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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.
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Washington, D.C. 20536



File: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: 6 - MAR 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:



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

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center approved the immigrant visa petition. Upon subsequent review of the petition, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director served the petitioner with notice of her intent to revoke the approval of the preference visa petition, and ultimately revoked the approval of the petition on June 16, 1999 after proper notice. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a California corporation that allegedly engages in the import and export of goods. It seeks to employ the beneficiary as its managing director and, therefore, endeavors to classify the beneficiary as a multinational manager or executive 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 revoked her approval of the petition because evidence in the record did not support a finding that the petitioner had the ability to pay the proffered wage or was doing business. The director also found that the beneficiary was not employed and would not continue to be employed by the petitioner in a primarily managerial or executive capacity.

On appeal, counsel submits a brief.

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.

In both the Notice of Intent to Revoke and the Notice of Revocation, the director informed the petitioner that she was seeking to revoke approval of the petition based upon information she received from an investigative report. According to the director:

At interview, the beneficiary stated that the petitioner has never shipped any goods nor received any goods from overseas, nor bought or sold any goods within the US Petitioner is currently not "doing business" in the United States The beneficiary is the sole employee and is himself carrying on the day-to-day activities of the petitioner as an agent for the parent company.

The director concluded that the petitioner was not doing business at the time the priority date of September 22, 1997 was established. She also concluded that the petitioner failed to submit evidence that it had the ability to pay the beneficiary's proffered salary of \$25,000 per year. Finally, the director concluded that, as the sole employee of the company, the beneficiary was not working in a primarily executive or managerial capacity.

On appeal, counsel states that the petitioner's ability to pay the beneficiary is evidenced by the assets of the petitioner's parent company, which are also the assets of the petitioner. Counsel submits a copy of the parent company's "balance sheet" as well as an unaudited "balance sheet" for the petitioner to support his claim that the petitioner has sufficient funds to support the beneficiary.

Regarding whether the petitioner was doing business, counsel asserts that the director failed to explain how she reached this conclusion, considering that the petitioner submitted evidence that it had hired an employee in 1999 and its business operations had increased during that year. Neither counsel nor the petitioner, however, addressed the director's finding that the beneficiary is not currently employed and would not continue to be employed in a primarily executive or managerial capacity.

I. ABILITY TO PAY

8 C.F.R. 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner has not submitted sufficient documentary evidence to show that it has the ability to pay the beneficiary's proffered wage of \$25,000 per year. On appeal, counsel submits an unaudited balance sheet that was prepared by an unknown party, which he believes shows the petitioner's financial solvency. However, the regulation cited above specifies that only audited financial statements are acceptable pieces of evidence. Therefore, the petitioner's submission of an unaudited balance sheet that was prepared by an unknown entity will not suffice to meet the burden of proof in these proceedings. Furthermore, the petitioner has not submitted copies of federal income tax returns, which it has filed with the Internal Revenue Service (IRS), in order to illustrate its ability to pay the proffered wage. Thus, the petitioner has not overcome this basis of the director's objections.

II. DOING BUSINESS

According to 8 C.F.R. 204.5(j)(3)(i)(D), at the time a petitioner files an I-140 petition it must submit evidence to show that it had been doing business for at least one year. *Doing business* is defined at § 204.5(j)(2) as "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."

In response to the director's Notice of Intent to Revoke, the petitioner submitted a copy of a Form W-2 and a Form I-9 to show that it had hired an additional employee. The petitioner also submitted copies of bank statements and a customer letter to show that its business operations had increased since the filing of the petition. Counsel claimed that these two pieces of evidence established that the petitioner had been and continues to do business.

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). The evidence of the petitioner's hiring of an employee and its increase in business operations after the filing of the petition on February 18, 1997 is irrelevant to whether the petitioner had been engaged in the regular, systematic and continuous provision of goods and/or services from February 18, 1996 through February 18, 1997. As the record is presently constituted, the evidence does not support a finding that the petitioner was doing business for the requisite time period.

The record reflects that the petitioner was incorporated in California in December of 1995. The petitioner did not issue

shares of its stock, and the parent company did not purchase the stock shares until April 15, 1996. The petitioner has submitted copies of invoices to evidence that it had been shipping goods to the parent company in China; however, the earliest invoice is dated March of 1996. The record does not contain any evidence that the petitioner was engaged in the regular, systematic and continuous provision of goods or services as early as February 18, 1996, which is one-year prior to the filing of the petition. Accordingly, the petitioner has not met its burden of showing that it was doing business, as that term is defined in the regulation.

III. EMPLOYMENT OF THE BENEFICIARY BY THE PETITIONER

Although the director noted in her Notice of Revocation that the evidence did not support a finding that the beneficiary is currently and would continue to be employed in a primarily executive or managerial capacity, neither counsel nor the petitioner chose to rebut the director's finding on appeal. As the revocation of the petition's approval is being affirmed on other grounds, this issue will not be examined further.

IV. CONCLUSIONS

It appears that in this case, the director erred in approving the I-140 petition upon its initial filing. As an approved visa petition is merely a preliminary step in the visa application and does not guarantee that the visa will be issued, the director had the discretion to revisit the approval and issue the Notice of Intent to Revoke for good and sufficient cause. The final Notice of Revocation was also proper.

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.