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U.S. Department of Homeland Security

Citizenship and Immigration Services

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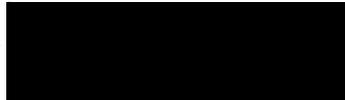
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Office: CALIFORNIA SERVICE CENTER

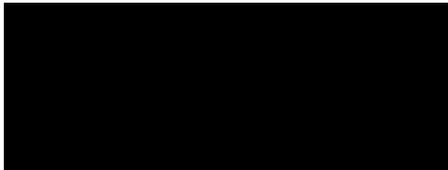
Date:

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:



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

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 company organized in March 1994 in the State of California. It is engaged primarily in obtaining orders for optical products. It seeks to employ the beneficiary as its 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 director initially approved the petition filed in May 1996. The director in the notice of intent to revoke 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 contends that the director ignored evidence submitted in rebuttal to the notice of intent to revoke and that the evidence submitted confirmed the validity of the petition.

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 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:

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 stated in a letter filed with its initial petition that the beneficiary's overseas employer owned 51 percent of its stock. The petitioner added that it was capitalized in March 1994 in the State of California with \$6,000. The petitioner also

provided a board resolution dated September 18, 1995 authorizing the issuance of 1000 shares each to three individuals and 3,123 shares to the beneficiary's overseas employer. The petitioner also provided its stock ledger and copies of the stock certificates issued in the amounts indicated in the resolution. The petitioner further provided its Internal Revenue Service (IRS) Form 1120-A, U.S. Corporation Short-Form Income Tax Return for 1995. The IRS Form 1120-A showed in Part III, Line 18 that the petitioner's equity in the form of common stock was \$3,000. Line 19 of the same Part III showed the petitioner had received \$3,000 of paid in or capital surplus for the 1995-year.

The director in the notice of intent to revoke approval of the petition noted that an examination of the record did not show that the beneficiary's overseas employer actually contributed funds to purchase its shares of the petitioner's stock. The director also noted that an overseas investigation revealed that the general manager of the beneficiary's Chinese overseas employer had indicated that it did not have a United States subsidiary. The director also stated that the overseas investigative report indicated that the general manager referred the investigator to a Hong Kong company for more information but the investigator could not reach representatives of that company.

In rebuttal to the director's notice of intent to revoke, the petitioner provided copies of four September 1995 invoices showing merchandise shipped from the beneficiary's overseas employer to the petitioner. The four invoices valued the merchandise shipped at \$739,534.80. The petitioner also provided a copy of its October 1995 bank statement showing its transfer of funds in the amount of \$736,411.80 to the beneficiary's overseas employer. Counsel for the petitioner asserted in the rebuttal that the difference between the \$739,534.80 owed to the beneficiary's overseas employer for the merchandise received and the \$736,411.80 paid to the beneficiary's overseas employer constituted the foreign entity's payment for the stock issued to it. The petitioner also provided a copy of two unfiled Notices of Transaction to the California Commissioner of Corporations. The first Notice of Transaction is dated April 1, 1994 and shows the petitioner sold securities for cash in the amount of \$3,000. The second Notice of Transaction is dated September 20, 1995 and shows the petitioner sold securities for cash in the amount of \$6,123.

Counsel for the petitioner also contended that the United States Consulate in Chengdu, rather than the CIS Beijing sub-office would have been the more appropriate office to investigate the beneficiary's overseas employer and the petitioner's relationship to that employer. Counsel also notes that the beneficiary's overseas employer did not have an employee by the name referenced by the investigator in a high-level managerial position. Counsel asserts that a revocation cannot be based on unsupported statements, unstated presumptions, or when the petitioner has not been adequately advised of derogatory evidence.

The director re-stated the issues set out in his notice of intent to revoke and then addressed the petitioner's rebuttal. The director recognizes that the difference in the amount of monies owed and paid to the beneficiary's overseas employer coincides with the number of shares of stock valued at \$1.00 issued to the beneficiary's overseas employer. However, the director speculates that the underpayment by the petitioner could have been an oversight or could have been a quantity discount. The director also continued to rely on the overseas investigative report stating that the investigator's failure to provide complete names of persons interviewed did not invalidate information provided by the partially identified individual. The director concluded that the petitioner had not provided clear evidence showing the consideration for the foreign entity's share in the petitioner, that the investigation revealed that the foreign entity did not have a subsidiary in the United States, and that the petitioner had not provided convincing documentary evidence of the foreign entity's controlling interest or ownership in the petitioner.

Counsel asserts on appeal that the director did not consider the evidence provided in rebuttal to the notice of intent to revoke and re-states his rebuttal contentions.

Counsel's contentions are persuasive in part. In accordance with CIS regulations, a petitioner must be permitted to inspect the record of proceeding that constitutes the basis of an adverse decision. See 8 C.F.R. § 103.2(b)(16). If an adverse decision will be based on derogatory information of which the petitioner is unaware, the petitioner must be advised of that evidence and offered an opportunity to rebut it before the decision is rendered. See 8 C.F.R. § 103.2(b)(16)(i). In revocation proceedings, where the director's notice of intent to deny is based upon an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, the denial of the visa petition cannot be sustained. See *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988). In this matter, the investigative report is not contained in the record. It is not clear that a copy of the investigative report was provided to the petitioner. The director cannot rely on the investigative report to conclude that the beneficiary's foreign employer does not have a United States subsidiary.

The director also improperly speculated that the underpayment by the petitioner to the beneficiary's foreign employer for merchandise could have been an oversight or could have been a quantity discount, rather than the foreign entity's payment for stock as the petitioner asserted. The director, instead of speculating on this issue, should focus on applying the statute and regulations to the facts presented by the record of proceeding.

Nevertheless, the record presents inconsistencies regarding the foreign entity's payment for the petitioner's stock. The

petitioner's IRS Form 1120-A for 1995, the year in which the foreign entity purportedly purchased 3,123 shares of stock, shows that the petitioner had issued stock only in the amount of \$3,000. An additional \$3,000 was invested as capital surplus not for the purchase of additional stock. The petitioner's two unfiled Notices of Transaction to the California Commissioner of Corporations also present inconsistencies. The first Notice of Transaction shows the petitioner sold securities for cash in the amount of \$3,000. The second Notice of Transaction shows the petitioner sold securities for cash in the amount of \$6,123. The first Notice of Transaction appears to match the information in the petitioner's IRS Form 1120-A for 1995, and the second Notice of Transaction appears to match the petitioner's stock certificates and stock ledger. However, the petitioner's later IRS Forms 1120 show that the petitioner has issued stock valued at \$6,000. 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).

In this particular matter, the petitioner has not presented sufficient consistent evidence to establish its qualifying relationship to the beneficiary's foreign employer. The record, excluding any reference to an investigative report or to speculation on the reason for the petitioner's underpayment to the foreign entity, is not sufficient to establish a qualifying relationship between the petitioner and the beneficiary's overseas employer.

The second 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 stated that the beneficiary was responsible for the following:

[S]etting up distribution system gradually, expanding the company's business operation, business activities coordination with parent company regarding financial support and profitability. Her duties are: (1) contribute to the annual establishment of corporate objectives; (2) establish divisional objectives, policies, and plans; (3) perform as a team member of the management committee on management problems; (4) Provide [sic] substantial input and work as a member of the wage and salary committee; (5) review, approve, and coordinate technical aspects of foreign products, whether imported or made under company or foreign license; (6) coordinate technical activities with parent company and other subsidiary or affiliated companies.

The petitioner also provided its organizational chart showing the beneficiary employed as a vice-president, and reporting to the president. The chart also depicted an assistant to the vice-president, and an accountant/optical engineer reporting to the beneficiary, and a customer service person, reporting to the accountant/optical engineer.

The director approved the petition based on this evidence on July 5, 1996. Upon review of the record, including the description of the beneficiary's duties and the organizational chart, the director issued a notice of intent to revoke the approval of the petition on December 17, 2002. The director determined that the petitioner had not established that it reasonably required three manager/executives with only five total employees. The director also determined that it was reasonable to believe that the beneficiary would be assisting in day-to-day non-supervisory duties. The director further determined that the beneficiary's subordinate employees were not employed in professional positions. The director requested that the petitioner submit a more detailed description of the beneficiary's duties, its California Forms DE-6, Quarterly Wage Reports for 1996, 1997, 1998, 1999, and 2000. The director also requested that the petitioner submit an organizational chart and list all employees under the beneficiary's supervision, including their names, titles, and job duties.

In rebuttal, the petitioner stated that the beneficiary directed and managed the overall operations of the petitioner. The petitioner indicated that the beneficiary recruited professionals such as optical engineers, financial managers, and marketing managers, that she cooperated with business partners in China and in the United States, coordinated with the president who traveled frequently, followed current market information and new technology, controlled the budget, prepared promotion policies for employees, controlled the work quality of the employees, and controlled the information management systems. The petitioner indicated further that the beneficiary arranged the day-to-day work for the employees, reviewed weekly and monthly reports, made quarterly reports to the president, negotiated business contracts, and participated in optical shows around the world. The petitioner also noted that the beneficiary contacted parties regarding messages received, reviewed financial documents, contacted business partners, and made social meetings with business partners.

The petitioner also provided several of its California Forms DE-6, Quarterly Wage Reports. The California Forms DE-6 for the quarter in which the petition was filed and continuing to June 30, 1998 showed the same four employees, the president of the company, the beneficiary as vice-president, an individual in the position of assistant to the vice-president, and an accountant/optical engineer. The California Forms DE-6 from the quarter ending September 30, 1998 through December 31, 2001

showed the petitioner employed three individuals, the president, the beneficiary as vice-president, and an accountant/optical engineer. The California Form DE-6 for the quarters ending March 2002 and June 2002 revealed only two employees, the beneficiary and the accountant/optical engineer. The final California Form DE-6 provided for the quarter ending September 30, 2002 showed four employees, the president, the beneficiary as vice-president, the accountant/optical engineer, and an individual identified as a marketing manager on a revised organizational chart.

The petitioner also provided brief job descriptions for the individuals identified on its revised organizational chart.¹ The petitioner indicated that the optical engineer provided technical data for the products, researched advancements in optical technology, checked the quality of optical products, participated in purchase negotiations, designed a plan of information management system for the optical products order, purchase, and sales. The petitioner did not provide a description for the position of assistant to the vice-president.

The director noted that the petitioner had submitted a list of duties and job titles for each of its employees in response to the notice of intent to revoke the approval of the petition. The director determined, however, that the petitioner had not established that the duties of the beneficiary's subordinate employees involved supervisory, managerial, or professional duties. The director determined that the optical engineer's duties did not involve optical engineering, but rather purchasing negotiations and sales duties. The director also noted that the marketing manager's duties showed this individual was primarily involved in sales of the company's product. The director noted that the third subordinate identified on the petitioner's revised organizational chart did not appear on any of the petitioner's California Forms DE-6. The director concluded that the petitioner had not shown that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts the beneficiary's job duties confirm her managerial activities, and that the educational documentation confirms that the employees of the petitioner are all professional persons in different fields. Counsel concludes by asserting that the director's decision is based on groundless presumptions and is not fair and is arbitrary.

¹ The petitioner's revised organizational chart showed the beneficiary as vice-president reporting to the president of the company. The chart also showed an optical engineer, a marketing manager, and a financial analyst reporting to the beneficiary. The California Forms DE-6 do not show the individual identified on the organizational chart as the financial analyst.

Counsel's assertions are not persuasive. 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 initially provided a broad description of the beneficiary's duties. The petitioner indicated that the beneficiary would establish policies and objectives, would be on the management team, coordinate and approve technical aspects of foreign products, and coordinate technical activities with other companies, and set up the petitioner's distribution system. This description does not effectively convey a sense of the beneficiary's actual daily duties.

In a response to a request for a more detailed description of the beneficiary's duties the petitioner indicated that the beneficiary recruited employees, coordinated with the president and business partners, followed market information and new technology, controlled the budget, prepared reports, and attended optical shows. The petitioner also indicated that the beneficiary's daily duties consisted of contacting business partners and organizing the daily work. Although the petitioner's statements regarding the beneficiary's duties were quite lengthy, they still do not provide a clear understanding of the beneficiary's duties. The primary focus of the beneficiary's duties appears to be contact with business partners, business negotiations, and preparing reports. These duties are not duties that are clearly managerial or executive. The descriptions provided are more akin to an individual performing sales or marketing duties for the petitioner.

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). It is not possible to discern from the petitioner's general statements that the beneficiary's primary assignment for the petitioner is to engage in managerial or executive duties relating to the duties described. Instead it appears that the beneficiary performs the operational tasks of an agent or salesperson.

Moreover, the petitioner has not provided independent evidence that individuals other than the beneficiary perform the operational and administrative tasks of the petitioner. The petitioner does not provide a job description for the assistant to the vice-president or the president. The petitioner's description of the accountant/optical engineer's duties indicates the optical engineer provides technical data, checks the quality of the product as well as participates in some purchase negotiations and sales. The division of duties between the beneficiary as vice-president and the optical engineer, however, is not clear. Their duties appear to overlap and the petitioner has not indicated the amount of time the beneficiary and the optical engineer spend on their listed duties. 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).

Additionally, the record does not substantiate counsel's assertion that the optical engineer holds a professional position. The CIS will review the actual duties of employees when determining the professional nature of their positions, rather than relying on job titles or the degrees of the individuals. The duties of each position and whether such duties require professional skills convey the nature of the position. Although, the person holding the position of optical engineer may have a degree, the actual duties of a position connote the professional requirements of a position. In this matter, the optical engineer's duties are indicative of an individual providing a technical skill to the petitioner rather than engaging in actual engineering duties. The record does not support a conclusion that the beneficiary's primary assignment is to supervise a professional position.

Further, 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 this matter, the petitioner employed four individuals when the petition was filed and continued the employment of these individuals for two years. The petitioner then decreased the number of employees to three, than to two, and only recently added employees that could possibly relieve the beneficiary from performing non-qualifying duties. The petitioner did not provide and still has not provided sufficient evidence that the beneficiary's duties were or will be primarily executive or managerial duties, rather than the execution of operational and administrative tasks.

In sum, the petitioner has not provided sufficient evidence to establish the beneficiary's primary assignment for the petitioner will be in a managerial or executive capacity. The descriptions of the beneficiary's job duties are general and fail to describe day-to-day duties of a manager or executive. 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 or will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve her 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.

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.