



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date:

AUG 19 2004

IN RE:

Petitioner:

[Redacted]

Beneficiary:

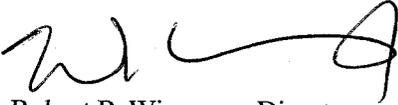
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


Robert P. Wiemann, Director
Administrative Appeals Office

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

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DISCUSSION: The Director, California Service Center, initially approved the employment-based visa petition. 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 corporation organized in the State of California in June 1996. It imports, exports, and retails china, jewelry, and crafts. It seeks to employ the beneficiary as its vice-general manager.¹ 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 subsequent review, including information obtained in an investigation in conjunction with the beneficiary's I-485, Application to Register Permanent Residence or Adjust Status,² the director issued a notice of intent to revoke indicating that the petitioner had not established: (1) that it was doing business in the United States; (2) its ability to pay the proffered annual wage of \$40,800; (3) that the beneficiary had been or would be employed in a managerial or executive capacity for the petitioner; or, (4) a qualifying relationship with the beneficiary's foreign employer.

Upon review of the documentation submitted in response to the notice of intent to revoke, the director determined that the petitioner had submitted sufficient evidence to overcome the grounds of revocation on the issues of the petitioner's doing business in the United States and its ability to pay the proffered wage. The director, however, revoked the approval of the petition on May 20, 2003, concluding that the petitioner's evidence did not overcome the grounds of revocation on the issues of the beneficiary's managerial or executive capacity and the existence of a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner asserts that: (1) Citizenship and Immigration Services (CIS) should not revoke the Form I-140 petition based on a position the beneficiary no longer holds; (2) the beneficiary's current position as president qualifies as an executive position; and, (3) the petitioner can establish a qualifying business relationship between the foreign parent company and the United States subsidiary.

Section 203(b) of the Act states in pertinent part:

¹ The AAO acknowledges that the petitioner promoted the beneficiary to the position of president in February 2000. However, the petition and the determination to revoke the petition must consider the beneficiary's eligibility 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). Moreover, if significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

² The AAO notes that the beneficiary has a second A number (A 75 641 909) apparently assigned when the I-485 was filed.

- (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).

CIS regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. See 8 C.F.R. § 245.1(a). Section 205 of the Act, 8 U.S.C. 1155, states: "The 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." Notwithstanding the CIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

Moreover, by itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke 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 its burden of proof. 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 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

The petition was filed November 20, 1997 and was approved January 1, 1998. The beneficiary filed her I-485 petition in February 1999. On September 5, 2001, the Los Angeles District Office of the former Immigration and Naturalization Service (INS) requested an overseas investigation to determine if the foreign entity and the beneficiary's position with the foreign entity existed. The overseas investigator visited the foreign entity's street location and after inquiry of individuals in the area, determined in a February 22, 2002 report that the foreign entity did not exist and that the beneficiary's employment with the foreign entity was questionable.

The director's realization that the petition was improperly approved established good and sufficient cause to issue the notice of intent to revoke. Counsel's argument that CIS should not revoke the Form I-140 petition based on a position the beneficiary no longer holds is not persuasive. The director, as will be discussed in detail below, did not have sufficient consistent evidence to approve the I-140 petition. The director's initial approval was granted contrary to the requirements stated in the statute and regulations. Counsel in his brief on appeal also recites "general guidelines for revocation." However, the general guidelines cited comprise the regulations set out for revocations of approved L-1 intracompany transferee petitions and are inapplicable to revocations of I-140 immigrant-based petitions. *See* 8 C.F.R. § 214.2(I)(9)(iii)(B). The director had good and sufficient cause to issue the notice of intent to revoke and the petitioner's rebuttal to two of the four grounds of revocation was not sufficient to overcome the director's determination.

The first issue in this proceeding is whether the petitioner established that the beneficiary would be employed in a managerial or executive 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 provided its organizational chart showing a general manager and the beneficiary's dual positions of vice-general manager/finance manager. The chart also showed that the beneficiary had direct supervision of an individual in the finance department and supervision of the marketing department consisting of positions labeled manager, supervisor, and shop assistant. The petitioner's description of the beneficiary's duties consisted of the statement: "To assist the General Manager in managing the company, and to be responsible for finance department." The director inexplicably approved the petition based on this inadequate information.

On January 23, 2003 the director sent a notice of intent to revoke to the petitioner's last known address. The notice was returned as undeliverable. The director researched the California Corporation State records and sent the notice of intent to revoke on February 21, 2003 to the petitioner's new address. Based on the record, the director determined that: (1) the petitioner had not established its reasonable need for an executive and that "it is contrary to common business practice and defies standard business logic for such a company to have an executive;" (2) the petitioner had not provided a description of the beneficiary's duties; (3) the record contained insufficient information to determine that the beneficiary had or would have managerial control over a function, department, subdivision, or component or managerial authority over subordinate professional, managerial, or supervisory personnel.

In rebuttal on March 20, 2003, the petitioner indicated that the beneficiary's duties as vice-general manager included:

1) discretionary decision-making in implementing the financial and marketing goals and objectives; 2) provide training of other U.S.-based managerial employees in the managerial policies established by the parent company[;] and 3) review financial and sales progress reports of the U.S. company and adjust operation strategies based on changes in target markets.

The petitioner added that the vice-general manager was responsible for the overall financial management and marketing operations while the general manager was in charge of the purchasing matters and functioned as the main contact between the U.S. organization and the claimed parent company's board of directors. The petitioner listed the beneficiary's daily activities as including:

Exercising discretion over investment projects and other financial issues; adjusting marketing strategies based on current market conditions; meeting the General Manger [sic] to discuss the company's development plans and other important issues; reviewing marketing and financial reports of the organization; meetings and luncheons with key executives from primary customers; setting goals for the organization based on telephone discussions and facsimile reports from the foreign parent company; and exercising discretionary decision-making on issues presented by the marketing manager and vice financial manager.

The petitioner also stated that the beneficiary had executive and managerial responsibilities and that her major duties included: (1) assisting the general manager by making strategic suggestions for further investment, market expansion, and development, and providing financial and sales reports and acting on behalf of the general manager when he was away, 20 percent of her time; (2) formulating and administering the overall financial plans and policies to support the company's expansion by maneuvering capital acquisitions, cost control, circulation of capital, directing all investment activities; reviewing financial reports and making decisions on issues presented by the vice-financial manager, and advising on solutions to internal issues, allocating resources, evaluating and signing bills and applications, 30 percent of her time; (3) making decisions on marketing strategies and operations by supervising and controlling the work of the department manager, analyzing market information and adjusting marketing strategies, meeting with subordinates or customers to ascertain progress and identify new areas of development, visiting key account clients, and reviewing reports from the marketing manager, 40 percent of her time; and, (4) training lower-level managerial staff and exercising authority to hire, fire, and make other personnel decisions, 10 percent of her time.

The petitioner also provided its California Form DE-6, Employer's Quarterly Wage Report, for the quarter in which the petition was filed, the last quarter of 1997. The California Form DE-6 confirmed the employment of individuals in the positions of general manager, the beneficiary's position of vice-general manager/financial manager, vice-manager (in the finance department), and manager, supervisor, and a part-time shop assistant in the marketing department.

The director determined that the petitioner's job description for the beneficiary's position did not establish that the beneficiary primarily performed executive duties. The director observed that the petitioner had not established that the nature of its organization would require so many executives and managers to run the business; rather, the director determined that it is reasonable to believe that the beneficiary would be assisting with the petitioner's day-to-day non-supervisory duties. The director further determined that the beneficiary's position was essentially a first-line supervisory position of non-professional employees. The director finally determined that the beneficiary was not a functional manager.

On appeal, counsel for the petitioner argues that the beneficiary's current position as president is executive. Counsel also takes issue with the director's characterization of the petitioner and observation that the petitioner does not need an executive. Counsel contends that it would be uncommon business practice to expect a parent company the size and sophistication of the petitioner's parent company to set up a subsidiary without the expertise of a chief executive. Counsel concludes that when considering the reasonable needs of the organization, the petitioner requires a president.

As explained above, the AAO cannot consider the beneficiary's claimed current position for this visa petition. When reviewing the initial documentation submitted with the petition, the petitioner did not establish that the beneficiary's dual position of vice-general manager and finance manager would be primarily executive or managerial. The petition was improperly approved.

Counsel's assertion that the petitioner requires a president is not relevant to the beneficiary's eligibility when the petition was filed. As noted earlier, the petitioner must establish eligibility when the petition is filed. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Counsel, on appeal, has not adequately addressed the issues raised in the director's decision.

As the director observed, a petitioner must clearly describe the duties to be performed by the beneficiary and clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. See 8 C.F.R. § 204.5(j)(5). A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. 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 that the beneficiary is both an executive and a manager.

The petitioner's initial description of the beneficiary's duties consisted of the statement: "To assist the General Manager in managing the company, and to be responsible for finance department." This statement even when coupled with the petitioner's organizational chart could not substantiate the managerial or executive capacity of the beneficiary's positions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner's lengthy description in rebuttal to the director's notice of intent to revoke also failed to establish that the beneficiary's vice-general manager/finance manager position would have been executive or managerial. For example, the petitioner indicated that the beneficiary spent 40 percent of her time making decisions on marketing strategies, analyzing market information, visiting key clients, reviewing reports, and supervising and controlling the work of the department manager. The petitioner does not detail the duties of the "department manager" or further explain how this individual relieves the beneficiary from performing the duties of the petitioner's market analyst. 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). Moreover, the petitioner indicated that the beneficiary devoted 20 percent of her time on market expansion and development.³

The petitioner indicates that the beneficiary spent 30 percent of her time on financial management including formulating and administering financial policies and plans by maneuvering capital acquisitions and directing investment. This assertion does not demonstrate that the beneficiary's activities associated with the petitioner's finances are managerial, rather than activities associated with the operational and administrative aspect of this department. Again, specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Neither has the petitioner clarified who carries out the petitioner's operational and administrative tasks, if not the beneficiary with the assistance of the vice-financial manager and the "manager," and "supervisor." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190.

The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of her duties to managerial or executive tasks. However, in the present matter, the petitioner has not shown that the beneficiary spent or would spend 51 percent of her time on managerial or executive duties.

³ Although the petitioner included the beneficiary's assistance to the president and "acting on his behalf when he was away" in this 20 percent allocation of the beneficiary's time, the petitioner's failure to provide a more precise allocation makes it impossible to understand how much time the beneficiary assisted the general manager and how much time the beneficiary spent on market expansion and development. The petitioner has not shown that either of these duties comprised managerial or executive tasks.

Although the appeal will be dismissed, the AAO notes that the director based his decision, in part, on an improper standard. The director should not hold a petitioner to his undefined and unsupported view of "common business practice" or "standard business logic." The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. The director must articulate some rational basis for finding a petitioner's staff or structure to be unreasonable. See section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in a particular industry will not preclude the beneficiary from qualifying for classification under section 203(b)(1)(C) of the Act. For this reason, the director's decision will be withdrawn, in part, as it relates to the reasonable needs of the petitioning business. As determined above, the petitioner has not shown that the beneficiary's duties are primarily something other than the marketing and financial aspects of the petitioner's operational activities.

The petitioner has not established that the beneficiary's assignment was or would be primarily managerial or executive in nature. The petitioner has not submitted evidence on appeal to overcome the director's decision on this issue.

The second issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. 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 director's sole concern with the petitioner's qualifying relationship with the beneficiary's foreign employer centers on the petitioner's failure to produce documentation that the foreign entity actually paid for the petitioner's stock.

Prior to the appeal, the petitioner submitted: (1) a copy of its stock certificate issued on June 14, 1996 for 100,000 shares to the claimed parent company; (2) a copy of its stock ledger showing the transfer; (3) a copy of its Articles of Incorporation authorizing the petitioner to issue 100,000 shares; (4) a copy of an application for payment order from an individual, Kuok Seng Wong, to the petitioner showing a funds transfer of \$60,000 on October 22, 1996; and (5) a copy of a funds transfer advice showing \$60,000 transferred from a bank on behalf of Kuok Seng Wong to the petitioner on October 22, 1996.

On appeal, counsel for the petitioner submits a copy of a receipt signed by Kuok Seng Wong acknowledging that he had received \$60,000 from the petitioner's claimed parent company. The receipt is dated August 20, 1996. Like a delayed birth certificate, the August 20, 1996 receipt submitted seven years after the claimed transaction raises serious questions regarding the truth of the facts asserted. Cf. *Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991)(discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

The petitioner has not explained on appeal why this vital piece of information was not submitted with the other documentation submitted in rebuttal to the director's notice of intent to revoke. The petitioner was put on notice of a deficiency in the evidence and given a reasonable opportunity to provide it for the record before

the visa petition was adjudicated. In rebuttal, counsel for the petitioner explained that the petitioner's parent company had used an individual to transfer funds to capitalize the petitioner to avoid Chinese restrictive regulations but it failed to submit Kuok Seng Wong's receipt acknowledging payment and only now submits it on appeal. Where, as here, the petitioner has been put on notice of a question regarding the actual purchase of stock and was given the opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in rebuttal to the director's notice of intent to revoke.

The petitioner has not provided sufficient probative 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.