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

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FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

JUL 22 2005

WAC 95 075 51521

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

DISCUSSION: The preference visa petition was initially approved by the Director, California Service Center. Upon further review, the director determined that the petition did not warrant approval and issued a notice of her intent to revoke approval of the petition. A revocation subsequently followed on September 19, 1999. The director then reopened the case and reaffirmed her prior decision to revoke the petition, which resulted in the petitioner's appeal before the Administrative Appeals Office (AAO). After review of the record and all submitted evidence, the AAO withdrew the director's decision and remanded the case for further action. The director issued two additional requests for evidence and ultimately issued another decision revoking approval of the petition. The case has been certified to the AAO for review. The director's decision to revoke approval of the petition will be affirmed.

The petitioner is a California corporation operating as an importer and wholesaler of office supplies. 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 based his decision to revoke approval of the petition on two grounds: 1) the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity; and 2) the petitioner failed to establish that it has a qualifying relationship with a foreign entity.

Although the petitioner responded to both of the director's requests for additional evidence, no further submissions have been received into the record in response to the latest notice revoking the approval of the petition. Therefore, the record will be considered complete as presently constituted.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 which 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.

The first issue in this proceeding is whether the beneficiary would be employed 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 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 AAO's prior decision remanding the matter back to the director, the AAO stated that the record lacked sufficient information regarding the beneficiary's proposed position in the United States. Accordingly, the

director issued a request for evidence (RFE) on February 9, 2004. The director instructed the petitioner to provide an organizational chart illustrating its managerial hierarchy and staffing levels as of January 23, 1995, the date the petition was filed. The petitioner was also instructed to provide a detailed description of the duties to be performed by the beneficiary under an approved petition.

The petitioner complied with both requests submitting an organizational chart, which listed eight positions and named a total of six employees who purportedly filled those positions at the time the petition was filed. The petitioner also provided a description of the beneficiary's typical day of work. As that description has been incorporated in the director's decision, the AAO need not repeat it in this discussion.

On May 12, 2004, the director issued a notice of his intent to revoke approval of the petition.¹ The director stated that the petitioner's first quarterly wage statement in 1995 did not name all of the employees who were included in the petitioner's organizational chart, which purportedly reflects its staffing at the time the petition was filed. Namely, the director indicated that the petitioner's president, the beneficiary, and its customer service employee were not listed in the relevant wage report.

Although the petitioner indicated that its president is generally employed by the overseas entity and only visits the United States twice per year, no explanation was provided to clarify why the remainder of the petitioner's organizational chart did not match its first quarterly wage statement for 1995. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The director also stated that the record lacks evidence to suggest that the beneficiary would primarily perform qualifying managerial tasks or oversee the work of managerial, supervisory, or professional personnel.

In response, the petitioner disputed the director's conclusion and claimed that two out of three of the beneficiary's subordinates are professionals with college degrees, while the other subordinate had a managerial title and carried out duties of a professional nature. However, the claim that the beneficiary directly supervises the petitioner's customer service employee contradicts the petitioner's organizational chart, which suggests that the sales manager supervises that employee. Furthermore, the customer service employee, who was claimed to have been one of the beneficiary's subordinates, was not employed by the petitioner in January of 1995 when the petition was filed. Even though the customer service employee was eventually hired, as indicated by the W-2 wage and tax statements issued by the petitioner in 1995, the beneficiary could not have supervised more than two individuals at the time the petition was filed. Although the managerial nature of one employee is plausible based on his managing a subordinate, the professional nature of the accounts receivable and purchasing employee is entirely unclear despite the individual's claimed college degree.

Section 101(a)(32) of the Act states that the term "profession" includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teacher of elementary or secondary schools, colleges, academies, or

¹ It is noted that the second RFE was erroneously titled, "Notice of Intent to Deny." In light of the fact that the petition had already been approved, a denial would not have been possible; only an option to revoke approval of the petition would have been, which the director ultimately did. As such, the notice of the director's intent to deny was, in effect, a notice of the director's intent to revoke the approval of the petition.

seminaries. Additionally, as provided in 8 C.F.R. 204.5(k)(2), the term "profession" includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. In the instant matter, the petitioner has failed to provide any evidence that a college degree is necessary to perform the bookkeeping tasks associated with an accounts receivable and purchasing position. Although the organizational chart also indicates that the same employee occupied the position of sales manager, the petitioner's quarterly wage statement for the first quarter of 1995 clearly shows that the sales manager's subordinate had not yet been hired at the time the petition was filed. Therefore, despite [REDACTED] managerial title, she could not have been deemed a managerial employee. As such, the AAO cannot conclude that the beneficiary would have primarily managed a staff of professional, managerial, or supervisory employees at the time the petition was filed.

Furthermore, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant matter, the petitioner has indicated that the beneficiary's daily tasks involve answering phones, communicating with clients and suppliers, and assisting with sales as needed. Regardless of the significance of these duties to the overall success of the petitioner's operation, the AAO cannot overlook the fact that they are of a non-qualifying nature. 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). Based on the petitioner's breakdown of the beneficiary's typical day of work, it appears that more than 50% of the beneficiary's time would be devoted to non-qualifying tasks. Therefore, the AAO cannot conclude that at the time the petition was filed, the beneficiary would have been primarily performing qualifying managerial or executive tasks.

The other issue in this proceeding is whether the petitioner established that it has a qualifying relationship with a foreign entity.

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 the instant matter, in response to the director's RFE, the petitioner submitted the foreign entity's Minutes of Special Meeting of Shareholders statement listing [REDACTED] as one of its shareholders. The petitioner also submitted the foreign entity's shareholder's roster, which indicated that Mr. [REDACTED] owns 54% of the foreign entity's issued shares. In regard to the ownership of the U.S. entity, the petitioner submitted a State of California Notice of Transaction indicating that a total of 100,000 shares would be issued. The petitioner's Minutes of Organizational Meeting and the petitioner's stock transfer ledger, which were also submitted in response to the RFE, both indicate that the same individual who owns 54% of the foreign entity owns 80% of the U.S. petitioner.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the instant matter, the petitioner has successfully established that both it and the foreign entity are majority owned and controlled by the same individual. Thus, contrary to the director's erroneous interpretation of the term "affiliate," a qualifying relationship does, in fact, appear to exist between the U.S. petitioner and the beneficiary's foreign employer. Therefore, the petitioner has overcome this portion of the director's decision.

Notwithstanding this conclusion regarding the qualifying relationship issue, the petitioner has failed to establish that the petitioner would have employed the beneficiary in a primarily managerial or executive capacity at the time the petition was filed. For this primary reason, the director's decision to revoke the approval of the petition will be upheld.

Beyond the director's decision, the petitioner has failed to establish its ability to pay the beneficiary's proffered wage. 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the instant matter, the petitioner's 1995 tax return indicates that the petitioner was operating at a net loss of \$252,113 the year during which the petition was filed. Additionally, while the beneficiary is not required to have been employed by the petitioner at the time the petition was filed, the W-2 wage and tax statements issued by the petitioner in 1995 clearly show that the beneficiary was employed by the petitioner and was receiving a salary of \$20,300 annually, which fell far short of the beneficiary's proffered wage of \$34,800 annually.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground discussed in the above paragraph, approval of the petition was not warranted.

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."

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 his 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, 19 I&N Dec. at 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)). Accordingly, the revocation of the approval of the instant petition was justified and will not be overturned.

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 sustained that burden.

ORDER: The director's decision revoking approval of the petition will be upheld.