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

ADMINISTRATIVE APPEALS OFFICE
AAO, BCIS, 20 Mass, 3/F
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Washington, DC 20536



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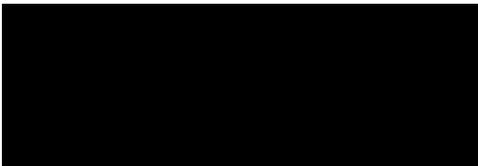
Office: CALIFORNIA SERVICE CENTER

Date: **DEC 17 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 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 employment-based visa petition was 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 company organized in August 1995 in the State of California. It is engaged in the import and export of home furnishing products. 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 in October 1997. The director issued a notice of intent to revoke the approval on November 8, 2002. Included in the notice of intent to revoke was a request for further evidence. Counsel for the petitioner submitted an eleven-page rebuttal to the notice of intent to revoke. Counsel asserted in the rebuttal that the notice of intent to revoke did not set forth the evidence and material that the director used to issue his decision to revoke. Counsel indicated that the petitioner was ready to supply information to the director and that upon receipt of a sufficient notice of intent to revoke the petitioner would rebut the new notice. The director issued a revocation decision on February 26, 2003. The director noted in the revocation decision that the petitioner had not submitted any of the requested evidence, and thus, had not overcome the grounds for revocation.

On appeal, counsel for the petitioner asserts that the director must present evidence supporting the notice of revocation and then the petitioner must rebut the evidence upon which the proposed revocation is based. Counsel asserts that the director's revocation decision was based upon the petitioner's failure to provide more evidence, but that the law requires only that such evidence be submitted after CIS reveals the evidence supporting revocation. Counsel contends that the director never revealed the evidence that would trigger the petitioner's obligation to produce further evidence.

Counsel's assertions are not persuasive. The notice of intent to revoke is based on deficiencies in the record regarding the beneficiary's managerial or executive capacity, the lack of the petitioner's qualifying relationship with the beneficiary's foreign employer, and the petitioner's inability to pay the proffered wage. The director revealed sufficient evidence to trigger the petitioner's obligation to produce further evidence on the issue of the beneficiary's managerial or executive capacity. Section 205 of the Act, 8 U.S.C. 1155, states that "[t]he Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition

approved by him under § 204 [of the Act]." When determining what is good and sufficient cause for the issuance of a notice of intent to revoke, CIS looks at the evidence of record at the time the notice was issued. If the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet its burden of proof, the revocation is sustainable. *Matter of Esteime*, 19 I&N Dec. 450 (BIA 1987; *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). In addition, 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. See *Matter of Ho*, *supra*.

In the present matter, the director improperly found that the record contained deficiencies regarding the petitioner's qualifying relationship. The director's request for further evidence in the form of a wire transfer to establish the petitioner's qualifying relationship with the beneficiary's foreign employer is not warranted without further detail. The petitioner's tax returns, stock certificates, and stock ledger show that the beneficiary's foreign employer owns 100 percent of the petitioner. If the director has reason to believe the stock certificates and tax returns are fraudulent the director should present the evidence that raised this concern. As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. However, in this instance, ownership and control of the petitioner appear to rest with the beneficiary's overseas employer. Without further evidence impugning the validity of the documents in the record this ground for revocation is insufficient.

The director also improperly found that the record contained deficiencies regarding the petitioner's ability to pay the proffered wage of \$30,000 per year. The director's notice of intent to revoke and revocation decision did not discuss the fact that the petitioner had paid the beneficiary more than the proffered wage in the year the petition was filed and in the two years subsequent to the filing of the petition. In the past, CIS has considered payment of the proffered wage to be sufficient evidence that the petitioner has the ability to pay the proffered wage. Again, if the director had reason to believe that the past payment of the proffered wage was manipulated in some fashion, or that the petitioner no longer had the ability to pay the proffered wage, the director must reveal the evidence underlying the cause for concern. This ground for revocation is also insufficient.

The director's decision will be withdrawn as it relates to the issues of the claimed qualifying relationship and ability to pay. The director's decision to revoke, however, will be affirmed on the ground that the petitioner has not established that the

beneficiary's assignment for the petitioner will be primarily in a managerial or executive capacity.

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 the beneficiary's duties for the petitioner as:

[P]lan, develop and establish policies and objectives of business organization in accordance with board directives and corporate charter. Review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions. Direct and coordinate formulation of financial programs to provide funding for new or continuing operation to maximize returns on investment and to increase productivity. Evaluate performance of executives. Hire and fire employees.

The record also contains the petitioner's California Form DE-6, Quarterly Wage and Withholding Report for the second quarter of 1997, the quarter preceding the quarter in which the petition was filed.¹ The California Form DE-6 shows the petitioner employed the beneficiary and four other individuals. The record also contains Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement for 1997. The IRS W-2s show that the petitioner paid the beneficiary \$70,000, and paid the following sums to five other employees, \$11,380, \$9,908, \$7,368, \$1,968, and \$600. The individual paid \$1,968 is not reflected on the California Form DE-6 for the second quarter of 1997.

The director determined that the petitioner's description of the beneficiary's duties did not describe what the beneficiary would actually be doing. The director found that: The description paraphrased the immigration definition of managerial and executive duties. The director stated that the descriptions, without further elaboration and clarification, were not sufficient to demonstrate the beneficiary's managerial or executive responsibilities. The director also noted the lack of the petitioner's organizational complexity and determined that the petitioner did not possess the organizational complexity to warrant having an executive employee. The director also determined that it appeared the beneficiary would be involved in the performance of routine operational activities rather than in the management of a function of the business.

Regarding this specific issue, counsel in rebuttal to the director's notice of intent to revoke asserts that the director did not set forth facts to support his conclusion that the beneficiary did not qualify as a manager or executive. Counsel

¹ The record does not contain a California Form DE-6 for the quarter in which the petition was filed.

also asserts that the director's conclusion that the petitioner lacked the organizational complexity to warrant having an executive is unsupported. Counsel further asserts that the nature of a business can allow a person to perform some menial tasks without negating a classification that the person is acting primarily to direct, manage, and protect an enterprise. Counsel cites a ninth circuit decision that reviewed a nonimmigrant treaty investor petition in support of this assertion. See *Lauvik v INS*, 910 F.2d 658 (9th Cir. 1990). Counsel also contends that the petitioner's own statements regarding the beneficiary's duties without more can be sufficient evidence. Counsel cites *Matter of Treasure Craft of California* that provides "[t]he petitioner's own statement must be given due consideration; however, this Service is not precluded from rejecting such statement when it is contradicted by other evidence in the record of the matter under consideration." *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel's assertions are not persuasive. When examining the beneficiary's executive or managerial capacity, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The description of the beneficiary's duties is vague and general. The description does, in part, paraphrase elements of the statutory definition of executive capacity without conveying an understanding of what the beneficiary's actual daily activities entail. For example, developing and establishing policies and objectives in accordance with board directives and the corporate charter, is a general paraphrase of section 101(a)(44)(B)(ii) and (iv) of the Act.

It is not possible to discern from the broad statement, "[r]eview activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions" that the beneficiary is primarily conducting executive duties in relation to this "duty" rather than performing the operational and administrative tasks necessary to provide such services to the organization. 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 beneficiary's task of formulating financial programs is written in the same vein as the beneficiary's task of reviewing activity reports, and again, does not delineate the managerial or executive nature of this duty.

The petitioner also indicates that the beneficiary will "evaluate performance of executives," however, the petitioner does not provide evidence to substantiate that the petitioner employs executives. 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*, *supra*. The salaries of the individuals the petitioner employs, in addition to the beneficiary, are not indicative of individuals in executive positions. It also does not appear from the record that the employees subordinate to the beneficiary are full-time employees.

The petitioner's own statements in regard to the beneficiary's duties are not sufficient in this case to establish the beneficiary's managerial or executive status. It must be noted that the petitioner does not specify 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.

Moreover, as noted above, the petitioner's own statement contains an explicit contradiction of the facts in the record. The petitioner indicates that the beneficiary will evaluate the performance of executives but the record does not contain evidence that the petitioner employs executives. In addition, the record is bereft of information regarding who will carry out the policies and objectives of the organization or who will prepare activity reports for the beneficiary's review. The record contains no information regarding the petitioner's other employees' titles or duties. The omission of this information implicitly challenges the petitioner's statement of the beneficiary's duties. The record does not contain information that the beneficiary will be relieved from primarily performing the operational and administrative tasks of the organization. The record, at present, indicates that the beneficiary is the petitioner's employee who is responsible for carrying out the majority of the petitioner's everyday non-executive and non-managerial duties.

The petitioner does not provide a comprehensive description of the beneficiary's duties. The record does not provide an understanding of the roles and responsibilities of the petitioner's employees. The petitioner does not indicate whether the beneficiary would be employed primarily as a manager or as an executive. Based on the information in the record when the notice of intent to revoke was issued, CIS cannot conclude, without committing gross error, that the beneficiary's assignment for the petitioner consists of primarily managerial or executive duties.

The director determined that the petitioner's description was inadequate and determined that the petitioner lacked the organizational complexity to support an executive. Coupled with these determinations was a request for evidence to provide further detail on the organizational hierarchy of the petitioner and a more detailed description of the beneficiary's duties. The information in the notice of intent to revoke sufficiently exposed the deficiencies in the record on this issue. The evidence of record at the time the notice was issued warranted a denial based on the petitioner's failure to meet its burden of proof; thus, the revocation is sustainable. *Matter of Estime, supra*; *Matter of Ho, supra*.

The petitioner had the opportunity to address the inadequate description of the beneficiary's duties and to explain the complexity of the organization and the necessity of an executive (or manager) for the organization. The director's notice of intent to revoke provided that opportunity. Generally, the decision to revoke approval of an immigrant petition will be sustained, notwithstanding the submission of evidence on appeal, where a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intention to revoke. *Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1988). The petitioner did not explain or rebut the evidence of the deficient record on this issue. The record does not contain sufficient evidence to conclude that the beneficiary's duties comprise duties that are managerial duties or executive duties.

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.