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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 01 2003

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:

[redacted]

PUBLIC COPY

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, California 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 petitioner is a South Korean government-sponsored international trade and investment promotional organization. The Los Angeles branch was established in November 1962 as a nonprofit foreign agent. It seeks to employ the beneficiary as its director.[1] Accordingly, it 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 and manager.

The director initially approved the petition. Upon review of the record, the director determined that the petitioner had not established that the beneficiary would be performing in an executive or managerial capacity for the petitioner. After issuing a preliminary notice of intent to revoke, the director revoked the approval of the petition on May 13, 2002.

Counsel for the petitioner asserts that the Bureau's determination

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[1] Upon review of the record after approval of this petition, but prior to adjudicating the beneficiary's adjustment application, the director requested additional evidence for the record. The response to the director's request for evidence indicated that the petitioner's organizational hierarchy had changed and that the petitioner was seeking approval to employ the beneficiary as a deputy director, a position subordinate to the position requested in the petition. However, a petitioner must establish eligibility at the time of filing, and the evidence supporting the request made in the petition is the evidence that must be reviewed. *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The purpose of the request for evidence is to elicit further information in support of the request made in the petition, not to review evidence that supports or attempts to support a different request. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. At the time of filing, the petitioner was seeking to employ the beneficiary as a director; as such, the record must support the petitioner's claim that the beneficiary's duties as a director were managerial or executive in nature. The AAO will review the record on the basis of the request in the petition. The record will be reviewed for evidence that supports the petitioner's claim that the beneficiary would be employed as a director and that the director's position would be executive or managerial in nature.

was arbitrary and capricious and was made without substantial evidence. Counsel also asserts that the statements in the revocation are unsupported by the evidence or regulations and reflect an abuse of discretion and violation of due process. Counsel submits a brief in support of his assertions.

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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> * * *
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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).

The issue in this proceeding is whether the beneficiary has been and will be employed in a managerial or executive capacity for the petitioner.

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.

Counsel for the petitioner initially indicated that the Los Angeles office would employ the beneficiary in the position of director with a total of eleven professional staff under his supervision. The petitioner stated on its Form ETA 750, Application for Alien Employment Certification, that the beneficiary's job duties would include the following:

> Responsible for planning, implementing, and executing KOTRA Los Angeles office policies and objectives. Direct overall trade and investment promotion activities through subordinate professionals in Administration, Market Research, Investment, Trade Promotion, and Trade Fair & Exhibition divisions. Responsible for planning of marketing strategy for the promotion of trade and investment between the United States and Korea, South and North Korea. Supervise professional managers and staff engaged in trade consulting service, trade information and telecommunication such as LAN (Local Area Network), public relations and publications, etc. Will have authority to hire and terminate employees under his supervision.

The petitioner also provided its organizational chart depicting the beneficiary as a director with three departments under his supervision. The chart indicated that each department had a deputy director and one to three staff members.

The director approved the petition based on this limited and inadequate information regarding the beneficiary's employment in a purportedly managerial or executive capacity.

Upon further review of the record in conjunction with the beneficiary's request to adjust his status, the director requested that the petitioner provide additional information. The request for evidence was dated December 28, 2001. The director specifically requested copies of the petitioner's California Form DE-6, Quarterly Wage Statements for the four most recent quarters and a statement indicating each employee's name, position title, duties, wage, and the number of hours worked each month. The director also requested the petitioner's organizational chart describing its managerial hierarchy and staffing levels. The petitioner responded to the director's request in March 2002 by submitting its California Forms DE-6 for the year 2001. The DE-6 Forms reflected eight employees except for one quarter when only seven employees were listed. The petitioner also submitted its organizational chart for 2002. The chart depicted a director general, a director, and three departments. The beneficiary was no longer identified as a director supervising three divisions, but rather, as the deputy director of the trade promotion and general affairs division. The chart also showed a manager and two consultants reporting to the beneficiary.

On March 27, 2002, the director issued his notice of intent to revoke approval of the petition, stating that the petitioner did not show a reasonable need for an executive because it was a small company that already had two executives and that, because the beneficiary had only three subordinates, he must be assisting in the performance of non-executive and non-managerial duties. The

director noted that the revised organizational chart of 2002 depicted the beneficiary reporting to a director and serving as a deputy director of a department rather than as a director supervising three departments and the staff in those departments. The director also determined that the record did not support a conclusion that the beneficiary's subordinates held professional or managerial positions. The director further determined that the record was insufficient to establish that the beneficiary managed or directed an essential function of the petitioner rather than performing the operational tasks of the petitioner.

Counsel for the petitioner responded that the beneficiary had been classified as a foreign government official pursuant to section 101(a)(15)(A)(ii) of the Act, and that the petitioner was not a small company, but had nine branches in the United States and 101 branches worldwide. Counsel also stated that by focussing on the size of the petitioner, the Service had misunderstood the nature of the operation. Counsel also attached job descriptions for the three employees subordinate to the beneficiary and asserted that the positions were professional positions. Counsel further attached letters asserting that the letters showed the beneficiary acting as a promoter of Korean trade and showing that the beneficiary responded to serious inquiries involving substantial investment and trade opportunities. Counsel finally asserted that since trade and investment promotion form the purpose of the organization, management of the Los Angeles office division of trade promotion was clearly management of an essential function.

The director determined that the description of duties was not supported by independent evidence and that the petitioner had not demonstrated that the majority of the beneficiary's time was devoted to executive duties. The director noted that a review of the recent organizational chart reflected five positions holding executive titles and four positions holding managerial titles with only eight non-managerial or non-executive employees. The director determined that the petitioner had not demonstrated that the petitioner had a reasonable need for staffing of this nature. The director also determined that the petitioner had failed to establish that the beneficiary qualified as a manager. The director noted that, although the employees subordinate to the beneficiary held college degrees, the duties relating to their positions were unclear and the positions did not reflect a need for professional employees. The director determined that the previous approval was in error and that the petitioner had not submitted sufficient evidence in rebuttal to the notice of intent to revoke to overcome the grounds for revocation.

On appeal, counsel for the petitioner states that the Service must demonstrate good and sufficient cause to revoke an approved petition and that only once some evidence to show cause has been produced does the alien bear the ultimate burden of proof. Counsel appears to assert that the Service abused its discretion by misrepresenting the record and failing to consider the evidence in

the record.

Counsel's statement that the Service must demonstrate good and sufficient cause to revoke an approved petition is correct. However, in the case at hand, the notice of intent to revoke was issued for "good and sufficient cause," as the evidence of record at the time the notice was issued warranted a denial of the visa petition based upon the petitioner's failure to meet its burden of proof. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). At the time the notice of intent to revoke was issued, the director had limited information regarding the beneficiary's alleged duties as a director of the petitioner. The director had a brief description of the beneficiary's duties that did not adequately convey an understanding of the beneficiary's purported managerial or executive duties on a daily basis. The director did not have any independent information supporting the petitioner's claim that it employed twelve individuals in the Los Angeles Office and limited information regarding the beneficiary's supervisory duties, if any. It is not possible to determine from the record whether the beneficiary would have been performing managerial or executive duties with respect to the duties generally described in the petition or would have been actually performing the duties. 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). The petitioner has not submitted sufficient relevant evidence to overcome the director's determination on appeal.

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.