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U.S. Department of Justice  
Immigration and Naturalization Service

**PUBLIC COPY**



OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

16 DEC 2002

File:

Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner:  
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:



**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 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 immigrant 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 engaged in the sale and distribution of lighting products. The petitioner seeks to employ the beneficiary in the United States as its president. Accordingly, it seeks 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 issued a notice of intent to revoke the approval on May 18, 2001. The director set out his reasons for the intended revocation stating that the petitioner had not established its ability to pay the beneficiary the proffered wage. The director also stated that the record did not support a finding that the beneficiary had been employed by the foreign entity in a managerial or executive capacity or that the beneficiary would be employed in an executive or managerial capacity for the petitioner. The record reveals that the director mailed the revocation notice to the petitioner on August 17, 2001, although the revocation notice is dated August 20, 2001. The basis of the revocation decision was that the record did not include a response to the director's notice of intent to revoke. The director also noted in the revocation decision that an extension of time may not be granted citing 8 C.F.R. section 103.2(b)(8) which states that additional time may not be granted beyond the 12 weeks to respond to a request for evidence.

On appeal, counsel for the petitioner asserts that on June 5, 2001, she requested an extension of time (60 days or until August 18, 2001) to respond to the Service's revocation notice. Counsel states that she did not receive a response from the Service on her request but subsequently mailed the petitioner's rebuttal to the intent to revoke on August 20, 2001 and asserts that the rebuttal was received by the Service on August 21, 2001 via Federal Express. Counsel also notes that although the revocation decision was dated August 20, 2001, she received the revocation notice on August 18, 2001.

Counsel admits that the rebuttal to the notice of intent to revoke was filed more than twelve weeks after the Service mailed the notice of intent to revoke. However, she contends that the Service's citation to 8 C.F.R. 103.2(b)(8) applies specifically to initial visa petitions that have not yet been adjudicated on the merits. Counsel also contends that the Board of Immigration Appeals has addressed the issue of time limits for responding to intents to deny or revoke. Counsel cites Matter of Obaiqbena, 19

I&N Dec.533 (BIA 1988) and Matter of Estime, 19 I&N Dec. 450 (BIA 1987) in support of her contentions.

Counsel's citation to Matter of Estime, *supra*, is not persuasive. Counsel has not furnished evidence to establish that the facts of the instant petition are analogous to those in the cited case. In Estime the Board of Immigration Appeals (BIA) stated that the facts supported the petitioner's contention that the response to the notice of intent to deny was filed within the 15 days required by the director in the notice of intent to deny the petition. In this case the petitioner acknowledges through its counsel that the response to the motion of intent to revoke was filed far outside the 30 days set out by the director to timely file a response to the notice of intent to revoke.

The BIA's decision in Matter of Obaigbena, *supra*, does provide some guidance on the issue of time limits. The BIA recognized that Service regulations do not prescribe any time limits for the issuance of a notice of intention to deny a visa petition or for the submission of a rebuttal to such a notice. Likewise, we do not find Service regulations that specifically prescribe time limits for responding to the issuance of a notice of intent to revoke or submit a rebuttal. The BIA also noted in Matter of Obaigbena that the Service had suggested to its examiners that 30 days is a reasonable period of time to give a petitioner to respond to notice of intention to revoke the approval of a petition. We note that the director in this case gave the petitioner the said 30 days to prepare and respond to the notice.

The precise issue in this case however, is whether the Service is required to provide the petitioner an extension of time to file a rebuttal to a notice of intent to revoke. Counsel again cites Matter of Obaigbena on this issue. The BIA states in pertinent part:

[T]hat reasonable and timely requests for an extension of time to submit a rebuttal to the notice of intent to deny a visa petition should be dealt with by the district director in a reasonable and fair manner. In particular, when a visa petition has been pending before the district director for a prolonged period of time or where the notice of intention to deny the visa petition includes extensive investigative findings or factual allegations, the district director should grant a petitioner's reasonable and timely request for an extension of time to submit his rebuttal and to present evidence in his behalf.

In this particular case, it appears that counsel relied on the director's lack of response to the request for an extension of time as an indication that the request was granted. Counsel's reliance on this decision is injudicious. As noted by the BIA in Obaigbena, the director is not required by regulation to grant an

extension request. The BIA addresses this issue only in dicta and phrases the dicta in non-mandatory language.

In addition, the director in the instant case set out three straightforward issues that the petitioner was required to address in its rebuttal. Counsel's request for an extension to rebut the proposed revocation was not supported by specific reasons but instead was a general request for extra time. Moreover, the petitioner, after more than 13 and a half weeks, submitted information that for the most part was available or could have been available to the petitioner and its counsel at a far earlier date. Upon review, the petitioner's request to extend the time to respond an additional sixty-five days was unreasonable.

The director's decision to revoke the approval was issued thirteen weeks after issuing the notice of intent to revoke. The director as a matter of courtesy delayed mailing the revocation decision an additional 60 days from the stated due date, a more than ample amount of time to provide rebuttal information in the instant case. The Service's receipt of the petitioner's rebuttal on August 21, 2001, an additional three days after counsel's own requested extension date does not aid the petitioner's cause in this matter.

Finally, where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. Matter of Soriano, 19 I&N Dec. 764 (BIA 1988). Generally, the decision to revoke approval of an immigrant petition will be sustained, notwithstanding the submission of evidence on appeal, where a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intention to revoke. Matter of Arias, 19 I&N Dec. 568, 569 (BIA 1988).

Counsel for the petitioner did not address the merits of the case on appeal. However, for thoroughness and to review the director's decision we will examine the issues. The first issue to be examined is the petitioner's ability to pay the beneficiary the proffered wage. The petitioner on the Form I-140 stated that the proffered salary was \$673.08 per week equaling approximately \$35,000 per year. The petitioner also submitted a "Unanimous Written Consent of Board of Directors and Stockholders in Lieu of Organization Meeting" dated November 10, 1998 authorizing the petitioner to enter into an employment agreement with the beneficiary and establishing her salary at \$65,000 per year with a benefit package valued at \$15,000. 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 Service is unable to determine the actual salary offered by the petitioner to the beneficiary from the contradictory information submitted.

In addition, as noted by the director, the petitioner's net taxable income for the 1996 tax year was negative \$44,700 and for the 1997 tax year was negative \$2,556. In determining the petitioner's ability to pay the proffered wage, the Service will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. Elatos Restaurant Corp. v. Sava, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F.2d 1305 (9th Cir. 1984)); see also Chi-Feng Chang v. Thornburgh, 719 F.Supp. 532 (N.D. Texas 1989); K.C.P. Food Co., Inc. v. Sava, 623 F.Supp. 1080 (S.D.N.Y. 1985); Ubeda v. Palmer, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983). The petitioner has not submitted other tax returns or other documentation to establish it has the ability to pay the beneficiary \$35,000 per year or \$80,000 per year including benefits. Further, even if the Association Commissioner considered the documents submitted in the untimely rebuttal on appeal the petitioner would not have met its burden on this issue. A one-time alleged infusion of capital to an escrow account by the claimed foreign entity is not sufficient to establish the ability to pay. Monies funding an escrow account and not available until certain speculative events occur do not demonstrate that the petitioner had the ability to pay the beneficiary the proffered wage at the time the petition was filed and continuing until the beneficiary obtained lawful permanent residence. The petitioner has not provided evidence that it has the ability to pay the beneficiary wage.

The second issue to be examined is whether the petitioner has established that the beneficiary was employed in an executive or managerial capacity for the claimed foreign entity. The petitioner states that the beneficiary was employed as an executive vice-president and was in charge of nine departments for the claimed foreign entity from October 1994 to the present. The petitioner's statement is contained in a letter dated March 1999. The petitioner provides a broad outline of the beneficiary's duties for the claimed foreign entity including monitoring the departments for quality, material costs and analysis, and shipping schedule arrangements. The petitioner also indicated that the beneficiary assisted the president of the claimed foreign entity in managing the overall operations of the claimed foreign entity. The petitioner provides as support for these statements an organizational chart provided by the petitioner and a recommendation letter from the president of the claimed foreign entity. It is not possible to determine from

this general description what the beneficiary was or is doing on a daily basis. Moreover, the record reveals that the beneficiary was also granted an L-1A non-immigrant visa as a multinational manager/executive valid from March 2, 1998 through March 1, 2001. The petitioner has not provided any information regarding the interruption of the beneficiary's duties for the foreign entity and how this interruption affected her purported duties with the claimed foreign entity. The petitioner has not supplied sufficient independent evidence to support a finding that the beneficiary was employed in a primarily managerial or executive capacity for the claimed foreign entity.

The last issue to be examined is whether the petitioner has established that the beneficiary will be employed in an executive or managerial capacity for the U.S. entity. The petitioner's description of the job duties is not sufficient to warrant a finding of managerial or executive job duties for the United States entity. No concrete description is provided to explain what the beneficiary will do in the day-to-day execution of her position.

The record contains insufficient evidence to demonstrate that the beneficiary will be employed in an executive or managerial capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties fail to describe the actual day-to-day duties of the beneficiary. The description of the duties to be performed by the beneficiary does not sufficiently 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 Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not established a qualifying relationship with a foreign entity. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas company. The petitioner has provided a copy of a stock certificate issued for 51 shares of the petitioner that bears a transfer notification. The transfer notification purportedly transfers 51 shares of the petitioner on January 5, 1998 to the alleged foreign entity in this case. However, in light of confusing references regarding the monies allegedly paid for the transfer of the shares, the petitioner has not established that a

legitimate transfer took place. The letter in support of the petition dated March 1999 contains a reference that the petitioner "received an influx of \$50,000 cash investment from Taiwan to shore-up the financial condition of the company." The record also contains a reference to a purchase agreement signed by the foreign entity and the petitioner in 1997 agreeing that \$50,000 will remain in escrow until the beneficiary has received approval of her permanent residency in the United States. Monies held in an escrow account awaiting a future event do not evidence that the foreign entity's purchase of the petitioner is complete. At the time of filing the petition, it appears that the foreign entity had not yet completed its purchase of a portion of the United States entity. Further, the record does not contain documentation that any monies, held in escrow or not, were paid by the foreign entity. The purported statement of a wire transfer dated November 5, 1998 does not indicate that the foreign entity transferred its funds to the petitioner rather than another entity or individual transferring the funds to the petitioner. For this additional reason, the petition may not 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.