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

PUBLIC COPY

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

[REDACTED]

File:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

MAR 28 2003

IN RE: Petitioner:
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)

ON BEHALF OF PETITIONER:

[REDACTED]

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

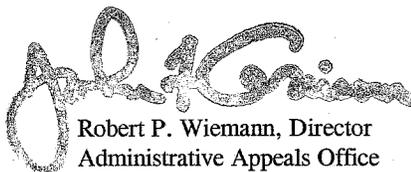
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office 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 (Bureau) 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 sole proprietorship that began doing business in California in February 1991. It is engaged in importing and selling diamonds and gems. It seeks to employ the beneficiary as a manager. 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. Upon review of the record, including a report from a United States government investigator, the director determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer. The director also determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the petitioner.

On appeal, counsel for the petitioner asserts that the Bureau's revocation decision was in error and lacks legal and factual support.

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. 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's overseas employer.

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

Affiliate means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

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 entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

The petitioner initially claimed that it was a subsidiary of the beneficiary's overseas employer. The petitioner also stated that the beneficiary's overseas employer was established in 1977 to import, export, and wholesale medicines and cosmetics. The petitioner further indicated that the overseas entity was a

partnership owned by the beneficiary (40%) and the owner of the petitioner (60%). A subsequent investigation of the overseas entity revealed that the overseas entity was instead a sole proprietorship. A statement by the sole proprietor disavowed any relationship with the petitioner and the sole proprietor claimed ownership of the business since 1996. The director issued a notice of intent to revoke informing the petitioner of this information.

In response to the notice of intent to revoke, the petitioner submitted an affidavit from the individual who had claimed he had been the owner of the overseas entity since 1996. The affidavit indicated that he was not the owner, that the beneficiary and the owner of the petitioner were the owners, and that his previous statements to the United States government investigator were made under duress and coercion. The petitioner also submitted several licenses identifying the owners of the overseas entity as the beneficiary and the owner of the petitioner. The licenses were issued in 1977 and were valid through December 31, 1978. The record also contains an agreement between the beneficiary and the owner of the petitioner allegedly amending the deed of partnership relating to the ownership of the overseas entity. This agreement is dated in June 1997.

The director determined that the petitioner had not submitted sufficient evidence to rebut the evidence contained in the notice of intent to revoke.

On appeal, counsel for the petitioner asserts that the director's decision was based solely on a tainted statement from an overseas investigation and that the documents submitted establish the qualifying relationship.

Counsel's assertion is not persuasive. The petitioner bears the burden of proof in these proceedings. See section 291 of the Act, 8 U.S.C. § 1361. Here, the AAO has contradictory statements allegedly from the same individual. It cannot be determined from the written statements which one is true. 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). Counsel's submission of documents dated approximately 20 years prior to the investigation to support the petitioner's version of the facts, is not competent, objective evidence revealing the ownership of the overseas entity at the time the petition was filed in 1997. The agreement between the beneficiary and the owner of the petitioner is of little probative value. There is no evidence the agreement was recorded or was recognized by official, independent entities. The record, thus, does not contain sufficient probative information regarding the ownership of the overseas entity at the time the petition was filed. In light of

the inconsistent statements on this issue and the lack of any supporting independent evidence to establish a qualifying relationship, the petitioner has not met its burden of proof. The petitioner has not established a qualifying relationship with the beneficiary's overseas employer.

The second issue in this proceeding is whether the beneficiary will be employed in an executive or managerial capacity 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 initially indicated that the beneficiary would be responsible for the development and implementation of manufacturing expansion and for the establishment of a retail network for the petitioner. In addition, the beneficiary would identify, cultivate, and manage new diamond markets. Counsel asserts in the rebuttal to the notice of intent to revoke that it is apparent that the beneficiary's primary duty is to manage and direct the development of the petitioning organization. The director determined that the beneficiary was involved in the performance of routine operational activities of the entity rather than managing a function of the business.

On appeal, counsel for the petitioner asserts that the beneficiary will perform in a managerial capacity for the United States entity.

Counsel's assertion is 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). In examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In this instance, the petitioner and counsel have provided a general description of the beneficiary's proposed duties. It cannot be determined from the vague description provided that the beneficiary will be performing managerial duties with respect to developing a retail establishment rather than performing the operational tasks associated with starting up a retail establishment. 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 record is deficient in demonstrating that the beneficiary's position will be a managerial position. 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 petitioner has not provided sufficient evidence to conclude that the petitioner will employ the beneficiary in a managerial capacity.

The third issue in this proceeding is whether the petitioner established that the beneficiary was employed in a managerial or executive position for the overseas entity. The petitioner initially stated that the beneficiary had been "responsible for strategic planning of overall operations" and had supervised three employees for the overseas entity. The director did not specifically state that the record was insufficient to determine that the beneficiary would be employed in a managerial capacity for the overseas entity in the notice of intent to revoke. The director did question whether the beneficiary could manage three personnel in the physically narrow confines of the overseas shop. Neither counsel nor the petitioner expanded further on the beneficiary's duties in rebuttal to the notice of intent to revoke, but rather, indicated that the overseas entity also used a desk in the basement of the shop. Counsel also appeared to assert that the physical size of the shop had no bearing on the beneficiary's managerial capacity.

The director determined in the revocation decision that the petitioner had not provided evidence of the beneficiary's duties in detail and had not submitted evidence that the beneficiary's subordinates were professional employees. The director concluded that the beneficiary was a first-line supervisor over non-professional employees and would have to be assisting in the operational tasks involved in the business and not primarily performing the duties of a manager or an executive.

On appeal, counsel notes that the director did not request that the petitioner provide additional details regarding the beneficiary's duties for the overseas employer. Counsel asserts that the director's conclusion is based on speculation and is without factual and legal support.

As noted above, the petitioner bears the burden of proof in these proceedings. Although the director did not request information on this issue in the notice of intent to revoke, the director's revocation decision pointed out the deficiencies in the record. Neither counsel nor the petitioner provided a more comprehensive description of the beneficiary's duties for the overseas entity on appeal. Contrary to counsel's assertion that the director's conclusion is without factual or legal support, the record does not contain sufficient facts to allow a determination that the beneficiary performed in a managerial capacity for the overseas entity. The AAO declines to speculate on the exact nature of the beneficiary's duties for the overseas entity. Without sufficient facts, the AAO cannot legally conclude that the petitioner has established this element of the beneficiary's eligibility for this visa classification. The petitioner has not provided sufficient evidence to overcome the director's determination on this issue.

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.

