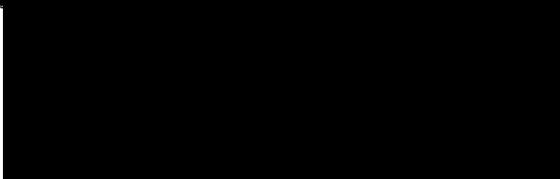




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U.S. Department of Justice
Immigration and Naturalization Service

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

File:

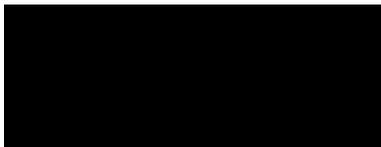
Office: VERMONT SERVICE CENTER

Date: **NOV 19 2002**

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:



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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was approved by the director, Vermont Service Center. Upon 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 April 19, 2001. 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 April 19, 2001. The appeal was filed on May 21, 2001, 32 days after the decision was mailed. Thus, the appeal was not timely filed.

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.

The petitioner is engaged in international trade and seeks to employ the beneficiary in the United States as its vice-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.

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.

The director in the notice of intent to revoke stated that the record was insufficient in demonstrating that the beneficiary's duties were managerial or executive in nature. The director also stated that the petitioner had not shown that it employed sufficient staff to relieve the beneficiary from performing the mundane duties of the organization. A review of the record reveals that the petitioner's initial description of the beneficiary's duties was overly broad and general in nature. The petitioner rather than providing a complete position description for the beneficiary relied on the past approvals of the beneficiary's classification as an L-1A nonimmigrant multinational manager or executive. It is not clear from the record for the employment-based immigrant classification whether the director reviewed the previous L-1A approved petitions. However, if the previous nonimmigrant petitions were approved based on the same position description contained in the record before the director at the time the notice of intent to revoke was issued, the past approvals of the L-1A petitions would constitute clear and gross error on the part of the Service. As established in numerous decisions, the Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g., Sussex Enqq. Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988); Matter of Church Scientology Int'l., 19 I&N Dec. 593, 597 (BIA 1988).

The documents in support of the petition in this proceeding did not establish the managerial or executive capacity of the beneficiary or the beneficiary's position. A notice of intent to revoke is properly issued for "good and sufficient cause" when the evidence of record at the time the notice is issued, warrants a denial of the visa petition based upon the petitioner's failure to meet its burden of proof. 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. Matter of Ho, 19 I&N Dec. 582 (BIA 1988). As noted above, the record lacked a comprehensive position description for the beneficiary's position for the United States petitioner. The decision to revoke will be sustained where the evidence on record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intent to revoke, would warrant such denial. Id.

The petitioner's rebuttal evidence in this particular case provides new information regarding the expansion of the petitioner's corporate structure. The petitioner also states that it has hired additional employees. However, a petitioner must establish eligibility at the time of filing the petition; 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). A beneficiary not eligible for classification as a manager or executive because the beneficiary's duties described are not sufficiently comprehensive to convey an understanding of the duties or support only a finding as a first-line supervisor of non-professional employees, cannot become a managerial or executive position simply with the growth of the petitioner. The addition of employees to the petitioner's staff must still be accompanied by comprehensive descriptions of a proposed beneficiary's duties that comport with the definition of managerial or executive capacity. The new facts regarding the growth of the petitioner and the proposed beneficiary's position in the expanded structure of the petitioner are properly evaluated at the time the petitioner files a new petition detailing the pertinent new facts.

Furthermore, even if the petitioner's new staff was considered, the job duties described for various individuals appear duplicative. For example, the beneficiary as vice-president hands out department assignments and the sales manager and the import/export/warehouse manager distribute these "assignments," and the sales manager and the deputy sales manager both track customer's orders and profiles. The duplicative nature of some of the duties detailed raise questions regarding the necessity of either deputy manager position. The description of the duties for both the sales manager and the import/export/warehouse manager reflect individuals providing basic services to the petitioner and do not reflect positions held by individuals that qualify as managers under the "managerial" definition found in the Act. See 101(a)(44)(A) of the Act. Even considering the additional staff, the beneficiary's position may be no more than that of a first-line supervisor of non-professional employees.

Finally, the director may consider the size of the petitioner and its number of staff but must also take the reasonable needs of the petitioner into consideration when doing so. See section 101(a)(44)(C) of the Act. The director should note that the petitioner's reasonable needs are but one factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity.

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