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U.S. Department of Homeland Security

Citizenship and Immigration Services

Identifying data deleted to prevent identity unwarranted invasion of personal privacy
ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536



DEC 23 2003

File: [Redacted] Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: Petitioner: [Redacted]
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)

PUBLIC COPY

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 the State of California in 1994. It claims to be engaged in the import and export business. It seeks to employ the beneficiary as its president. Accordingly, it seeks 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 September of 1996. Upon review of the record and an investigative report, the director found that the beneficiary was merely an agent of a foreign entity. The director based her determination on the representations of the beneficiary, the lack of the petitioner's employees and invoices and receipts, and the type of business being conducted. The director concluded that as the beneficiary was a mere agent of the petitioner's claimed parent company, the beneficiary was not an executive or a manager of the petitioner. The director issued these findings in a letter of intent to revoke the approval of the petition dated April 18, 1998.

The director on February 10, 2001 issued a revocation decision. The director stated that [CIS] had not received any communication regarding the proceeding and issued the notice of revocation.

On appeal, the petitioner states that it had provided a letter and supporting documents on May 12, 1998 rebutting the information contained in the letter of intent to revoke. The petitioner also provides information regarding its current status. The petitioner requests a consideration of all the evidence and a reversal of the revocation decision.

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.

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.

The issue in this proceeding is whether the beneficiary is merely an agent of the claimed foreign entity and thus will not be employed in a primarily managerial or executive capacity for the United States entity.

The director in this instance has not fully delineated the requirements of eligibility and detailed the deficiencies in the petitioner's attempt to satisfy the requirements.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) states:

Doing Business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

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.

On the issue of the beneficiary's "agency" for the foreign parent the [CIS] investigator found that the petitioner's operation consisted of a 5-foot by 10-foot office (containing two small desks, one metal file cabinet, a fax machine, a personal computer, and printer) and three employees in addition to the beneficiary. The investigator interviewed the beneficiary on his duties and salary and the beneficiary stated that he was paid on a commission basis by the foreign parent company. The beneficiary further explained that he sought customers for gift items and after payment was made for the gift items he would deduct a commission for his salary and the rest of the funds would be forwarded to the foreign parent company. Although the beneficiary claimed to have arranged 10 containers of modems to the parent company and to have received eight containers of goods, the investigator apparently could not confirm this information. The investigator concluded that the beneficiary was acting as an agent for the foreign parent company and that a high-level position of president was not justified. As noted above, the director used the investigator's information in the notice of intent to revoke the approval of the petition and ultimately revoked the approval.

In the rebuttal to the notice of intent to revoke the petitioner stated that at the time of filing the petition, the petitioner dealt in noodles, medical instruments, and textiles and had later begun developing its souvenir business. The petitioner stated that it acted as the agent for the parent company rather than the beneficiary acting as the agent for the parent company. The petitioner explained that "this company naturally serves as the agent for its Chinese parent company developing markets, seeking customers, coordinating business transactions and other business assignments designated by the Chinese company." The petitioner stated that it was solely owned by the Chinese parent company and that the beneficiary was merely a salaried employee employed to manage and operate the United States subsidiary on the parent company's behalf. The petitioner concludes that the business scope of the company can support the beneficiary in an executive and/or managerial position.

On appeal, the petitioner provides documentation to reflect its growth and states that denying the petition would force the petitioner to eventually close its operation.

The petitioner's explanations are not persuasive. The petitioner has not established that at the time of filing, it was a qualifying organization providing goods or services rather than a mere agent or office of the foreign parent company set up to transact business on behalf of the parent company. In other words, when the petition was filed the petitioner was not an independent viable company but was acting solely on behalf of the parent company and not itself. For example, the petitioner stated that "[a]s a U.S. subsidiary, this company develops and turns over our developed business products to the parent company for dealing directly with overseas customers, and we go on to seek and develop new business opportunities on behalf of our Chinese parent company." The petitioner's statements appear to confirm that at least initially it was acting as an agent on behalf of the parent company. The petitioner has not established that it was doing business on its own behalf when the petition was initially filed. The petitioner's possible growth after the petition was filed and possible development into more than an agent or office of the foreign parent company does not contribute to a finding of eligibility at the time 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).

In addition, on the issue of managerial or executive capacity without regard to the issue of the petitioner's doing business as an agent of the foreign entity, the petitioner's description of the beneficiary's duties does not demonstrate that the position is a managerial or executive position.

The petitioner initially provided a broad overview of the beneficiary's duties that vaguely refers, in part, to duties such as "contacting and networking with American manufacturers, suppliers and trade associations for business opportunities and arrangements," and "overseeing the negotiation and progress of various contracts with both Chinese and American companies," and "making the company's purchasing and marketing decisions and plans." The petitioner also noted that the beneficiary had four employees, a marketing manager, an import manager, an export manager, and a corporate secretary reporting to him. The job duties described by the petitioner are vague and too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis. At most it appears that the beneficiary was acting as a first-line supervisor over non-managerial, non-supervisory, and non-professional employees.

In the rebuttal to the letter of intent to revoke, the petitioner does not expand on or clarify the beneficiary's duties in any significant way. The petitioner states that it employs three individuals in addition to the beneficiary. The petitioner again identifies these individuals as a corporate secretary who is also in charge of marketing, an employee responsible for importing, and an employee responsible for exporting, and adds that an accounting firm acts as its accountant. The petitioner by way of explaining why the employees are not always in the office states that the petitioner's business requires the employees "to go to market, talk to the customers and collect their opinions on products and designs." This provides little insight into the duties of the three additional employees other than to indicate that these individuals are sales representatives.

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are vague and fail to describe the actual day-to-day duties of the beneficiary. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. CIS is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

The petitioner has not provided sufficient evidence to overcome the director's decision in this proceeding. The petitioner has not established that the petitioner was doing business as defined

by 8 C.F.R. § 214.2(l)(1)(ii)(H). Furthermore, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity.

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, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.