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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[redacted]

JUN 20 2005

File: [redacted] Office: VERMONT SERVICE CENTER Date:

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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 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 Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petition was filed by the alleged parent company of the United States entity. The letter in support of the petition is submitted on blank letterhead and signed by an individual not identified as employed by the United States employer. The petition was approved on November 6, 1998, although the United States employer, the party in interest in an employment-based immigrant petition, had not petitioned for the employment of the beneficiary. There is no evidence the United States and foreign employer share a branch relationship.

The foreign-based petitioner indicated that it owned a United States subsidiary established in June 1997 in the State of New York. The foreign-based petitioner indicated that it was engaged in the production and trading of medicine materials, herbal medicine, and medical equipment. The foreign-based petitioner also indicated that the subsidiary was created "to act as a liaison between our company and foreign companies world-wide, to import advanced manufacture [sic] equipment, to explore potentially [sic] opportunities in the States to open new markets for our products, and to provide service in search of international economic cooperation partners as well." The foreign-based petitioner seeks to employ the beneficiary as president of its claimed subsidiary. 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 initially approved the petition. Upon review of the record, the director determined that the petitioner had not established that the beneficiary's position with the United States entity had been or would be an executive or managerial position, other than in position title. After properly issuing a preliminary notice of intent to revoke and receiving no rebuttal to the notice of intent to revoke, the director revoked the approval of the petition on June 7, 2002.

The beneficiary signed the I-290B, Notice of Appeal, although it is not clear that it is in her capacity as president. The letter in support of the appeal is on the United States employer's letterhead but is signed by an individual identified as a director of the claimed parent company. The letterhead lists the United States employer's address as the address of the beneficiary. In support of the appeal, the beneficiary re-stated her duties and asserted that she was managing an essential function rather than supervising and controlling other employees. The beneficiary also submitted the United States employer's bank statement for June 2002, her

Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement for 2001, the United States employer's IRS Form 1120, U.S. Corporation Income Tax Return for the 2001 year, the United States employer's payroll journal for the first quarter of 2001, and the New York Quarterly Combined Withholding and Wage Reporting Return for the quarter ending March 31, 2001.

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):
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> * * *
>
> (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 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).

As noted above, it is not clear that the petitioner is the real party in interest in this proceeding. The record seems to indicate that the United States employer is a subsidiary, not a branch office, of the foreign-based petitioner and, as such, the United States employer should be the petitioner in this proceeding.

The director, in the notice of intent to revoke approval of the petition, did not question the origin of the petitioner; but did

question whether the beneficiary's position had been or would be a primarily managerial or executive position for the claimed United States subsidiary. Although the petitioner did not respond to the director's revocation, it filed this timely appeal.

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 stated that the beneficiary had been performing the following duties for the United States subsidiary:

- directing all day-to-day operations of the company, including finance, personnel, legal and marketing;
- developing the company's business plans and establishing operating systems; evaluating business opportunities and proposals;
- interacting and coordinating between the parent company and the subsidiary;
- negotiating and signing legal agreements on behalf of the company;
- participating in personnel management including the firing [sic] and firing of employees; and
- reporting to the Board of the parent company.

The petitioner also stated that the beneficiary would perform the following duties for the United States subsidiary:

- overseeing and coordinating the overall business operation of the company;
- developing and formulating the company's objectives, policies and operating procedures;
- interacting with other subsidiaries, divisions within the parent company;
- rendering work assignments to and supervising work performance of employees, conducting personnel evaluations hiring, firing and promotion; and
- reporting to the Board of the parent company.

The petitioner concluded the position description by stating that the beneficiary spent six hours dealing with the general day-to-day operation and occurrence of import and export activities, eight hours formulating sales and marketing strategies, and six hours researching the fashion industry. The petitioner stated that the beneficiary spent an additional seven hours on budgets, eight hours overseeing the operation of imports and exports, and five hours evaluating the performance of the four clerks, the bookkeeper, and the secretary.

The petitioner provided an organizational chart depicting a president, a vice-president, a marketing department staffed with salespersons and a finance department staffed with clerks. The petitioner also provided a New York Quarterly Combined Withholding and Wage Reporting Return for the quarter ending March 31, 2001. The New York return showed two employees in addition to the beneficiary.

On the basis of this limited information the director approved the petition.

As previously stated, the director subsequently issued a notice of intent to revoke approval of the petition that allowed time for the petitioner to rebut the director's reasons for revocation. The petitioner chose not to respond to the notice of intent to revoke and the director ultimately revoked the approval of the petition.

On appeal, the beneficiary indicates that she is "functioning in the capacity of general manager." The beneficiary indicates that her duties include:

> 1. Mapping strategies to develop a network of suppliers of new and used vehicular and other heavy construction equipment within the U.S.;
>
> 2. Coordinating operations with our parent company which thus far is the predominant source of PRC order; and
>
> 3. Directing and overseeing the timely and satisfactory delivery of all orders sourced in the PRC and filled from U.S. market; and development of current lines of non-auto trading between U.S. and China.

Also as previously noted, the beneficiary submitted several documents: (1) allegedly relating to the United States employer's status in 2001 and 2002; and (2) asserting she was a functional manager.

The assertion, the documents submitted by the beneficiary, and the revised description of the beneficiary's duties are not persuasive. The documents submitted by the beneficiary allegedly relate to the United States employer's status in 2001 and 2002. A petitioner must establish eligibility at the time of 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 petition was filed in July 1998; it is on that date that the petitioner must be able to establish that the beneficiary is or will be employed in a managerial or executive capacity. The record does not reveal the United States employer's number of employees at the time the petition was filed. Furthermore, the record does not clearly and consistently depict the beneficiary's duties at the time of filing the petition. The initial description is overly broad and general. The petitioner simply indicates that the beneficiary has been directing and developing the business, negotiating legal agreements, interacting with the parent company and other subsidiaries, and reporting to the Board of the parent company. This description does not convey an understanding of what the beneficiary will actually be doing on a daily basis. It is not possible to discern from the vague description provided whether the beneficiary will be performing executive or managerial duties in relation to the activities or

will be performing tasks related to the activities. 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). Moreover, the hourly breakdown of the beneficiary's weekly tasks is more indicative of an individual performing the sales, marketing, market research duties along with handling the budget and the operation of the import and export duties, rather than performing managerial or executive duties related to those tasks.

In addition, the description provided indicates that the beneficiary will be "participating in personnel management" and "rendering work assignments to employees." However, the record contains no independent evidence of the number of individuals employed by the United States employer at the time the petition was filed. It is not possible to conclude that the United States employer employed a sufficient number of individuals to conduct the routine day-to-day business of the company thereby relieving the beneficiary of the task of performing non-qualifying tasks. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The beneficiary's description of her duties on appeal is also vague and serves only to confuse the beneficiary's role for the United States entity and the type of import and export activity in which the United States employer is engaged. 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). The beneficiary does not effectively describe the function that she purportedly manages and does not provide evidence of the management of a function, rather than the performance of the function.

In sum, the record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a managerial or executive capacity for the United States entity. The descriptions of the beneficiary's job duties are vague and at most indicative of an individual performing the operational tasks associated with an import and export concern. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of

professional, managerial, or supervisory personnel who will relieve her from performing non-qualifying duties. The Bureau is not compelled to deem the beneficiary to be a manager or an 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 primarily in a managerial or executive capacity.

Beyond the decision of the director, the petitioner has not provided sufficient evidence that it is actually engaged in doing business and was engaged in doing business for a one-year period prior to the filing of the petition. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

The record contains no evidence of import or export activity or of other types of business transactions. The absence of such evidence draws into question whether the United States entity is actually conducting business. As noted above, going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999), *supra*.

Likewise, the record contains insufficient evidence establishing the United States employer's ability to pay the beneficiary the proffered wage at the time the petition was filed. *See* 8 C.F.R § 204.5(g)(2).

Further, the record does not demonstrate a qualifying relationship exists between the beneficiary's overseas employer and the United States entity. Although the petitioner provided a stock certificate showing the overseas entity owned 100 percent of the United States entity, there is no evidence that the overseas entity actually invested funds in the United States entity thereby creating a legitimate qualifying relationship.

For these additional reasons, 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.