



U.S. Citizenship
and Immigration
Services

BH

[Redacted]

FILE: [Redacted] Office: VERMONT SERVICE CENTER
(EAC 00 006 51375 and EAC 01 036 50795)

Date: SEP 23 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:

[Redacted]

PUBLIC COPY

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
protect clearly unwarranted
privacy of personal information

DISCUSSION: The director initially approved two employment-based preference visa petitions that the petitioner filed on behalf of the beneficiary. Subsequently, the director determined that he had made an error in approving both petitions. The director, therefore, properly served the petitioner with two Notices of Intent to Revoke on March 14, 2003, and he ultimately revoked each petition's approval on June 5, 2003. Both matters have been consolidated into a single record, and are now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. Each petition's approval will be revoked.

The petitioner is a New York corporation that seeks to employ the beneficiary as its sales and marketing manager. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director revoked his approvals of the petitions because the proffered position in the United States is not in an executive or managerial capacity.

On appeal, counsel submits a brief and additional evidence.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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.

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, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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 an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it is a subsidiary of Diamondstar Exports Limited of India and engages in the international trade of diamonds. When filing the first petition in October 1999, the petitioner employed two persons, including the beneficiary who was occupying the proffered position as an intracompany transferee

(L-1A). When filing the second petition in November 2000, the petitioner employed three persons including the beneficiary. In both I-140 petitions, the petitioner failed to disclose a proffered salary.¹

The regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. 8 C.F.R. § 245.1(a). If the beneficiary of an approved visa petition is no longer eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." A Notice of Intent to Revoke (NOIR) is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Notwithstanding Citizenship and Immigration Services' (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).

The issue to be discussed in this proceeding is whether the beneficiary's job with the petitioner is in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be

¹ Because the director issued two identical NOIRs and revocation notices, the AAO shall address the revocation of both petitions in this one decision. The only difference between the two petitions is the number of employees that the petitioner employed when it filed the petition; the petitioner increased its staff by one person at the time of filing the second petition.

acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the NOIRs, the director informed the petitioner that a review of the petitioner's Forms W-2 for the 1997 through 2000 years led him to conclude that the beneficiary was the company's sole employee. The director, therefore, requested evidence to show that the beneficiary would be employed in a primarily managerial or executive capacity. This evidence included, but was not limited to, copies of the petitioner's Forms W-3 and corporate income tax returns, an organizational chart, job descriptions for all employees, and a comprehensive job description for the beneficiary.

In response, the petitioner submitted the requested Forms W-3 and corporate tax forms. The petitioner also stated that when filing the second petition in November 2000, it employed three persons: a sales and marketing manager (the beneficiary); a senior marketing analyst; and an administrative assistant. The petitioner asserted further that it hired a purchasing and sales manager at the end of 2002, and that its accountant, who works on a contractual basis, also reports to the beneficiary. In describing the beneficiary's job, the petitioner stated the following:

After transferring to the U.S. subsidiary . . . [the beneficiary] has continued in his role as Chief Export Marketing Executive in the international organization, while also directing the establishment and growth of the American office.

[The beneficiary] is responsible for overseeing our agents and independent sales representatives at Assorted Diamonds Co. Ltd[.], reviewing and evaluating their performance and making decisions as to retaining or terminating their services, and determining commissions to be offered. He also contracts for and directs the activities of Venus casting, the manufactures [sic]of our jewelry settings.

[The beneficiary] also organizes and directs our international fulfillment operation (arranging and scheduling purchasing of rough stones, manufacturing, sorting and shipping and delivery)

to meet specific orders from American customers and to maintain marketable inventory through staff in India. His duties are exclusively of an executive and managerial nature and he devotes all of his time to planning, organizing and directing international sales and fulfilment for our organization.

When describing the job duties of the employees who report to the beneficiary, the petitioner stated that the senior marketing analyst markets diamonds and the administrative assistant is responsible for correspondence and record keeping.

In the revocation notices, the director noted that the beneficiary would not be supervising the work of managerial, supervisory or professional employees. The director stated specifically, "the record does not currently show what the beneficiary does that qualify [sic] him as a manager or executive"

On appeal, counsel states that the beneficiary's primary role is managerial. According to counsel, the beneficiary "manages the American subsidiary . . . , directs the essential import and sales function, controls all the other employees in the United States as well as the sales agency and the contract manufacturers of jewelry settings, and has discretionary authority over the American operations." The petitioner also submits a letter in which it disagrees with the director's characterization of the beneficiary's job and the company's operations. According to the petitioner, the beneficiary's "primary job is to maintain better relation [sic] with the clients, to hire or fire the employees and contract workers, interact with other professionals like CPA, lawyers, to set goals and policies and to keep a close watch on the finances of the company."

The evidence in the record fails to establish that the proffered position is in a managerial or executive capacity. As stated previously, the petitioner is required to furnish a job offer in the form of a statement that clearly describes the duties to be performed by the beneficiary. 8 C.F.R. § 204.5(j)(5). In the present matter, the petitioner has never submitted a detailed description of what the beneficiary does for the U.S. entity to warrant a finding that his job duties are either primarily managerial or executive. The petitioner is engaged in the international trade of diamonds, and it reported gross receipts in excess of \$4 million in 2000. However, the petitioner employs only the beneficiary, a marketing analyst and an administrative assistant; there is no information about how it was able to generate the receipts without any sales staff.

In addition, the petitioner's job description for the beneficiary is not clear. For example, the petitioner stated that the beneficiary was responsible for "overseeing our agents and independent sales representatives at [REDACTED]"; however, the petitioner fails to identify its relationship to Assorted Diamonds [REDACTED] or explain how the beneficiary's duties for this company establish that he is working in a primarily managerial or executive position for the petitioner. Even though the petitioner gives the beneficiary the title of "sales and marketing manager," it does not claim to have anyone on its staff to actually perform the sales function. Thus, either the beneficiary himself is performing the sales function or he does not actually manage the sales function as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. 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. 582, 591 (BIA 1988). If the beneficiary is performing the sales function, the AAO notes that 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).

Regarding its staffing level, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner's statement that the company hired a purchasing and sales representative in 2002 is irrelevant, as this is not the staff that was in place when the petitions were filed. The positions of senior marketing analyst and administrative assistant, which were in place in November 2000, do not establish, by themselves, that the beneficiary performs primarily managerial or executive duties. The petitioner did not submit sufficient information to enable CIS to determine that either position is managerial, professional or supervisory. None of the duties that each individual performs elevates the beneficiary to more than a first-line supervisor.

There is "good and sufficient cause" within the meaning of section 205 of the Act to revoke the approval of a visa petition if the evidence of record at the time of the decision warrants a denial based on the petitioner's failure to meet his or her burden of proof. *Matter of Estime, supra*. Based upon the above discussion, the petitioner has not demonstrated that the position offered to the beneficiary is in an executive or managerial capacity. Therefore, the director's decision to revoke approval of the petitions shall not be disturbed.

Beyond the decision of the director, the evidence in the record does not establish that the petitioner and the Indian company, Diamondstar Exports Limited, share a common relationship pursuant to 8 C.F.R. § 204.5(j)(3)(i)(C). Although the petitioner claims to be a subsidiary of the Indian entity, the record does not contain any documentary evidence of its ownership such as stock certificates, the corporate stock ledger, or its Articles of Incorporation. In addition, because the relationship between the Indian and U.S. companies has not been adequately documented, the beneficiary cannot meet the requirements of the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B), which states that the beneficiary must have been employed by a qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States in a nonimmigrant status. Although the director did not raise these issues in either of the two NOIRs or revocation notices, they are, nevertheless, additional reasons why the petitions may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The approvals of the petitions are revoked.