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FILE:

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EAC 01 214 50012

Office: VERMONT SERVICE CENTER

Date: JUN 13 2005

IN RE:

Petitioner:
Beneficiary:

[Redacted]

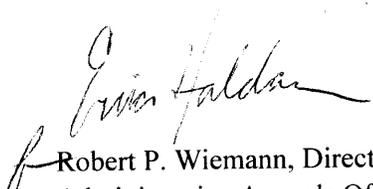
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[Redacted]

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 Director, Vermont Service Center, initially approved the employment-based visa petition. Upon subsequent review of the record, the director issued a Notice of Intent to Revoke and ultimately revoked 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 New Jersey in June 1997. It apparently operates a dry cleaning establishment.¹ The petitioner 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 petition was approved on August 29, 2001. On April 2, 2003, the director issued a notice of intent to revoke approval of the petition. The director observed: "the beneficiary is the father of the petitioner." The director questioned the petitioner's ability to pay the beneficiary the proffered annual salary of \$41,600. The director requested the petitioner's 2002 U.S. federal tax return or in the alternative audited annual reports or financial statements for 2000. The director also requested evidence of the petitioner's staffing, including the number of employees and their duties and the petitioner's use of contractors, if any. The director further requested evidence that the petitioner had engaged in the regular, systematic, and continuous provision of goods or services for at least one year.

The director notified the petitioner that a final decision would not be made regarding the revocation for 30 days and that the petitioner could submit evidence to overcome the reasons for revocation during that time period. On April 9, 2003, counsel for the petitioner submitted a letter stating: "there are sufficient grounds to justify the approval already granted." Counsel requested an additional 90 days to submit a detailed brief and the information requested.

On June 2, 2003, counsel for the petitioner submitted a brief. Counsel noted that the director's observation that "the beneficiary is the father of the petitioner," is *prima facie* incorrect and not relevant to this matter. Counsel also asserted that the ability of the petitioner to pay the beneficiary is supported by the facts in the record and not relevant according to the statutory provisions. Counsel submitted: (1) unaudited financial statements as of December 31, 2000 and December 31, 2001, explaining that audited statements would be submitted in due course; (2) the petitioner's organizational chart showing the beneficiary in the position of vice-president over a manager and staff member in administration, a staff member in finance, and a staff member in marketing, sales and business development; (3) a letter from the petitioner's accountant confirming that the accounting firm had provided services to the petitioner and a letter from Aqua, Inc. confirming that it had provided services to the petitioner; and (4) telephone and electric bills issued to the petitioner in November and December 1998 and January 1999.

¹ The record does not contain evidence of the nature of the petitioning entity. The petitioner's 2000 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, indicates that it is in the business of "drycleaning."

Although evidence had been submitted prior to the director's decision, the director revoked approval of the petition on July 26, 2003, observing that the petitioner had not submitted evidence within the 30-day time period indicated on the notice of intent to revoke.

On appeal, counsel for the petitioner asserts that the notice of intent to revoke did not state "good and sufficient cause" to revoke approval. Counsel claims that evidence to overcome the reasons for revocation has been submitted. Counsel requests that the AAO review all the facts and evidence in the record and order the revocation set aside.

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).

Section 205 of the Act, 8 U.S.C. 1155 (2005), states: "The Secretary of Homeland Security 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 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition."

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. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

Neither the Act nor the regulations require a specific time period in which to respond to a notice of intent to revoke, requiring only that if service is by mail, Citizenship and Immigration Services (CIS) must add an additional three days to the prescribed period to respond. See 8 C.F.R. § 103.5a(b). Accepting late-filed evidence is within the director's discretion. Generally, however, the director's decision to revoke the approval of a petition will be affirmed, notwithstanding the submission of evidence on appeal, where a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intention to revoke. See *Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1988).

The regulations do 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). 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). The record in this matter does not establish eligibility for the requested visa classification.

In the notice of intent to revoke, the director incorrectly observed: "the beneficiary is the father of the petitioner." As counsel noted, the petitioner is a separate corporate entity. Although the petitioner has not established the relationship between the beneficiary, the petitioner, and the foreign entity, the director's observation is unfounded. Whether the director is attempting to call into question the qualifying relationship between the petitioner and the beneficiary's foreign employer or whether the director is questioning the viability of the petitioner is not clear. The director's observation is specifically withdrawn.

The director also questioned the petitioner's ability to pay the beneficiary the proffered annual salary of \$41,600 and requested documentation to substantiate its ability to pay. In rebuttal, counsel for the petitioner claimed that the petitioner's ability to pay the proffered wage was not relevant. However, the regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the

beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's ability to pay the proffered wage is relevant, as this visa classification requires an offer of employment. The record does not provide documentation that establishes that the petitioner had and continues to have the ability to pay the beneficiary the proffered wage. In this matter, to establish the ability of the petitioner to pay the proffered wage, the petitioner must provide independent documentary evidence that it has paid the beneficiary in the past at a salary equal to or greater than the proffered wage and has the continuing ability to pay the proffered wage. Such evidence would include Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement issued by the petitioner to the beneficiary. If the petitioner has not paid the beneficiary in the past or has not paid the proffered wage, the petitioner as an alternative must provide certified copies of its IRS Forms 1120, for the 2001, 2002, 2003, and 2004 years or audited financial statements for the same years. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In this matter, the petitioner has not provided either forms of evidence showing that it had paid the proffered wage or has the ability to pay the beneficiary the proffered wage. The record contains a copy of the petitioner's uncertified IRS Form 1120 for 2000, an audited financial statement for the year ending December 31, 2000, and an unaudited financial statement for the year ending December 31, 2001. These documents do not establish that the petitioner had the ability to pay the beneficiary the proffered wage when the petition was filed in April 2001 as well as the continuing ability to pay the proffered wage. 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). CIS 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).

Beyond the decision of the director, the record does not establish that the beneficiary had been employed for the foreign entity in a managerial or executive capacity for one of three years prior to entering the United States as a nonimmigrant. The petitioner does not provide a comprehensive description of the beneficiary's duties for the foreign entity. The petitioner must establish that the beneficiary's position for the foreign entity was in a managerial or executive position pursuant to the definitions of same found at section 101(a)(44)(A) and (B) of the Act.

The record also fails to establish that the beneficiary's position for the United States entity will be in a managerial or executive capacity. The record contains the petitioner's general statements that the beneficiary operates the petitioner's business in a managerial capacity and establishes the goals of the company through corporate planning as well as paraphrasing other elements of the definition of executive and managerial capacity. See 101(a)(44)(A)(i) and (ii) and 101(a)(44)(B)(ii), (iii) and (iv) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the

statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The petitioner provides an organizational chart but fails to substantiate the employment and job duties of the beneficiary's subordinates, if any. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner does not provide a comprehensive description of the beneficiary's proposed duties for the petitioner or for staff that would relieve the beneficiary from performing primarily non-qualifying duties. The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity.

The petitioner also has not established a qualifying relationship between the petitioner and 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. In this matter, the petitioner has not provided probative evidence of its ownership and control.

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 (BIA 1988); *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 at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N at 595. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

Finally, the record does not contain evidence that the petitioner had been doing business for one year prior to filing the petition on April 30, 2001 as required by 8 C.F.R. § 204.5(j)(3)(i)(D). As noted above, it appears from the petitioner's 2000 IRS Form 1120, that the petitioner operates a dry cleaning establishment. The record does not contain other evidence of the nature of the petitioner's business or when it began to offer goods or services on a regular, continuous, and systematic basis. *See* 8 C.F.R. § 204.5(j)(2)

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).

The AAO finds that the initial evidence submitted in support of the Form I-140 petition did not establish the beneficiary's eligibility and the director's approval of this petition was clearly in error. Upon review of the record, including the petitioner's belated rebuttal to the director's notice of intent to revoke and the brief submitted on appeal, the record does not contain sufficient evidence to establish the beneficiary's eligibility for this visa classification.

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.