

On appeal, the petitioner submits a statement and documentation disputing the director's conclusions.

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 which 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)(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 petitioner has established its ability to pay the beneficiary's proffered wage.

8 C.F.R. 204.5(g)(2) states, in pertinent part:

> 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 appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

On March 13, 2001, the Service issued a notice requesting that the petitioner submit additional evidence establishing visa eligibility. The petitioner was instructed, in part, to submit its latest corporate tax returns signed by an authorized official or the latest audited corporate financial statements, such as balance sheets and statements of income and expenses. In regards to the petitioner's burden of establishing that it is doing business, the Service requested the submission of such documents as original computer printouts from the Internal Revenue Service (IRS), date stamped by the IRS, showing the status of all tax returns filed by the U.S. entity, sales invoices, and telephone and utility bills.

The petitioner's response included, but was not limited to, the following documentation:

1) Petitioner's bank statements from March 2000 to April 2001;
2) Long distance and local phone bills;
3) Internally generated income statement covering the period of April 1999 through March 2000; and
4) Unsigned, unstamped corporate tax return for 1999.

The director denied the petition, noting that the tax return submitted was not certified by the IRS and the petitioner's income statement was not audited as previously requested by the Service. The director further determined that even if both documents were considered valid, their contents contradict the petitioner's claimed ability to compensate the beneficiary her proffered wage.

On appeal, the petitioner asserts that China greatly differs from the United States in the arena of employee wages. However, the amount of the beneficiary's proffered wage is not disputed by the director. Rather, the director focused on the fact that the petitioner was not able to pay the wage promised to the beneficiary, regardless of the amount. Therefore, the petitioner's point in drawing on the distinction between wages paid in the two cultures is irrelevant in this instance.

The petitioner also states that tax returns for the year 2001 were unavailable at the time the request for additional evidence was made and indicates the intent to submit such tax information as it becomes available. However, the petitioner has submitted no additional evidence. Further, the Service's request did not specify that the petitioner must submit its 2001 tax return; it merely requested the submission of the last tax return which, at the time of the petitioner's response, was the 2000 tax return. Even if the 2001 tax return would have established the petitioner's ability to pay, the petitioner must establish the ability to pay at the time the petition is filed. See Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977) and 8 C.F.R. 204.5(g)(2). In the instant case, the petition was dated December 18, 2000.

Accordingly, the 2001 tax return would have been irrelevant in establishing the petitioner's ability to pay as of the filing date of the petition.

The most recent tax return and statement of income submitted by the petitioner indicate that the petitioner paid only $12,000 in wages, even though the petition indicates that the beneficiary's proffered wage was supposed to be $18,000 per year. As noted by the director, the petitioner's liabilities outweigh its assets by over $5,000. While a letter from the petitioner's bank indicates that the "current" account balance is nearly $83,000, the letter is dated October 29, 2001. As previously stated, the petition is dated December 18, 2000. The bank statements from March 2000 through January 2001 indicate that the petitioner maintained account balances under $10,000. Accordingly, the petitioner has failed to establish its ability to pay the beneficiary's proffered wage as of the filing date of the petition. For this reason the petition cannot be approved.

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

8 C.F.R. 204.5(j)(5) states:

> *Offer of employment*. No labor certification is required for this classification; however, the prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such letter must clearly describe the duties to be performed by the alien.

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.

In the response to the Service's request for additional evidence, the petitioner submitted, in part, a letter of authorization, specifying the duties the beneficiary would conduct on behalf of the petitioner. The duties include the following:

1. Sell competitive products from China to the United States of America.

2. Raise capital and investments in the U.S. funding for the Corporation, import technology and equipment, and provide information and market and products.

3. Purchase high quality U.S. products for the Corporation.

4. Purchase seeds and young plants, provide technology in cultivation and nursing; sell and rent low price farmland in Hainan Island to American clients.

5. Conduct other business that would benefit the Corporation.

The petitioner also submitted applications, one requesting to participate in a Los Angeles County Fair, and another requesting to

participate in a Riverside County Fair. Both applications were completed by the beneficiary who indicated that she would be selling clothes which she designed herself.

The director concluded that the beneficiary was performing duties which were neither managerial nor executive. The director noted that the beneficiary's direct involvement in sales indicates that she was performing one of the petitioner's main functions.

On appeal, the petitioner indicates that it is still in the start-up stages of development and cannot afford to hire additional employees. The petitioner further states that as its financial situation improves, the beneficiary "will move towards what has been considered the normal duties for multinational executive or manager." This argument does not overcome the director's findings.

While the reasonable needs of the petitioning company might be met by the services of one executive, the petitioner did not establish that the beneficiary has been and will be functioning as an executive. Merely because the demands of a small enterprise may be reasonably met by the services of one executive employee, that reasonable need does not absolve the employee to undertake duties of a non-executive nature. 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). Regardless of the reasonable needs of the petitioner, the petitioner must establish that the alien is to be employed in the United States in a primarily managerial or executive capacity and must clearly describe the duties to be performed by the alien. As discussed above, the petitioner has not established that the beneficiary has been and will be employed in a managerial or executive capacity. For this additional reason the petition cannot 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.