B4

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass. Ave., 3rd Floor
Washington, D.C. 20536

PUBLIC COPY

[redacted]

JUL 08 2003

FILE: WAC 01 253 60862 Office: CALIFORNIA SERVICE CENTER Date:

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)

ON BEHALF OF PETITIONER:

[redacted]

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 Bureau of Citizenship and Immigration Services (Bureau) 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 denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in 1997 in the state of Delaware and is claimed to be a wholly-owned subsidiary of [redacted] located in Canada. The petitioner is engaged in the business of computer design and development. It seeks to employ the beneficiary as its business development 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: (1) the petitioner failed to establish that it has a qualifying relationship with a foreign entity; (2) the record does not establish that the beneficiary has been or would be employed in a managerial or executive capacity; and (3) the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage.

On appeal, counsel disputes the director's findings and submits a brief in support of the petitioner's claims.

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.

The first issue in this proceeding is whether the petitioner has established that it has a qualifying relationship with a foreign entity as claimed in the petition.

On December 26, 2001 the director issued a notice requesting additional information. The petitioner was instructed to submit, in part, evidence to establish that the foreign parent has paid for the U.S. entity. The director indicated that proof of this claim should include original wire transfers from the parent company, and could also include cancelled checks or deposit receipts detailing money amounts for the stock purchase.

The petitioner responded by submitting a percentage breakdown of shares owned by various individuals in the foreign entity. The petitioner also submitted a number of the foreign entity's bank statements and the petitioner's stock certificate. However, none of the documents properly established ownership and control over the U.S. entity. As general evidence in an immigrant petition for a multinational executive or manager, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The petitioner further submitted a documented titled "Stock Power," purportedly assigning ownership of the petitioner's stock shares from [redacted] to the foreign entity. However, as accurately discussed by the director in the denial, the record lacks any evidence establishing that Mr. [redacted] ever owned the petitioner's stock. Furthermore, the record does not present evidence that the foreign entity

purchased the petitioner's shares, beyond the unsubstantiated statements of the Stock Power document.

On appeal, counsel asserts that a qualifying relationship exists between the petitioner and a foreign entity. She explains that Mr. [redacted] was counsel for the foreign entity, and that in that capacity he was the "interim incorporator and lone original director" responsible for the execution of the stock certificate establishing the foreign entity's ownership of the U.S. entity. Counsel further claims that Mr. [redacted] never had any ownership interests in the U.S. entity. Rather, she contends that Mr. [redacted] merely issued the stock in the capacity of the foreign company's attorney and initial director. However, despite the plausibility of counsel's explanations, simply 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). Moreover, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On review, the record lacks sufficient evidence to determine whether the petitioning enterprise has a qualifying relationship with the claimed parent company. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this immigrant visa classification. *Matter of Church of Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986)(in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982)(in nonimmigrant visa proceedings). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church of Scientology International at 595*.

In the instant case, the petitioner has provided a stock certificate to establish the existence of a qualifying relationship. However, a certificate of stock is merely written evidence that a named person is owner of a designated number of shares of stock in a corporation. *Black's Law Dictionary* 1430

(7th ed. 1999). The regulation at 8 C.F.R. § 204.5(j)(3)(ii) specifically allows the director to request additional evidence in appropriate cases. The petitioner has not established that the foreign entity actually contributed the funds to purchase the petitioning enterprise. As ownership is a critical element of this visa classification, the Bureau may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Although requested to submit specific documentation that would establish the existence of a qualifying relationship, the petitioner has opted to submit unsupported explanations of counsel instead. As previously noted, simply 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*. As the petitioner has failed to submit sufficient evidence of a qualifying relationship with a foreign entity, this petition cannot be approved.

The second 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 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 initial filing, the petitioner described the beneficiary's prospective duties as follows:

- Motivation and development of new sales channels. Close contact with sales staff of many VAR/Distributor/OEM accounts . . . .

- Major account management of Key OEM accounts, including forging joint venture product concepts with other software manufacturers.

- Co-ordination of all marketing and trade who activities, including web based marketing material, datasheet and product documentation, print

advertising, targeted marketing campaigns and PR/Press liaison.

- Pricing analysis. Close monitoring of competitive technologies to determine correct market placement and pricing for products.

- Product marketing and competitive analysis. Development of product range to suit market sectors. Development of new products to suit market demand.

- Technical pre-sales support. Responsible for pre-sales support and the training and management of pre-sales technical support staff for the companies software/hardware product range.

- Statistical sales analysis by market sector. Extrapolation of historical sales data combined with current market conditions to accurately forecast quarterly and annual sales targets.

The director's request for additional evidence instructed the petitioner to submit, in part, its organizational chart identifying the beneficiary's position, a more detailed description of the beneficiary's job duties indicating the percentage of time spent performing each duty, and a list of all of the employees under the beneficiary's supervision. The petitioner was also asked to provide its state quarterly wage reports for the last four quarters.

The petitioner's response included an organizational chart naming only the beneficiary among its employees. It is noted that on the petition, the petitioner indicated a total of 15 employees. 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, 591-92 (BIA 1988). The petitioner did not, however, explain or provide evidence to reconcile its two significantly distinct claims. The petitioner merely confirmed that the beneficiary is, in fact, its only employee, by submitting its W-3 wage and tax statement for 2001 which matched exactly the total amount of

money received by the beneficiary as indicated in his W-2 wage and tax statement for the same year.

The petitioner also provided a list of the beneficiary's job duties. However, this most recent list of duties is almost identical to the list of duties previously submitted. Therefore, the Bureau need not enumerate that list again.

The director denied the petition, basing her decision, in part, on the following conclusion:

> . . . the petitioning entity does not have a reasonable need for an executive because they are basically a one-man sales operation. This type of business does not require or have a reasonable need for an executive because all they do is sell the foreign company's products. Additionally, it is contrary to common business practice and defies standard business logic for such a small company to have an executive, as such a business does not possess the organizational complexity to warrant having such an employee.

Although the appeal will be dismissed, it must be noted that the director based her decision, in part, on an improper standard. The director's above comments are inappropriate. The director should not hold a petitioner to her undefined and unsupported view of "common business practice" or "standard business logic." The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. Although the Bureau must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some reasonable basis for finding a petitioner's staff or structure to be unreasonable. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or the fact that it is engaged in sales or services will not preclude the petitioner from qualifying the classification under section 203(b)(1)(C) of the Act. For this reason, the director's decision will be withdrawn, in part, as it relates to the reasonable needs of the petitioning business.

Aside from the above inappropriate comments, the director validly concluded that, because the beneficiary is the petitioner's sole employee, it is inevitable that he will be required to directly perform all of the petitioner's sales

duties. The director properly determined that sales duties do not fit the definition of managerial or executive capacity.

On appeal, counsel asserts that the beneficiary is a function manager who manages the petitioning organization through a variety of contractors. However, the petitioner has not provided any evidence that would support counsel's claim that the beneficiary manages the entire organization through the use of outside contractors. Simply 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*. Furthermore, counsel cites a non-precedent decision in support of her argument. However, while 8 C.F.R. § 103.3(c) only provides that Bureau precedent decisions are binding on all Bureau employees in the administration of the Act, unpublished decisions are not similarly binding.

Additionally, counsel also asserts that the Bureau previously supported the petitioner's claim regarding the beneficiary's qualifying job duties when it granted the petitioner's L-1A petition. However, the director's decision does not indicate whether she reviewed the prior approval of the nonimmigrant petition referred to by counsel. The record of proceeding does not contain copies of the visa petition that is claimed to have been previously approved. If the previous nonimmigrant petition were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the Bureau. The Bureau is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals, which may have been erroneous. See, *e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that the Bureau or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988).

The Administrative Appeals Office, is not bound to follow the contradictory decision 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). Therefore, the AAO need not consider the approval(s) of any prior petition(s) in the instant matter.

In examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the instant case, the description of the beneficiary's job duties repeatedly indicates that the beneficiary has been and will be responsible for soliciting clientele in order to sell the foreign company's product. While counsel asserts that the beneficiary receives sales assistance from employees of the foreign entity, the record is clear that the sales staff whom the beneficiary may once have supervised are not employed by the petitioner. As such, there is no evidence that the beneficiary has any assistance in carrying out the sales function in the United States, contrary to counsel's assertions. The summary of the beneficiary's duties does not include a description of any subordinate positions that would perform the essential functions of the petitioner's business or the beneficiary's duties. Upon review, the description of the beneficiary's job duties lead the Bureau to conclude that the beneficiary is performing as a professional or "staff officer," but not as a manager or executive.

On review, the record contains insufficient evidence to demonstrate that the beneficiary has been and will be employed in a primarily managerial or executive capacity. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Bureau is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity. For this additional reason the petition cannot be approved.

The final issue in this proceeding is whether the petitioner has established that it has the ability to pay the beneficiary's proffered wage.

When the director requested additional evidence, the petitioner was given the choice of submitting a variety of documents to establish its ability to pay. The documentation included copies of annual reports, federal tax returns or audited financial statements.

The petitioner did not submit any of the requested documentation; instead the petitioner submitted an unaudited profit and loss statement and an unaudited balance sheet. Failure to submit requested evidence that precludes a material line of inquiry, as the petitioner did in the instant case, shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Furthermore, where a petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, the Bureau will not consider evidence submitted on appeal for any purpose. Rather, the Bureau will adjudicate the appeal based on the record of proceedings before the director. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The petitioner in the instant case has failed to submit the requested evidence to properly establish its ability to pay the beneficiary's proffered wage. For this final 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.