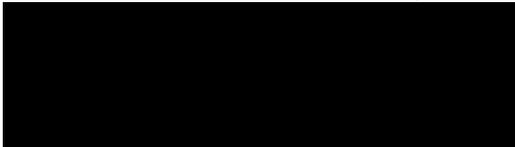


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U.S. Department of Homeland Security

Citizenship and Immigration Services

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



DEC 19 2003

File:

Office: CALIFORNIA SERVICE CENTER

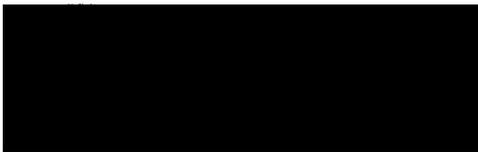
Date:

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 October 1996 in the State of California. It provides graphic design services. It seeks to employ the beneficiary as its chief operations officer. 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 February 1, 2001. Upon review of the record, the director determined that the evidence in the record did not demonstrate that the petitioner was actually doing business. The director also determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer. Finally, 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 July 25, 2002.

On appeal, counsel for the petitioner asserts the revocation is without merit as evidence was submitted to refute all CIS' allegations.

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 is doing business in a regular, systematic, and continuous manner.

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

Doing Business means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

In the notice of intent to revoke, the director noted that the petitioner had submitted a brochure and invoices as proof of doing business. The director observed that invoices could be easily replicated and that the record contained no corroborating evidence that the petitioner actually performed the work listed on the invoices.

In rebuttal, the petitioner provided copies of checks made out to the petitioner, check stubs, invoices, deposit receipts, and state, local, and district sales and use tax returns.

The director stated in the notice of revocation that the validity of the invoices was not disputed but noted that the petitioner was not listed in the telephone directory at its new location.

It is not clear from the revocation decision whether the director actually determined that the petitioner is doing business. However, the record contains sufficient evidence to establish that the petitioner was providing graphic design services when the petition was filed and when the revocation decision was entered. The director's decision will be withdrawn to the extent it relates to the question of whether the petitioner was doing business.

The second 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 provided copies of its stock certificates, six through ten, issued to various parties including 600 shares (60 percent of the authorized 1000 shares) issued to the petitioner's claimed parent company. The petitioner's stock ledger noted that share certificates one through five were non-existent.

The director requested evidence that the foreign company had, in fact, paid for its interest in the United States entity. The director requested that such evidence include wire transfers from the parent company, cancelled checks, and deposit receipts detailing monetary amounts for the stock purchase. The director stated that the originator(s) of the monies deposited or wired must be clearly shown and that the petitioner must explain the source and reason for any funds not originating with the foreign company.

In response, the petitioner cited California Corporations Code section 13310-13316 that provides that an association shall not issue a certificate for stock to a member until the stock has been fully paid. The petitioner asserts given that the foreign company holds a stock certificate, the presumption is that the foreign company fully paid for its stock interest. The petitioner also noted the previously approved L-1A nonimmigrant intracompany transferee petitions for the same petitioner and beneficiary and asserted that the approvals created a presumption of a qualifying relationship.

In the notice of intent to revoke, the director observed that the petitioner had not submitted evidence that the foreign company purchased an interest in the United States company. The director also noted that previous approvals of L-1A nonimmigrant

intracompany transferee petitions did not require the approval of a later petition where eligibility had not been demonstrated. The director determined that the prior approvals would not be considered, and if the previous petitions had been approved on the same unsupported assertions, the approvals would have constituted gross error. The director cited *Sussex Enqq. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988) and *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (BIA 1988) in support of his determination.

In rebuttal, counsel for the petitioner re-stated the assertions contained in the response to the request for evidence. In addition, counsel contended that the decisions cited by the director were not relevant to the proceeding. Counsel explained that all the documents pertaining to the stock purchases were lost or misplaced during the relocation of the petitioner. Counsel attached a copy of a wire transfer initiated by the claimed parent company in February 2002 to defray the petitioner's operation expenses. Counsel asserts the reason for the infusion of funds was because the foreign company continued to have a financial interest in the existence of the petitioner.

The director determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer on the grounds stated in the notice of intent to revoke.

On appeal, counsel repeats previous assertions and contends that the approval of the L-1A petitions and the I-140 petition were based on sufficient documentary evidence. Counsel asserts that the director's decision to revoke approval of the petition is not based on evidence but is based on personal speculation and conjecture.

Counsel's assertions are not persuasive. The stock certificate alone is not sufficient to establish that the beneficiary's foreign employer owns 60 percent of the petitioner. Stock certificates may evidence ownership but are also easily issued and manipulated. As such, the director may request such other evidence as the director may deem necessary. See 8 C.F.R. § 214.2(1)(3)(viii). Ownership is a critical element of this visa classification and CIS may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. See *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership.

Despite the recognized deficiency of the record regarding the petitioner's ownership, the director approved the petition. After recognizing the erroneous approval, the director issued a notice of intent to revoke. The director had ample reason to issue the notice of intent to revoke on this issue. First, the petitioner failed to properly respond to the director's request for evidence

of payment for the foreign company's claimed 60 percent interest in the petitioner. The response to the request for evidence was made prior to the petitioner's relocation; thus, if the evidence actually had been available, it could have easily been provided. Moreover, counsel's implied assertion that the California Corporation Code should take precedence over federal regulation and case law interpreting federal regulations is without merit. For immigration purposes, the terms "parent," "subsidiary," "ownership," and "control" have been defined by federal statute, regulation, and case law. See *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988). Accordingly, the state law definitions of these common business terms will not supplant those accorded by federal immigration law. In visa proceedings, as noted above, a stock certificate alone is not sufficient to establish ownership and control.

Second, the petitioner's stock ledger indicates that its first five stock certificates are non-existent. The petitioner offers no explanation or reason why its first five stock certificates are "non-existent." The lack of information on these stock certificates is sufficient to call into question the petitioner's ownership and control.

Third, the petitioner's response on its Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return on Schedule K, Line 7 indicate that no foreign person¹ owned directly or indirectly a 25 percent interest in the petitioner. This response also calls into question the petitioner's qualifying relationship with a foreign entity. 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).

The petitioner has not provided independent, consistent documentary evidence that the beneficiary's foreign employer purchased a controlling percentage of the petitioner's stock. 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).

The third issue in this proceeding is whether the beneficiary will be performing primarily managerial or executive duties for the petitioner.

¹ According to IRS instructions for the Form 1120, a foreign person includes a foreign-owned corporation.

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 initially provided a broad statement of the beneficiary's responsibilities. The petitioner stated in its letter in support of the petition that the beneficiary was "responsible for developing operational policies and coordinat[ing] functions and operations between U.S. branch and head office." In addition, the petitioner indicated that the beneficiary would "[e]xercise managerial control of the company to ensure smooth operations and cash flow," and "[n]egotiate tie-ups and/or joint ventures with full discretionary authority [sic] day-to-day business operations, hire and fire key management staff, etc."

In response to a request for evidence, the petitioner provided its organizational chart. The chart showed the beneficiary as the chief operating officer over a managing director. The chart also included an executive assistant/bookkeeper, an account director/creative services manager, and two graphic designers subordinate to the position of managing director. The petitioner's California Form DE-6, Employer's Quarterly Wage and Withholding Report confirmed the employment of three individuals in the month the petition was filed. The individuals whose names correspond to the petitioner's organizational chart hold the positions of chief operating officer (the beneficiary's position), and executive assistant/bookkeeper. The California Form DE-6 listed an individual with the same last name as the name of the managing director listed on the organizational chart, but the first names are different.

The petitioner later submitted an organizational chart dated May 2001 a year after the petition was filed. This organizational chart showed the beneficiary in the position of chief operating officer and managing director. The chart showed an account manager, an art director, and a business development director subordinate to the beneficiary's position. However, the California Form DE-6 for May 2001 shows that the petitioner employed two individuals. The individuals whose names correspond to the petitioner's organizational chart hold the beneficiary's position and the business development director position.

The petitioner's response to the director's request for evidence described the beneficiary's duties as:

Overall managerial control to ensure smooth operations and profitability. (50%)

Developing a sound business plan in cooperation with the managing director, establishing operational policies and pricing guidelines. (20%)

Supervising new business development and other sources of revenues. (10%)

Negotiating tie-ups and or joint ventures in other areas such as San Francisco and New York. (10%)
Identifying, sourcing, and pre-qualifying local suppliers, establishing strategic partnerships or alliances. (5%)

Coordinating functions and operations between the U.S. office and the parent company. (5%)

Hiring and firing key management staff. (Whenever required)

The director observed the inconsistencies between the organizational charts and the petitioner's California Forms DE-6 in the notice of intent to revoke. The director also referenced the beneficiary's testimony in connection with her I-485, Application to Register Permanent Residence or Adjust Status. The director indicated that the beneficiary had stated that the petitioner had four employees and that the business was located in her home. The director determined that the petitioner had not established that the beneficiary would be performing as a manager or executive.

In rebuttal, counsel asserted that CIS misinterprets immigration regulations as the regulations do not require a minimum number of employees to qualify an individual as a manager or an executive. Counsel explained that a downturn in the economy necessitated the re-organization and relocation of the petitioner. Counsel asserted that, although the number of the petitioner's employees has decreased, the petitioner continued to use the services of independent contractors. The petitioner also submitted a revised organizational chart.

The director observed that all the individuals listed on the revised organizational chart, except one, were referred to as independent contractors. The director noted that the petitioner provided no independent evidence that it had paid independent contractors. The director concluded that the petitioner had only provided evidence of the beneficiary supervising one employee. The director further concluded that the beneficiary was working as a graphic designer.

On appeal, counsel for the petitioner re-states assertions made in rebuttal to the notice of intent to revoke. Counsel also submits several checks made out to individuals identified as independent contractors over the course of several years. Counsel asserts that CIS is grossly misinterpreting the statute and regulations if it is requiring an individual to manage or serve as an executive over hundreds of employees. Counsel paraphrases elements of the definitions of managerial and executive capacity and asserts that the beneficiary performs these duties and responsibilities.

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's initial description of the beneficiary's duties was broad and did not convey an understanding of the beneficiary's actual daily duties. The petitioner's response to the director's request for evidence indicated that the beneficiary spent 50 percent of her time on managerial control to ensure smooth operations and profitability. This statement is not comprehensive. The petitioner stated further that the beneficiary would spend 20 percent of her time developing a sound business plan and establishing operational policies and pricing guidelines. The AAO cannot discern from these statements whether the beneficiary is or will be performing managerial or executive duties in relation to these activities or whether the beneficiary will be providing the necessary services to continue the petitioner's business. 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).

As the petitioner's description of the beneficiary's duties is not sufficient to establish that the beneficiary's assignment will comprise primarily executive or managerial duties, the remainder of the record is reviewed to find support for the petitioner's claim that the beneficiary is primarily performing managerial or executive tasks. The record in this matter does not contain consistent, independent evidence that the petitioner employs sufficient personnel or utilizes independent contractors to carry out the petitioner's day-to-day business. Contrary to counsel's assertion that CIS is attempting to require that the beneficiary manage or direct hundreds of employees, CIS requires only that the petitioner provide independent, consistent evidence that the beneficiary is relieved from primarily performing non-qualifying duties. In this matter, the petitioner has not cured the deficiencies of the record. The petitioner has yet to present an understanding of the number and role of employees or other personnel when the petition was filed to the date of the appeal.

Furthermore, the record must support a conclusion that the beneficiary will not be the individual primarily providing the petitioner's services to clients. In this regard, the AAO observes that the beneficiary's IRS Form 1040 Schedule C, Profit or Loss from Business (Sole Proprietorship) for the year 2000 lists her occupation as consultant. The record does not establish that the beneficiary's assignment has been or will be in a primarily managerial or executive capacity. The AAO declines to further speculate on the exact nature of the beneficiary's tasks or whether she considers the business to be a sole proprietorship, but upon review of the complete record cannot overturn the director's decision in this matter.

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 recognition 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 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, the petitioner has not established its ability to pay the beneficiary the proffered annual wage of \$36,000. See 8 C.F.R. § 204.5(g)(2). When 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 sufficient net income to support the proffered wage. Specifically, in 1997 the petitioner had a net negative income of \$52,493, in 1998 a net income of \$6,639, and in 1999 a net



negative income of \$10,582. For this additional reason the petition could not have been 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.