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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
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Washington, DC 20536

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

FILE: EAC 02 088 50984 OFFICE: VERMONT SERVICE CENTER DATE: JUN 0 5 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 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 Director of the Vermont Service Center denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a New York corporation that seeks to employ the beneficiary as its president. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition on the ground that the proffered position is not in an executive or managerial capacity.

On appeal, counsel submits a brief. Counsel states, in part, that the director improperly focused on the size of the petitioner's operations when concluding that the petitioner did not need the services of an executive level employee.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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.

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, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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 an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is affiliated with Almira, Ltd. of Russia; (2) imports and exports various materials; and (3) employs four persons, including the beneficiary, who is currently occupying the proffered position as a nonimmigrant intracompany transferee (L-1A). The petitioner is offering to employ the beneficiary permanently at a salary of $80,000 per year.

The issue to be discussed in this proceeding is whether the proffered position of president is in an executive or managerial capacity. The Bureau notes that the petitioner is seeking the services of the beneficiary as a multinational executive, not as a multinational manager.

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.

At the time of filing the petition with the Vermont Service Center on January 4, 2002, the petitioner stated that the beneficiary would be responsible for developing policies, hiring and firing employees, negotiating contracts, and overseeing the budget. Specifically, the petitioner stated that it had been acting as a coordinator of trade, distribution, market research, and financial planning for its alleged affiliated companies, and that it was seeking to hire additional employees in the areas of engineering and marketing to augment its staff. Although the petitioner indicated on the I-140 petition that it employed four persons, one of whom was the beneficiary, the petitioner did not provide the names, job titles, or job descriptions of its three other employees.

On March 4, 2002, the director issued a request for evidence to the petitioner stating: "Your United States office is not of sufficient size to justify a managerial or executive level position. You may wish to withdraw this petition." The director requested, among other items of evidence, an organizational chart

of the petitioner's operations, a comprehensive description of the beneficiary's proposed duties, and job descriptions for the petitioner's other employees.

Although the director stated in the denial letter that the petitioner failed to submit the requested organizational chart, the petitioner did submit the chart along with the other items of requested evidence. According to the chart, the beneficiary has supervisory authority over two vice presidents and one manager. The organizational chart also showed a fifth employee, a secretary, who is supervised by one of the vice presidents.

Regarding a comprehensive description of the beneficiary's proposed position, counsel stated:

> The beneficiary will take information, data and recommendations from his direct reports - two vice-presidents and an operations manager - and will decide, in consultation with the board of directors of both the U.S. and foreign entity, matters that include identification of new markets, identification and selection of new suppliers and manufacturers; negotiations of relationships and execution of contracts with new suppliers and manufacturers; establishment of relationships with major logistics partners, including banking institutions, freight forwarders, customs brokers, legal and accounting advisors; approving the hiring of all supervisory and management level staff; approving and/or conducting firings and employment terminations; representing the U.S. entity at strategic meetings and at the foreign entity; developing policies; choosing strategic direction of the petitioner's business; final decisions on new product[;] and marketing direction. . . . The beneficiary's direct reports will relieve him of performing non-qualifying duties according to the functional area in which each such report is working. . . .

The director determined that that the proffered position was not in an executive or managerial capacity because the petitioner's size could not support a primarily executive position. The director noted that, in response to his request for evidence, the petitioner submitted "a tremendous amount of documentation." The director further noted: "It is absolutely unnecessary to send hundreds of pages of the same type of evidence. It only makes it more difficult to find the relevant documents." In addition to stating erroneously that the petitioner failed to submit the requested organizational chart, the director asserted that an organizational chart was unnecessary because the petitioner is a small business. According to the director, the beneficiary would "be involved in primarily in the day[-]to[-]day activities to produce a product or provide a service with occasional first-line supervisory duties

over nonprofessional employees." Additionally, the director noted that the petitioner's gross income was not significant for an import/export company, which led him to conclude that an executive level position was a superfluous addition to the petitioner's organization.

On appeal, counsel states that, at the time the petition was filed, the beneficiary was directing three subordinate employees, two of whom performed duties in their respective functional areas to relieve the beneficiary from performing nonqualifying duties. Counsel states that the beneficiary currently employs four subordinate employees, and that professional assistance in the areas of accounting and engineering is retained on a contractual basis. According to counsel, the beneficiary's primary duty is to establish the petitioner's goals and policies for finance, marketing/sales, operations, and administration. Counsel also states that the beneficiary's duties consist of:

- taking information, data and recommendations from his lower-level supervisors - two vice-presidents and an operations manager (now two);
- recommending and then deciding, in consultation with the board of directors of both the U.S. and foreign entity, matters that include identification of new markets, selection of new suppliers and manufacturers[,] negotiations of relationships, and execution of contracts with new suppliers and manufacturers;
- establishing relationships with major logistics partners, including banking institutions, freight forwarders, customs brokers, legal and accounting advisors;
- approving the hiring of all supervisory and management level staff;
- representing the U.S. entity at strategic meetings and at the foreign entity;
- developing policies;
- choosing strategic direction of the petitioner's business; and
- making final decisions on new product and marketing directions.

Finally, counsel states that the director improperly focused on the size of the petitioner when determining that the petitioner's operations could not use an executive employee.

The Bureau notes that the director admonished the petitioner for submitting too much documentation in response to the request for evidence. However, a review of his request for evidence reveals that the director asked the petitioner to submit a sizable amount of documentation. Therefore, the petitioner's response was appropriate. Instead of focusing on the amount of evidence that

the petitioner supplied, the director should have looked at the quality of the evidence as it related to the petitioner's eligibility for the benefit being sought *See* 8 C.F.R. § 103.2(b)(8). The petitioner's documentation, while extensive, fails to establish that the beneficiary would primarily execute the high level responsibilities that are specified in the definition of executive capacity.

The record contains various job descriptions for the beneficiary from both the petitioner and counsel. Although each job description is slightly different, they all indicate that the beneficiary would conduct the business of the petitioner's operations. Each job description indicates that the beneficiary would establish and build relationships with customers, and negotiate contracts. Although the job descriptions also indicate that the beneficiary would establish policies and goals for the petitioner, there is no evidence to show that the beneficiary would primarily execute the high level responsibilities specified in the definition of executive capacity. *See Republic of Transkei*, 923 F. 2d 175, 177 (D.C. Cir. 1991).

Additionally, the beneficiary's job descriptions contain vague descriptions of the duties that the beneficiary would be required to perform. In the organizational chart, the petitioner listed one duty as "deepening of interrelations between the managers. . . ." Another duty is described in the organizational chart as "financial planning and maintenance of circulating assets." There is no clarifying information regarding how the beneficiary would "deepen" relationships between the managers or how he would conduct financial planning and maintain circulating assets. Without more specific information regarding how and at what frequency the stated duties are performed, the petitioner's job description does not establish that the position offered to the beneficiary involves primarily executive duties.

Regarding counsel's statement that the petitioner employs a sufficient staff to relieve the beneficiary from performing nonqualifying duties, the evidence does not support counsel's claim. The organizational chart lists each employee and his or her job duties. As previously stated, this chart indicates that the beneficiary has supervisory authority over two vice presidents and one manager. The job descriptions for these employees, however, are replete with vague duties. One vice president is responsible for "maintenance of purchases of synthetic strings and fibers." Another vice president is responsible for "operational management of interaction with the affiliated structures." Although each individual occupying a vice president position has a managerial title, the job duties associated with each position fail to show that the beneficiary is relieved from conducting the business of the organization. The absence of evidence illustrating who performs the petitioner's purchasing function, for example, does not enable the Bureau to find that the beneficiary manages or

directs the provision of its services, rather than performs the tasks necessary for the petitioner to provide its services in the import/export arena. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988). Furthermore, although counsel states on appeal that the petitioner has contractual employees in the areas of accounting, engineering and legal services, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Although counsel correctly asserts on appeal that the size of the petitioner, by itself, is an inappropriate ground for denying the petition, a review of the evidence in the record does not warrant a withdrawal of the director's decision to deny the petition. Based upon the above discussion, the petitioner has not demonstrated that the position offered to the beneficiary is in an executive capacity. Therefore, the director's decision to deny the petition shall not be disturbed.

Beyond the decision of the director, there is insufficient evidence of a qualifying relationship between the Russian and U.S. entities.

In a letter that accompanied the I-140 petition, the petitioner claimed that it and the Russian entity were affiliates because the beneficiary wholly owned the petitioner and was the "majority owner" of the Russian entity. In support of its assertion, the petitioner submitted copies of its stock certificates and stock ledger, and a document from Russia concerning the Russian entity's status as a limited liability company (LLC).

Ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between two entities for purposes of this immigrant visa classification. *Matter of Church of Scientology International*, 19 I&N Dec. 593 (Comm. 1988). Generally, a petitioner's assertions, by themselves, will not suffice to establish the essential elements of ownership and control. *Matter of Treasure Craft of California, id.* The petitioner must disclose all documents relating to the ownership and control of the two entities, which include, but are not limited to, copies of stock or interest certificates, a corporate stock ledger, stock certificate registry, corporate bylaws, minutes of relevant annual shareholder meetings, articles of organization, and operational agreements.

The petitioner has not presented sufficient documentary evidence to establish that the beneficiary has ownership and control over the Russian entity. The document from Russia merely indicates

that the beneficiary is the "founder" of the Russian entity; it does not establish that the beneficiary has ownership and control over the Russian entity. Again, 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.* Based upon information before the Bureau at the present time, the petitioner has not demonstrated that it and the Russian entity are affiliated. 8 C.F.R. § 204.5(j)(2). As the petitioner has not established the existence of a qualifying foreign entity, the beneficiary cannot meet the requirement of 8 C.F.R § 204.5(j)(3)(i)(B), which calls for the beneficiary's employment by the qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States in a nonimmigrant status.

As the appeal is being dismissed because the petitioner failed to establish that the proffered position is in a managerial or executive capacity, these additional issues, which were not raised by the director but are critical elements to establishing eligibility for this immigrant visa classification, will not be discussed further.

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 met that burden.

ORDER: The appeal is dismissed. The petition is denied.