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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: JUL 24 2002

IN RE: Petitioner: [Redacted]
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 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

[Handwritten Signature]

Robert P. Wiemann, Director
Administrative Appeals Office

JUL2402-01B4203

DISCUSSION: The employment-based visa petition was approved by the Director, Vermont Service Center. On subsequent review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the preference visa petition, and his reasons therefore, and ultimately revoked the approval of the petition on December 23, 1999. The matter is now before the Associate Commissioner for Examinations on appeal. The case will be remanded for further consideration.

The regulation at 8 C.F.R. 205.2(d) indicates that revocations of approvals must be appealed within 15 days after the service of the notice of revocation. The record indicates that the notice of revocation was mailed on December 23, 1999. The appeal was filed on January 13, 2000, 21 days after the decision was mailed. Thus, the appeal was not timely filed.

It is noted that the director erroneously allowed the petitioner 30 days to file the appeal. The director's error does not, and cannot, supersede the regulation regarding the time allotted to appeal a revocation.

The regulation at 8 C.F.R. 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. 103.5(a)(2), the appeal must be treated as a motion, and a decision must be made on the merits of the case.

8 C.F.R. 103.5(a)(2) requires that a motion to reopen state the new facts to be provided in the reopened proceeding, supported by affidavits or other documentary evidence. Review of the record indicates that the appeal meets this requirement. The petition will be remanded to the director for consideration as a motion to reopen.

Although the petition will be remanded, examination of the record reveals a number of issues that must be addressed at this time.

Regarding the immigrant classification of an alien worker as a multinational executive or manager, 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.

Review of the record discloses that the beneficiary of this petition was initially approved as a multinational executive, namely the vice-president of purchasing.

The director served the petitioner by mail with a notice of intent to revoke on August 10, 1999. The grounds for the notice of intent to revoke were based on a finding that the petitioner had not established a qualifying relationship with a foreign entity. The director also found that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity.

On September 10, 1999 the Service received a rebuttal to the notice of intent to revoke.

Counsel asserted in the rebuttal that the Service did not have good and sufficient cause for the issuance of a notice of intent to revoke. Counsel asserted that the Service had improperly considered the 1993 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return filed by the petitioner when determining the petitioner's ownership. Counsel noted that information evidencing a transfer of ownership subsequent to the 1993 IRS Form 1120 had been provided to the Service and had not been considered.

Counsel also asserted in the rebuttal that the Service had "presented no new evidence or rationale for doubting the managerial nature of the beneficiary's position." Counsel then stated that the beneficiary would hold an executive position with the petitioner. Counsel also stated that the beneficiary "qualifies as an executive/manager." Counsel further stated that the beneficiary "manages an essential function," and "supervises an important and major aspect of [the petitioner]," and "qualifies as an individual who has 'wide latitude in discretionary decision-making'," and finally "is supervised only indirectly, and therefore only receives general supervision from higher executives"

The director revoked the approval of the petition on December 23, 1999, erroneously noting that the petitioner had not submitted a rebuttal to the director's notice of intent to revoke.

In the untimely appeal filed by the petitioner, counsel's only assertion is that a response to the notice of intent to revoke was

timely submitted to the Service. As noted above, counsel is correct in that the response was timely received by the Service, however, counsel's assertions in the rebuttal to the director's notice of intent to revoke are not persuasive.

Section 205 of the Act, 8 U.S.C. 1155, states that "[t]he Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204 [of the Act]."

A notice of intent to revoke approval of a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. Matter of Li, 20 I&N Dec. 700, 701 (BIA 1993); Matter of Arias, 19 I&N Dec. 568, 569 (BIA 1988); Matter of Ho, 19 I&N Dec. 582 (BIA 1988). By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of a petition's approval, provided the director's revised opinion is supported by the record. Id. In the case at hand, the record contained significant deficiencies and the original approval was in error.

In addition, the record continues to be deficient when considering the qualifying relationship between the petitioner and foreign entities. The petitioner has submitted its 1995, 1996 and 1997 IRS Form 1120s. In each of the tax returns the petitioner on Schedule K, at Line 10 represents that no foreign person maintains an ownership interest in the company. This representation directly contradicts evidence provided by petitioner with the petition and in rebuttal to the notice of intent to revoke. 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, supra at 590.

Further, the record continues to be deficient in establishing that the beneficiary will be employed in a managerial or executive capacity. The petitioner has provided a broad position description and does not clarify if the beneficiary claims to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. We note that counsel has borrowed from the first two elements of the managerial definition and the last two elements of the executive definition in an attempt to classify the beneficiary as just such a hybrid.

The director raised sufficient factual issues to support the revocation. The notice of intent to revoke was based on evidence



that was in the record at the time the notice was issued. Although the evidence submitted in response to the notice of intent to revoke was not considered by the director, upon review, that rebuttal is also deficient in overcoming the deficiencies in the record.

ORDER: The petition is remanded to the director for further action in accordance with the foregoing.