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U.S. Department of Homeland Security

Citizenship and Immigration Services

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



File:  Office: CALIFORNIA SERVICE CENTER

DEC 18 2003
Date:

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:



PUBLIC COPY

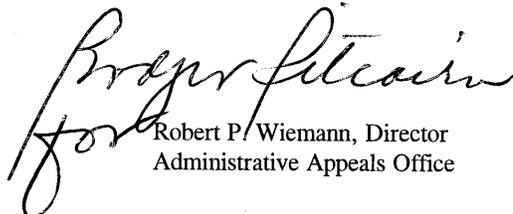
INSTRUCTIONS:

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 (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 is a corporation established in February 1996 in the State of California. It is engaged in real estate development and importing and exporting construction materials and related equipment. 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 24, 2000. Upon review of the record, the director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity. After properly issuing a notice of intent to revoke, the director revoked the approval of the petition on December 6, 2002.

On appeal, counsel for the petitioner asserts the director erred and that the beneficiary qualified for an executive/managerial position.

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 issue in this proceeding is whether the beneficiary 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 petitioner stated in its letter in support of the petition that it was "responsible for market research and development, procurement and purchasing, implementation of international marketing strategies to identify and analyze developing trends in the projected product industries and coordinating efforts of U.S. contractors or suppliers." The petitioner stated that it employed two individuals, the beneficiary and a financial manager.

The petitioner indicated that the beneficiary's role in the company would encompass "overall management and administration of the company's business operations, and implementation of the company's goals and policies for marketing, procurement, purchasing, trading and real estate development and investment." The petitioner also indicated that the beneficiary would "direct the management and administration of the company's day-to-day operations, financial controls, and [oversee] general activities concerned with new business projects, marketing and product research and development, contractual proceedings, and management of corporate legal affairs and personnel administration." The petitioner further indicated that the beneficiary would act as the primary liaison with the parent company and would manage the activities of subordinate personnel.

The director approved the petition on this limited information regarding the beneficiary's managerial or executive capacity.

The director issued a notice of intent to revoke observing that the petitioner had only two employees in 2001 and three employees in 2003. The director stated "it is imperative that the manager/executive must have employees under his authority to exercise his managerial/executive functions." The director determined that good and sufficient cause existed to revoke the benefit granted. The director afforded the petitioner 30 days to offer evidence in rebuttal to the proposed revocation.

The petitioner did not submit evidence in rebuttal and the director revoked the petition.

On appeal, counsel asserts that the director improperly relied on the petitioner's small number of employees when revoking the approval. Counsel contends that the beneficiary supervises an employee who holds a professional position. Counsel claims that the beneficiary manages an essential function. Counsel cites unpublished decisions in support of these assertions and claims. Counsel also asserts that when revoking an approved petition, CIS must base its decision on substantial evidence.

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). Moreover, neither the petitioner nor counsel clarify whether the beneficiary is claiming 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. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

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 petitioner stated that the beneficiary would manage and administer the business operations, as well as, implement the company's goals and policies for marketing, procurement, purchasing, trading, and real estate development, and investment. The petitioner also stated that its responsibility or purpose was to perform market research and development, procurement and purchasing, implement international marketing strategies, and coordinate the efforts of United States contractors and suppliers. These duties reflect an individual who performs the basic operational tasks of the petitioner. 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).

In addition to a description that shows an employee performing the basic responsibilities of the company, the petitioner confirms that it employs only two employees: the beneficiary as president and a financial manager. The petitioner does not provide evidence of other individuals who would perform the tasks of market research, procurement, purchasing, coordination of contractors and suppliers, trading and real estate investment. The AAO agrees that the director inarticulately stated her concern that the U.S. entity required additional employees to relieve the beneficiary from performing the services for which the petitioner was created. However, the record before the director, when the notice was issued, warranted a denial of the visa petition based upon the

petitioner's failure to meet its burden of proof. See *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). The petitioner had not established that the beneficiary's primary assignment would be in a managerial or an executive capacity, instead of a primarily operational capacity. The record does not demonstrate that the reasonable needs of the petitioner could be met by the beneficiary and one other employee without the beneficiary contributing to the majority of tasks for which the company was created.

A review of the record does not substantiate counsel's contention that the beneficiary supervises an individual holding a professional position. On appeal, counsel asserts that the financial manager holds a professional position. The record before the director when the notice of revocation was issued did not contain evidence that the individual holding this position would devote the majority of his time to providing professional services to the petitioner. 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). Furthermore, counsel's description, on appeal, of the financial manager's duties is not sufficient to establish the professional nature of this position. *Matter of Obaigbena, supra*; *Matter of Ramirez-Sanchez supra*. Finally, the financial manager's salary does not comport with a salary of a professional position.

The record also does not support counsel's assertion that the beneficiary is managing an essential function. The term "essential function" generally applies when a beneficiary does not supervise or control a petitioner's staff but instead is primarily responsible for managing a function. To allow the broad application of the term "essential function" to include all individuals who head organizations would render the term meaningless. If counsel claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, as well as, establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive description of the beneficiary's duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Counsel's citation to unpublished cases carries little probative value. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished cases. 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 services. 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 acknowledgment 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 the present matter, the decision to revoke will be affirmed on the ground that the petitioner did not establish that the beneficiary has been or would be employed in a primarily managerial or executive position.

Beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered annual wage of \$30,000. See 8 C.F.R. § 204.5(g)(2). In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D.Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In this matter, the petitioner has not previously paid the beneficiary the proffered wage and the petitioner's Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, do not show a sufficient net income to support the proffered wage. For this additional reason the petition could not have properly approved.

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.