

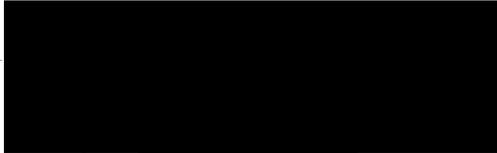
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536



File:

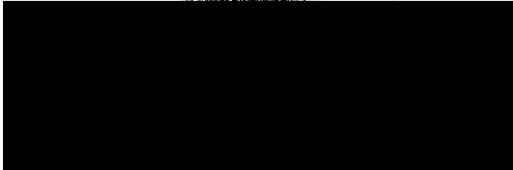
Office: CALIFORNIA SERVICE CENTER

Date: **DEC 16 2003**

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)

ON BEHALF OF PETITIONER:



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 (CIS) 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 Director, California Service Center initially approved the employment-based visa petition. Upon review of the record, the director properly issued a notice of intent to revoke and ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a corporation organized in October 1993 in the State of California. The petitioner states that it is an investment company. It seeks to employ the beneficiary as its president. Accordingly, the petitioner 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 or manager.

The director initially approved the petition on November 8, 1996. Upon review of the record, including an overseas investigative report, the director determined that the petitioner had not established a business relationship with the beneficiary's claimed overseas employer. The director also determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity for the petitioner. After properly issuing a notice of intent to revoke, the director revoked the approval of the petition on November 6, 2002.

On appeal, counsel for the petitioner asserts the director's decision is in error and that the appeal provides ample grounds for a grant of the petition.

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 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. See 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's overseas employer.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entity in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. The petitioner and overseas entity must maintain the multinational nature of the organizations as defined above.

The petitioner initially provided its Certificate of Incorporation dated October 15, 1993. The petitioner also provided a copy of share certificate number one dated October 28, 1993. The share certificate showed that 5000 shares of 100,000 shares authorized were issued to the beneficiary's claimed overseas employer. The petitioner also provided its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 1995. The Form 1120 at Schedule L, Line 22(b) indicated common stock valued at \$300,000 had been issued.

The director approved the petition and the underlying qualifying relationship based on this limited information. CIS requested an overseas investigation in July 2001. The request was generated because of the beneficiary's testimony in his Form I-589, Request for Asylum in the United States. The declaration accompanying the I-589 request indicated that the beneficiary had returned to the Philippines from abroad in May 1992 and had left the Philippines due to threats in September 1992.

The record contains a brief investigative report prepared by the officer-in-charge in Manila, Republic of Philippines on June 22, 2001. The investigative report, based on an interview with the beneficiary's sister, stated that the beneficiary's overseas employer had ceased doing business when the beneficiary left the Philippines in 1992. The investigative report further indicated that, when the beneficiary left the Philippines, a new company was established that was owned and operated by the beneficiary's sister and her husband.

The director determined, based on the investigative report, that there was no business relationship between the petitioner and another entity when the petition was filed in October 1996. In rebuttal, counsel for the petitioner claimed that the beneficiary's overseas employer did not cease operations. Counsel submitted several documents as evidence that the foreign entity had not ceased operations including:

- A Certificate of Corporate Filing with the Philippine Securities and Exchange Commission dated October 25, 2001 indicating the corporation had been registered and that no Amended Articles of Incorporation dissolving the corporation had been filed.
- Copies of the foreign entity's annual tax returns filed for 1996 through 2000. Counsel noted that box "7" of each tax return indicated that the corporation had business operations in the year of filing.
- Bank statements showing deposits and withdrawals.
- Letters from other entities doing business with the foreign entity, two agreements dated in 1999 and 2000, and four deeds of sale dated in 1996, 1997 and 1998.

The director determined that the documents submitted established that a company existed in the Philippines but concluded that the documentation did not substantiate that the foreign company had a qualifying business relationship with the petitioner. The director also referenced the beneficiary's asylum application signed under penalty of perjury on February 18, 1993. The asylum application confirmed that the beneficiary had left the Philippines on September 11, 1992 and had not returned to the

Philippines as of February 18, 1993. The director inferred from this information that the beneficiary had not been working for one year for the same employer or a subsidiary or affiliate of the legal entity by which the alien was employed overseas preceding his entry as a nonimmigrant. The director concluded that the petitioner had not submitted sufficient evidence in rebuttal to overcome the grounds of revocation.

On appeal, counsel references the documents submitted in rebuttal and asserts that these documents contradict the findings in the investigative report.

The AAO observes that the director does not properly consider the entirety of the record and inarticulately states the ultimate decision. Nevertheless, the decision to revoke in this matter must be sustained. The petitioner has not established a qualifying relationship with the beneficiary's claimed overseas employer. The director correctly notes that the documentation provided in rebuttal substantiates the existence of a foreign entity. However, the stock certificate issuing 5000 shares to the foreign entity is not sufficient to establish that the beneficiary's foreign employer owns and controls the petitioner.

The record contains the petitioner's IRS Form 1120 for 1995, in addition to the stock certificate. The Form 1120 at Schedule L, Line 22(b) contradicts the number of shares issued to the beneficiary's foreign employer. In addition, the petitioner's subsequent Forms 1120, at Schedule L, Line 22(b) shows that the petitioner's stock is valued at \$5,000 rather than \$300,000. The 1995 return has not been amended and provided for review. The record does not contain an explanation of the gross difference in value of the petitioner's stock. 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).

This contradiction raises significant concerns regarding the petitioner's actual ownership and control. See *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). The record does not contain evidence that the beneficiary's claimed overseas employer actually paid for the petitioner's shares. When the record raises questions regarding ownership and control the director must determine the means by which stock ownership was acquired. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership.

In addition, and alluded to though not clearly stated by the director, is the actual employment of the beneficiary by the foreign entity for one year prior to entering the United States as a nonimmigrant. The record contains unclear information regarding

the beneficiary's whereabouts during the year prior to entering the United States as a nonimmigrant. The record does not contain documentary evidence that the beneficiary was actually employed by the foreign entity prior to his entry into the United States in September 1992. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, the record does not establish that the beneficiary's assignment for the foreign entity, if employed by the foreign entity, was in a managerial or executive capacity as defined by the Act. See section 101(a)(44) of the Act set out below. The record does not contain a comprehensive description of the beneficiary's duties for the foreign entity. Titles alone are not sufficient to establish that a beneficiary's duties are primarily executive or managerial.

Finally, the record presents contradictory information regarding the nature and viability of the petitioner. The AAO notes that the petitioner filed Articles of Incorporation and filed IRS Forms 1120. However, the record shows that the petitioner's claimed assets and licenses are held in the beneficiary's name. The record does not sufficiently explain the reason for this discrepancy. Again, the petitioner must 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*. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. The record suggests that the beneficiary, rather than the petitioner, is conducting business.

For these reasons, the director had good and sufficient cause to issue a notice of intent to revoke approval. The petitioner's rebuttal does not provide sufficient evidence to overcome the grounds of revocation. The record even absent the investigative report does not demonstrate a qualifying relationship between the petitioner and the overseas entity. Likewise, the record even absent the investigative report does not establish the beneficiary was employed for one year by the foreign entity in a managerial or executive capacity.

On appeal, the petitioner raised a second issue about which the director did not make specific determinations in the notice of revocation. The issue is whether the beneficiary has been or will be performing primarily managerial or executive duties 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.

The Form I-140, Immigrant Petition for Alien Worker, states that the petitioner employed two persons when the petition was filed. The petitioner initially provided a broad position description for the beneficiary that included phrases such as, "direct the management of the U.S. subsidiary," and "established corporate organizational goals and policies," and "exercises a wide latitude of discretionary decision-making." In addition, the petitioner indicated the beneficiary was "responsible for hiring/firing of personnel," and "formulates company financial and business goals and develops business strategies." Further, the petitioner stated that the beneficiary "handles all financial matters and advertising," and "actively investigat[es] new properties to invest in and will be responsible for the purchas[e] of the facilities."

In the notice of the intent to revoke, the director observes that the petitioner claimed to be an investment company but was engaged primarily in operating board and care facilities. The director noted that the petitioner's California Forms DE-6, Employer's Quarterly Wage and Withholding Report did not show that the petitioner employed full-time personnel, other than the beneficiary. The director also noted the lack of an organizational chart in the record and a description of duties for the petitioner's other employees. The director determined that the record did not contain a comprehensive description of the beneficiary's duties.

In rebuttal, counsel for the petitioner made clear that the petitioner is an investment company that invests primarily in the board and care facility industry. Counsel asserted that the beneficiary delegated responsibilities, such as applying for a fictitious name request and acting as the petitioner's agent, to another employee. Counsel also indicates that each board and care facility has a staff of two or more employees. Counsel also claims that CIS places undue emphasis on the relative size and staffing level of the petitioner's company and cites *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570 (N.D. GA. 1988) in support of a rejection of this approach. Counsel also cites an unpublished decision in support of his assertion that the number of employees does not determine whether an individual holds a managerial or executive position.

The director determined that the petitioner had not submitted sufficient evidence to overcome the grounds for revocation, although the issue of the beneficiary's managerial or executive capacity was not further addressed.

On appeal, counsel repeats that the petitioner is an investment company, that the beneficiary delegates responsibilities, and that the petitioner employs a vice-president, secretary, chief financial officer, assistant administrator, and an administrative assistant, in addition to the beneficiary.

Counsel's assertions are not persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In this matter, the AAO will review the evidence as it relates to the beneficiary's eligibility for this classification as of the date the petition was filed. A petitioner must establish eligibility at the time of filing; 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).

Moreover, when examining the beneficiary's executive or managerial capacity, CIS will look first to the petitioner's description of job duties. See 8 C.F.R. § 204.5(j)(5). The initial description borrowed liberally from the definition of managerial and executive capacity without conveying an understanding of the beneficiary's daily duties. See section 101(a)(44)(A)(iii) and section 101(a)(44)(B)(i), (ii), and (iii) of the Act. In addition, the petitioner indicated that the beneficiary investigates the new properties to invest in and is responsible for the purchase of the facilities. Thus, it appears the beneficiary is the person performing the petitioner's most basic function; that is providing the petitioner's investment services. 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). Further, as stated previously, the beneficiary and his wife purchased the petitioner's claimed assets and hold the deeds to those assets. The beneficiary alone holds the licenses to operate the three board and care facilities.

Counsel's citation to *Mars Jewelers, Inc. v. INS*, in rebuttal is without merit. First, a Georgia District Court decided *Mars Jewelers, Inc. v. INS*, a case with no precedential value in this matter's jurisdiction. Second, the *Mars Jewelers, Inc. v. INS* decision dealt with the Georgia court's application of the 1983 regulations to the matter, not to the application of subsequent and relevant regulations. Counsel's citation to an unpublished case carries no probative value. Counsel did not furnish evidence to establish that the facts of the instant petition are analogous to those in the unpublished case. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. See 8 C.F.R. § 103.3(c).

In sum, the record does not support a finding that the beneficiary's duties are or will be in a managerial or executive capacity. The petitioner has not provided evidence that the beneficiary will be relieved of performing the petitioner's primary function. In addition, the record shows that the beneficiary's position is akin to an owner/operator of board and care facilities, rather than an executive or manager of an investment company. The petitioner has not provided sufficient

evidence that the beneficiary's assignment will be in a primarily managerial or executive capacity.

In addition, the director's determination that a petition was incorrectly approved is good and sufficient cause for the revocation of a petition's approval, provided the record supports the director's revised opinion. *Matter of Ho, supra*. In this matter, the decision to revoke will be affirmed on the ground that the petitioner has not established that the beneficiary has been primarily employed in a managerial or executive position and that a qualifying relationship has not been established. Beyond the decision of the director and as noted above, the petitioner has not established that the beneficiary was employed for one year prior to entering the United States in a managerial or executive capacity.

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.