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U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: [Redacted] Office: VERMONT SERVICE CENTER Date:

JAN 30 2003

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)

IN BEHALF OF PETITIONER: [Redacted]

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, Vermont Service Center. Ultimately, on further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice of his intention to revoke the approval of the preference visa petition, and his reasons therefore. The director ultimately revoked approval of the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner was incorporated in 1996 in the State of New Jersey and is claimed to be a subsidiary of Jillin Pharmaceutical Co., Ltd., located in China. The petitioner is engaged in the manufacture and sales of various pharmaceutical products. It seeks to employ the beneficiary as president of its firm. 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 determined that the petitioner had not established that the beneficiary had been and will be employed in a managerial or executive capacity.

On appeal, counsel submits a brief and additional evidence.

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 which 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 has been and will be employed in a primarily 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.

In a statement submitted in support of the petition, counsel provided the following description of the beneficiary's prospective duties in the United States:

As President of the U.S. subsidiary, Mr. Zhao has full discretionary authority and control of all business operations and development including sales, marketing, promotions, investment projects, joint ventures, and all personnel decisions. He is accountable directly to the Board of Directors of the parent corporation in China and serves as a member of the parents management committee where he contributes to planning, development and implementation of company policies, business strategy, etc.

Mr. Zhao spends approximately 90% of his time meeting with major clients in developing new markets, reviewing and analyzing market reports, performing major contract negotiations. The balance of his time is spent in directing and supervising management of the company. . . .

The petitioner also submitted a number of documents, including tax returns, stock certificates, financial statements for both the U.S. and foreign entity, and photographs of the U.S. entity's headquarters. On December 15, 1998, the petition was approved.

However, upon further review of the record, the director determined that despite the petitioner's considerable gross income, the evidence submitted does not indicate that the petitioner employs a sufficient staff to relieve the beneficiary from having to perform non-qualifying duties. Therefore, the director issued a notice of intent to revoke, asking that the petitioner submit additional evidence to establish that the duties performed by the beneficiary are primarily managerial or executive.

In response, the petitioner submitted, in part, a letter stating that it "has always hired either 4 or 5 employees" and that by the end of the year 2000 "the company expects to have 7 or 8 employees and annual sales revenue reaching 4.5 - 5.0 million dollars." It is noted, however, that the petitioner's projected hires and future income cannot be taken into account in regards to the instant petition since eligibility must be established at the time the petition was filed. See 8 C.F.R. 103.2(b)(12).

The petitioner's response also includes the following description of the beneficiary's job duties in the United States:

- Manage personnel plan, market development, and financial report.
- Set up annual purchasing plan, and review price policy based on market information.
- Supervise financial stability and approve budget and expenditures.
- Approve the Purchasing Order.
- Review contractors performance and wages policy.
- Review employee benefit and bonus plans and wage policy.
- Oversee market and business opportunity; represent to sign up joint venture agreement and new contracts with customers.
- Conduct semi-annual report to the parent company in China.

The petitioner also provided job descriptions for three additional full-time employees which include a manager, a sales representative and an administrative clerk. The petitioner claimed that it contracted a consultant to negotiate shipping rates. Supporting documentation primarily includes state and federal income tax returns, the petitioner's financial statements, and shipping and sales invoices belonging to the foreign entity.

The director revoked approval of the petition, stating that the petitioner had not established that the beneficiary had been or would be primarily engaged in an executive or managerial capacity.

On appeal, counsel asserts that the director has the burden of establishing "good and sufficient case to revoke an approved employment-based preference petition" and that in the instant case, that burden has not been met.

However 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 section 204 [of the Act]."

A notice of intent to revoke approval of a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. Matter of Li, 20 I&N Dec. 700, 701 (BIA 1993); Matter of Arias, 19 I&N Dec. 568, 569-70 (BIA 1988); Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988); Matter of Estime, 19 I&N Dec. 450 (BIA 1987). The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial. Matter of Ho, supra at 590.

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. Id. In the present case, the director raised sufficient factual issues to support the revocation.

Counsel also asserts that the beneficiary's position as president fits under the definition of "executive capacity" and provides the following revised definition of the beneficiary's duties:

- Reviewing marketing reports prepared by Vice President;
- Reviewing and approving monthly and annual sales plans as prepared by the Vice President;
- Reviewing the Vice President's reports on ensuring that compliance with customers specifications, quantity requirements, and delivery expectations are met;
- Reviewing the Vice President's reports on business expansion in China for American-made medicinal products;
- Reviewing the Vice President's reports regarding personnel planning, advertising, and interviewing;
- Deciding on new employees based on Vice President's suggestions;
- Reviewing the Vice President's reports on employee benefits/bonus plans and salary policy;
- Reviewing the Vice President's monthly reports on pharmaceutical industry information, marketing forecasts import plans;
- Reviewing the administration manager's financial stability report, approving payment plans and monthly budgets;
- Reviewing and signing quarterly and annual tax returns;
- Reviewing the outside contractor's performance reports and approving commission payments forms as prepared by manager;
- Conducting weekly and monthly business meetings with management staff;
- Traveling to China quarterly to attend parent company's annual management meeting and board of directors meeting;
- Attending other national and international pharmaceutical industry meetings, such as PHIW (Pharmaceuticals Ingredients Worldwide);
- Preparing monthly and quarterly reports to corporate parent company.

According to the above list of duties, it appears that the beneficiary's job primarily consists of reviewing a series of reports generated by the vice president who, according to the petitioner's organizational chart, is directly supervised by the beneficiary. However, the petitioner did not provide the Service with any of the reports which the beneficiary purportedly spends a majority of his time reviewing and analyzing. Simply going on record without supporting documentary evidence is not sufficient

for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, the revised list of duties provided above excludes several of the duties listed earlier in support of the petition and in the petitioner's response to the notice of intent to revoke. For instance, there is no indication in the above list, or in the response to the notice of intent to revoke, that the beneficiary meets with major clients or performs major contract negotiations, both of which were duties specified in the initial descriptions of duties.

Further, the most recent description of duties indicates that a majority of the beneficiary's time is spent reviewing reports generated by his subordinate. However, the list of job duties submitted in response to the intent to revoke is inconsistent with the most recent job description in that the earlier list does not include reviewing reports among the beneficiary's duties. In fact, according to the job descriptions of the petitioner's remaining employees (provided in the response to the intent to revoke) none of the beneficiary's subordinates were generating any reports. Thus, if the beneficiary spent a majority of his time reviewing and analyzing reports when the petition was first filed, there is no explanation as to why the description of duties submitted in response to the intent to revoke notice did not indicate that any of the beneficiary's subordinates were actually generating any reports. Only after an appeal was filed did counsel provide the Service with new position descriptions which indicate that the vice president, a position which was not previously listed, generates a majority of the reports that the beneficiary reviews. 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, supra at 591-92. The petitioner has not overcome or even acknowledged these inconsistencies.

Counsel's most recent submission, dated November 15, 2002, consists of tax documentation for the year 2002, as well as an organizational chart and job description for the company's most recent hires. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). As the newly submitted evidence does not apply to the petitioner's eligibility at the time the petition was filed, it is irrelevant in this proceeding and need not be considered.

Upon review, counsel's assertions are not persuasive. The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity. The petitioner has submitted several different descriptions of the beneficiary's duties without reconciling the differences and, more

importantly, without supporting most of those descriptions with documentary evidence. The Service is not compelled to deem the beneficiary to be a manager or executive simply because he possesses a managerial or executive title or because the description of his duties has been altered to fit the definition of manager or executive. The petitioner has not submitted sufficient evidence to support the beneficiary's eligibility for the requested immigrant visa. As previously stated, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Supra* at 190.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.