

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

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ADMINISTRATIVE APPEALS OFFICE
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File:

Office: CALIFORNIA SERVICE CENTER

Date: NOV 21 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 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 corporation organized in June 1995 in the State of California. It is engaged in international trade. It seeks to employ the beneficiary as its executive vice-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 petition was filed in March 1998 and the director approved the petition in August 1998. Upon review of the record, 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. The director also determined that the petitioner had not established the ability to pay the beneficiary the proffered wage of \$31,200 per year. The director issued a notice of intent to revoke approval of the petition, and revoked approval on February 19, 2003.

On appeal, counsel for the petitioner asserts that the director erred in his 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.

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

subsidary 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 beneficiary will perform primarily managerial or executive duties 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 the beneficiary would be responsible for the company's overall business operations and financial affairs including:

1. assisting the President to establish objectives and policies of the company, including its financial goals;
2. preparing budget proposals to the board of [d]irectors and overseeing overall financial affairs of the company;
3. directing and supervising the work of company's officers and managerial and professional staffs;
4. directing the preparation of financial reports to the board;
5. making necessary adjustments to operational and financial plans according to company's performances;
6. making decisions on hiring, promoting, and firing employees of the company, and retaining outside professional services, such as certified public accountants and attorneys; and
7. coordinating the international trade operations between [the petitioner] and [the parent company].

The petitioner provided its California Form DE-6, Quarterly Wage Report for the quarter preceding the filing of the petition. The California Form DE-6 confirmed the employment of six individuals identified on the petitioner's organizational chart. The six individuals held the positions of president, executive vice-president (the beneficiary's position), international department manager, import/export administrator, business manager, and business assistant. The petitioner did not provide independent

evidence of its employment of the certified public accountant identified on the organizational chart.

The petitioner indicated that the international trade manager reported directly to the beneficiary and that the import/export administrator reported to the international trade manager. The international trade manager's responsibilities included:

Managing and controlling day-to-day operations and making recommendations to the beneficiary regarding the organizational structure of the department;

Formulating operational plans for the department including budget proposals;

Directing the efforts of the department to secure the formalities of the import and export business operations from authorities; and

Directing and supervising the work of the employees of the department, with authority to hire, promote, and fire subordinate managerial and professional staff and other employees.

The petitioner indicated that the import/export administrator obtained product information, such as price, availability, and delivery schedule, prepared terms of letters of credit with banks, contacted shipping agents or shippers, negotiated contracts within budgetary limitation and scope of authority, and maintained records of import and export operations.

The petitioner indicated that the business manager reported directly to the beneficiary and that the business assistant reported to the business manager. The business manager's responsibilities included:

Managing and controlling day-to-day operations and making recommendations to the beneficiary regarding the organizational structure of the department;

Formulating operational plans for the department including budget proposals;

Directing and supervising the work of the employees of the department, with authority to hire, promote, and fire subordinate managerial and professional staff and other employees;

Negotiating contracts within budgetary limitations and scope of authority.

The petitioner indicated the business assistant kept in touch with suppliers in the United States to obtain product information and

with buyers abroad to sort purchase orders. The business assistant also selected products for purchase, estimated value according to knowledge of market price, prepared purchase orders and payment documents, and maintained procurement records and inventories.

The director approved the petition based on this information. Upon subsequent review of the record, the director issued a notice of intent to revoke. The director determined, based on the information in the record, that the international trade manager and the business manager were first-line supervisors of non-professional positions. The director concluded that the beneficiary would not be employed in a managerial or executive capacity. The director based this conclusion on his determination that the beneficiary would not primarily supervise and control the work of other supervisory, professional or managerial employees.

The director also observed that only the beneficiary and the president of the petitioner were paid full-time wages for the 1997 year. The director noted further that the record contained quarterly employment reports for 1999 and the first and second quarters of 2000 and 2001. The director concluded from these documents that the beneficiary was the only full-time employee for the second, third and fourth quarters of the year 2000 as well as the fourth quarter of 2001. The director concluded that the beneficiary did not supervise full-time employees; thus, could not be considered an executive. The director based this conclusion on his determination that a multinational executive required a number of full-time employees commensurate with the stage of development and operations of the company to truly perform executive or managerial functions.

In rebuttal, counsel asserted that the beneficiary supervised directly or indirectly four full-time employees. Counsel also asserted that the director's decision was flawed because the director failed to consider that the beneficiary supervised and controlled the work of other "supervisory" employees. Counsel contended further that the petitioner's import/export administrator, indirectly supervised by the beneficiary, could also be considered a professional position because of the job's complexity.

Counsel also stated that the regulations did not require that the beneficiary manage full-time employees in order to direct the management of an organization or major component of the organization. Counsel indicated that, since the beneficiary would be responsible for overseeing the operations of the company and developing and implementing company guidelines and policies, the beneficiary served an essential function in the company.

Counsel acknowledged that the beneficiary must establish eligibility at the time the petition was filed. Nevertheless, counsel asserted that since the petition was approved the director should now review the beneficiary's activities as a whole and not

only at specific time periods. Counsel also maintained that CIS must sustain a much heavier burden of proof when seeking to invalidate a previously approved petition.

The director determined that the beneficiary did not supervise professional employees, noting that the record reflected the beneficiary's subordinates received minimal salaries and the job descriptions for the subordinate employees did not describe complex duties. The director stated, "[E]ven the beneficiary, who was in charge of the manager positions, the beneficiary still would not qualify as a manager because the manager would not be considered a 'manager.'" The director also stated, "[A]lthough it would appear that the beneficiary was a second-line manager, for immigration purposes, we would have to consider the beneficiary a first-line because the department manager was not managing professional employees." The director also stated that the beneficiary performed routine operational activities for the petitioner; thus, was not managing functions for the petitioner. The director concluded that the beneficiary had not been and would not be employed in a primarily managerial capacity.

The director also determined, that due to the petitioner's low staffing levels, the petitioner did not have sufficient employees to perform all of the petitioner's day-to-day menial tasks. The director concluded that the beneficiary must assist in routine duties, thus precluding the beneficiary from being considered an executive for immigration purposes.

On appeal, counsel repeats the claims and assertions contained in the petitioner's rebuttal to the notice of intent to revoke. Counsel asserts that CIS bears a heavier burden when revoking an approved petition. Counsel also asserts that the beneficiary supervises two managers who in turn supervise two professionals. Counsel contends that employment of part-time workers does not preclude the beneficiary from directing the part-time employees. Counsel cites an unpublished decision in support of this contention. Counsel further asserts that the beneficiary supervises supervisory employees. Finally, counsel asserts that the beneficiary manages a function and cites an unpublished decision to support this contention.

Counsel's assertion that CIS must sustain a heavier burden of proof when revoking a previously approved petition is incorrect. First, the director's determination 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*, 19 I&N Dec. 582 (BIA 1988). Second, a notice of intent to revoke is properly issued for "good and sufficient cause" if the evidence of record at the time the notice was issued, warranted a denial of the visa petition based upon the petitioner's failure to meet its burden of proof. *Id.* In this matter the evidence on record at the time the director issued the revocation decision, including the

evidence and explanation submitted by the petitioner in rebuttal to the notice of intent to revoke, warranted the denial. *Matter of Ho, supra*. The decision to revoke will be affirmed on the ground that the petitioner has not established that the beneficiary was or would have been primarily employed in a managerial or executive position when the petition was filed.

The AAO acknowledges that the director's notice of intent to revoke contains typographical, grammatical, and factual errors. Similarly, the AAO observes that the revocation decision contains grammatical mistakes as well as several unexplained conclusions. Despite these deficiencies, the AAO must for the reasons stated below dismiss the appeal.

The petitioner's initial descriptions for five¹ of the six filled positions are general and do not readily convey an understanding of the employee's actual duties. When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The petitioner's description of the beneficiary's duties paraphrases elements of the statutory definition of executive and managerial capacity. See section 101(a)(44)(A)(ii), (iii) of the Act and section 101(a)(44)(B)(ii) of the Act. The remaining portion of the beneficiary's job description focuses on the preparation of budget proposals, financial reports, and oversight of the petitioner's financial affairs, as well as, adjusting operational and financial plans and coordinating international operations with the parent company. It is not possible to discern from these broad statements whether the beneficiary's primary assignment will be in an executive or managerial capacity.²

¹ The petitioner does not include a description of duties for its president, although the individual holding the president's position is shown on the petitioner's California Forms DE-6 for the fourth quarter of 1997 through the first quarter of 1999. The individual in this position is shown as being paid at a level comparable to the beneficiary's salary level and continues to be employed even when the petitioner employed as few as three individuals during this time period.

² The AAO notes that the petitioner apparently claims that the beneficiary will be engaged in both managerial duties under section 101(a)(44)(A) of the Act, and executive duties under section 101(a)(44)(B) of the Act. However, 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. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The descriptions of job duties for the international department manager and the business manager are also vague. Both descriptions indicate that the employee in the position will manage the department, formulate operational plans, and supervise employees within the respective departments. The only difference between the descriptions is that the international department manager will handle the import/export formalities while the business manager will negotiate contracts.

The description of the duties of the business assistant does provide an overview of this employee's actual duties. The business assistant appears to provide basic administrative services relating to the purchase and payment of products. Although the petitioner's California Forms DE-6 show that an individual was employed in the position when the petition was filed, it appears this position was eliminated in the fourth quarter of 1998. The petitioner's California Forms DE-6 do not confirm the employment of an individual in the import/export administrator's position when the petition was filed or within the following two years. It appears that the purported manager of the international department would have been providing the operational services associated with importing and exporting products.

The descriptions of job duties for the petitioner's employees do not convey an understanding of who in the organization would perform the daily operational tasks of the petitioner. The petitioner's California Forms DE-6 undermine the petitioner and counsel's implicit claim that the beneficiary would be relieved from performing non-qualifying duties by other employees. 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 does not support counsel's assertion that the beneficiary supervises other supervisory, managerial, or professional employees. 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 record does not include descriptions that support counsel's assertion that the duties of any of the three to four positions subordinate to the beneficiary require knowledge or experience requiring the expertise of a professional, rather than the knowledge and experience of a clerk or technical staff officer. Neither counsel nor the petitioner provided sufficient documentary evidence in rebuttal or on appeal that would elevate the positions subordinate to the beneficiary to professional positions.

The petitioner also has not provided descriptions or sufficient documentary evidence to establish that the beneficiary supervises managers or supervisory personnel. As stated above, the position descriptions provided are vague. In addition, the record does not demonstrate that the employees subordinate to the beneficiary spend the majority of their time supervising, managing, or controlling other employees. Also as noted above, the record does not clarify who will perform the basic operational and administrative tasks of the petitioner. The evidence, therefore, suggests that the beneficiary's subordinate employees primarily perform the necessary daily tasks to continue the petitioner's business.

Counsel's assertion that the employment of part-time employees does not preclude the beneficiary from performing managerial or executive duties is not persuasive. The petitioner must substantiate that it employs a sufficient number of individuals, either on salary or on a contractual basis, to provide the petitioner's basic operational and administrative duties. Generally, managers and executives plan, organize, direct, and control an organization's major functions and work through other employees to achieve the organization's goals. The petitioner has not provided evidence that it employs a sufficient number of employees or independent contractors to carry out the functions of the organization throughout the petitioner's fiscal year. The petitioner has not provided evidence that the beneficiary is relieved from primarily performing non-qualifying duties when the petitioner's part-time employees are on hiatus.

Counsel's claim on appeal that the beneficiary is managing an essential function is not persuasive. The term "essential function" in immigration matters generally applies when a beneficiary does not supervise or control a petitioner's staff but instead is primarily responsible for managing a function. A petitioner that claims a beneficiary is managing an essential function, must identify the function with specificity, articulate the essential nature of the function, as well as, establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive description of the beneficiary's duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Counsel's citation to unpublished cases carries no probative value. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished cases. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. See 8 C.F.R. § 103.3(c).

In sum, the record does not establish that the beneficiary's primary assignment was or would be in a managerial or executive capacity when 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). The petitioner must be able to support an employee whose primary duties relate to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

In this matter, the petitioner has not established that the beneficiary directs the management or manages and controls supervisory, managerial, or professional employees full-time. The record does not establish that the beneficiary is relieved from primarily performing the petitioner's daily operational and administrative tasks when the beneficiary's subordinate employees are not employed. Moreover, when the petitioner employs workers subordinate to the beneficiary, the beneficiary apparently carries out the duties of a first-line supervisor over these employees. The record failed to establish the managerial or executive capacity of the beneficiary when the petition was filed. Neither counsel nor the petitioner has adequately cured these deficiencies, either in rebuttal or on appeal.

The second issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered wage of \$31,200 per year.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner has provided its Internal Revenue Service (IRS) Forms 1120 for the years 1997, 1998, 1999, and 2000. The IRS Forms 1120 cover the petitioner's fiscal years beginning July 1, 1997 and ending June 31, 2001. The petitioner's IRS Forms 1120 show:

- In 1997 the beneficiary was paid \$19,800 for the year. The petitioner's taxable net income was \$6,348.
- In 1998 the beneficiary was paid \$12,600 and the petitioner's taxable net income was \$12,983.

- In 1999 the beneficiary was paid \$18,000 and the petitioner's taxable net income was \$17,333.
- In 2000 the beneficiary was paid \$21,600 and the petitioner's taxable net income was \$2,159.

In 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).

Counsel asserts that the petitioner is only required to establish its ability to pay the proffered wage when the beneficiary's adjustment of status application is approved. Counsel also asserts that the petitioner has shown its ability to pay the beneficiary the proffered wage through the tax returns submitted.

Counsel's assertions are not persuasive. The regulation governing the issue of ability to pay states that the petitioner must demonstrate the ability to pay the proffered wage at the time the priority date is established (in this matter March 23, 1998) and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). The petitioner has never paid the beneficiary the proffered wage. Moreover, when examining the petitioner's net taxable income and adding that figure to the amount the petitioner actually paid the beneficiary, the petitioner could not have paid the proffered wage except in its fiscal year beginning July 1, 1999 and ending June 30, 2000. The petitioner has not established that it has paid or could have paid the beneficiary the proffered wage when the priority date was set or in all the subsequent years. The petitioner has not provided evidence to overcome the director's decision 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.