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: VERMONT SERVICE CENTER Date: JAN 15 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 initially approved by the Director, Vermont Service Center. Upon subsequent review, the director properly issued a notice of intent to revoke, and ultimately revoked the approval of the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Georgia and is engaged in international trade. It seeks to employ the beneficiary as its president. Accordingly, it 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 initially approved the petition. Upon review of the record, the director determined that the petitioner had not established that the beneficiary had been employed overseas in a managerial or executive capacity for one year in the three years prior to the beneficiary's application, or that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. After properly issuing a preliminary notice of intent to revoke, the director revoked the approval of the petition on February 1, 2002.

On appeal, counsel for the petitioner asserts that the Service did not consider the case law and the facts presented in the petitioner's rebuttal to the notice of intent to revoke.

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 first issue in this proceeding is whether the beneficiary was employed overseas in a managerial or executive capacity for one year in the three years prior to the beneficiary's application for immigrant status on February 7, 1997.

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.

The petitioner initially submitted a letter in support of the petition that stated the beneficiary had been employed by the petitioner's parent company as a vice-president since February of 1992. The petitioner stated that the beneficiary was responsible for the foreign trade function of the company and had participated in planning the company's policies, strategies, and business goals and objectives. The petitioner also provided three examples of projects that the beneficiary had negotiated.

The director in his notice of intent to revoke, noted that the beneficiary had entered the United States as a B-1 visitor for business in February of 1993 and had departed the United States in June of 1993. The director also noted that the beneficiary had again entered the United States in August of 1993 as a J-1 exchange visitor and had not departed until April of 1995. The director further noted the beneficiary had returned to the United States in July of 1995 as an L-2 dependent and on or about October 5, 1995 the petitioner had filed a Form I-129 petition on the

beneficiary's behalf. The beneficiary then changed his status from the L-2 dependent status to that of an L-1A intracompany transferee. The director concluded from this information that the beneficiary had been in the United States for 26 of the 36 months preceding the filing of the I-140 immigrant petition. The director determined that the beneficiary had not been employed abroad for one continuous year within the three-year period immediately preceding the filing of the current petition and that the approval of the petition had been in error. The director requested an affidavit that explained the discrepancies regarding the beneficiary's employment by the overseas entity corroborated by credible documentary evidence if the petitioner desired to provide rebuttal evidence to the notice of intent to revoke.

In rebuttal, the petitioner provided an affidavit from its president that stated that the beneficiary had been continuously employed by the petitioner's parent company between February 1992 to October 1995 in an executive capacity. The affidavit also explained the beneficiary's trips to the United States as a trip to receive training, a trip to participate in and manage the personnel exchange programs sponsored by the China Association for International Exchanges of Personnel, and a trip as an L-2 nonimmigrant. The affidavit stated that the first two trips were on behalf of the petitioner's parent company and did not comment on the purpose of the beneficiary's last trip to the United States.

The director determined that the petitioner had not provided credible, documentary evidence corroborating its assertion that the beneficiary's stays in the United States were on behalf of the petitioner's parent company.

On appeal, counsel for the petitioner states that he cited the relevant statute and case law and had provided a detailed account of the beneficiary's stays in the United States and abroad in rebuttal to the director's notice of intent to revoke. Counsel asserts that the director did not make any meaningful comments regarding the statute and case law submitted other than to note that the petitioner had not provided any credible, documentary evidence to support its assertions regarding the beneficiary's overseas employment.

Counsel's assertion is not persuasive. The petitioner did not submit any independent documentary evidence in support of its affidavit. For example, although the affidavit contained information that the beneficiary received training while in the United States on his first trip to the United States, the petitioner submits no documentary evidence regarding the training he allegedly received. The petitioner also does not adequately explain how the training was necessary or useful for the beneficiary's position with the overseas entity. In addition, the petitioner submits no evidence of the beneficiary's employment by its parent company during the beneficiary's extended stay in the

United States between August of 1993 and April 1995 as a J-1 exchange visitor. The record contains no documentation that confirms that the beneficiary received remuneration from the petitioner's parent company during this time period. 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). The information submitted in rebuttal to the director's notice of intent to revoke on this issue is insufficient to establish that the beneficiary was employed for one year by the petitioner's parent company prior to entering the United States as a nonimmigrant. Furthermore the description of the beneficiary's duties for the overseas employer is not comprehensive and does not detail the beneficiary's duties for the overseas employer. The Service cannot conclude from the information submitted that the beneficiary was either employed by the overseas entity or was employed by the overseas entity in an executive or managerial capacity. Counsel has not submitted information on appeal that overcomes the director's determination on this issue.

The second issue in this proceeding is whether the beneficiary has been and will be performing managerial or executive duties for the United States petitioner.

In the notice of intent to revoke the director questioned the beneficiary's employment by the petitioner in an executive or managerial position. The director noted that the petitioner employed the beneficiary as its vice-president and claimed to employ four other individuals all with position titles that were executive or managerial in nature. The director requested that the petitioner provide a complete position description for all of its employees. The director also requested that the petitioner submit Internal Revenue Service (IRS) Form 941, Employer's Quarterly Tax Return for the first two quarters of 1997, IRS Form W-2, Wage and Tax Statements for the year 1997, and any evidence of wages paid to contractors.

In rebuttal to the notice of intent to revoke, the petitioner provided a list of its employees and brief job descriptions for each position. The list included the positions of president, the beneficiary's position of vice-president, a sales manager, a business associate, and a sales representative. The petitioner also provided its Form 941, for the first quarter of 1997, the relevant time frame regarding the eligibility of the beneficiary for this classification. The Form 941 revealed that the petitioner only employed one individual during that time period and had paid wages and other compensation in the amount of $6,250. The Form 941 does not list the name of the employee. The record presents inconsistent information regarding the number of employees and their purported job duties at the time of filing the petition. 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). Furthermore, a petitioner must establish eligibility at the time filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45,49 (Comm. 1971). The petitioner has not provided sufficient consistent information to determine that the beneficiary had been or would be working in a managerial or executive capacity at the time of filing the petition.

Contrary to the decision of the director, the petitioner has not established that it was doing business in the United States for at least one year prior to the filing of the petition as required by 8 C.F.R. section 204.5(j)(3)(i)(D). The petitioner was incorporated in August of 1995 and apparently leased office premises in February of 1997. However, the earliest invoice provided to demonstrate that it was doing business is dated March 22, 1996, only eleven months prior to filing the petition. The petitioner has not established that is was engaged in continuous, systematic, and regular provision of goods and/or services for a full one-year period prior to filing the petition.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.