



U.S. Citizenship
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FILE:



WAC 00 059 50789

Office: CALIFORNIA SERVICE CENTER

Date: JUN 16 2005

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 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, California Service Center, approved the employment-based petition on January 29, 2001. On February 25, 2004, the director issued a Notice of Intent to Revoke, providing the petitioner with thirty days within which to rebut the proposed revocation. The petitioner responded on March 23, 2004. The director subsequently revoked approval on April 6, 2004. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the immigrant petition seeking to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a New York corporation that is authorized by the State of California to engage in the marketing and distribution of products manufactured by the foreign company in Shanghai, China. The petitioner seeks to employ the beneficiary as its president and general manager.

Following approval of the petition on January 29, 2001, the director issued a Notice of Intent to Revoke noting that the petitioner had not demonstrated that the beneficiary had been and would be employed by the United States entity in a primarily managerial or executive capacity. Despite the petitioner's response to the director's notice of the proposed revocation, the director revoked approval in a decision dated April 7, 2004, wherein the director concluded that the beneficiary was not employed in the United States as a manager or an executive.

On appeal, counsel claims that the director erred in determining that the beneficiary has not been employed in the United States as a manager, and contends that the director failed to consider that: (1) the majority of the beneficiary's time is spent managing the company's marketing functions; and (2) the beneficiary supervises and manages a subordinate staff of subcontractors who conduct market research and negotiate sales and payment terms. Counsel also states that the director should have taken into account the complexity of the foreign organization and its needs "to develop large scale marketing functions in the United States." Counsel indicates on Form I-290B that a brief would be submitted to the AAO within thirty days of the filing of the appeal. The appeal was filed on April 22, 2004. As of this date, no additional documentation has been provided, and the record will be considered complete.

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 or 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 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. 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 "good and sufficient cause" and the revocation of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals (BIA) 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 unrebutted, 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)).

The issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly

supervised; 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 filed the instant petition on December 21, 1999 noting that the beneficiary would be employed as the president and general manager of the United States entity. In an appended letter, dated December 15, 1999, the petitioner stated that in this capacity the beneficiary would perform the following job duties: (1) direct the company's market research; (2) establish marketing strategies; (3) manage the company's daily business operations; (4) hire and fire employees; (5) formulate and administrate company policies; and (6) develop long-range goals and policies to implement business projects for the foreign company. The petitioner submitted an accompanying job description, wherein it outlined the same six job duties to be performed by the beneficiary. The petitioner also provided its organizational chart, in which it identified the beneficiary as the president and general manager overseeing the sales, marketing and design departments. The petition was approved by the California Service Center on January 29, 2001.

On February 25, 2004 the director issued a Notice of Intent to Revoke, noting that the petitioner had not demonstrated that the beneficiary qualified for classification as a multinational manager or executive. The director stated that in its description of the job duties to be performed by the beneficiary, the petitioner "borrowed liberally" from the statutory definitions of "managerial capacity" and "executive capacity." The director noted that paraphrasing the statutory definitions "is not sufficient to convey an understanding of what the beneficiary will be doing on a daily basis." The director further noted that the petitioner's organizational chart failed to identify the company's managerial hierarchy, staffing levels, and job duties performed by employees under the beneficiary's supervision.¹ The director concluded that the beneficiary was likely

¹ The director referenced a previously issued request for evidence, dated October 13, 2000, wherein the director asked that the petitioner provide a detailed organizational chart of the United States entity identifying the beneficiary's position in relation to others in the company and describing the tasks performed by the

responsible for performing the non-qualifying tasks of the business. The director provided the petitioner with an opportunity to rebut the proposed revocation, and specifically requested that the petitioner provide: (1) a detailed organizational chart of the petitioner's staffing levels on December 21, 1999, the date on which the petition was filed; (2) a detailed description of the beneficiary's "typical" daily job duties; (3) a description of the tasks performed by the employees under the beneficiary's supervision; (4) copies of the petitioner's state quarterly wage reports for all four quarters in the year 1999 and the third and fourth quarter of 2003; and (5) copies of the petitioner's years 2000, 2001, and 2002 federal corporate tax returns.

Counsel responded in a letter dated March 23, 2004 and submitted a revised organizational chart, identifying the beneficiary's direct subordinate as a marketing and sales manager. The chart reflected a sales employee and an administrative assistant as the manager's lower-level employees. In an attached document describing the beneficiary's employment as the petitioner's president and general manager, the petitioner stated:

[The beneficiary] is completely and solely in charge of day to day operations of the business functions. She has the both [sic] authority to hire and fire employees and to recommend personnel actions. She has the sole responsibility to establish goals and policies and make marketing decisions on behalf of the company.

The United States subsidiary was formed to market and distribute the products manufactured by the China parent company. [The beneficiary] spends each day directing this specific marketing function, as well as supervising the employees.

In 1999, [the petitioning entity] employed a Marketing and Sales Manager, who was under [the beneficiary's] direct supervision, and a salesperson and administrative assistant who were supervised by the Marketing Manager. [The beneficiary] exercised the top control over these employees, as well as discretion in the day to day operations of [the petitioning entity].

* * *

[The beneficiary's] typical day consists of reviewing and directing the activities of the Marketing Manager and the Sales Manager. She is the sole employee of [the petitioning entity] who is authorized to make final decisions regarding the marketing policy, sales, pricing, and distribution of the products. Her years of experience with the parent company in China, gives [the beneficiary] the specialized knowledge of the products which is crucial to its successful marketing and sales in the United States. She meets daily with the Marketing and Sales Managers to assure that company policy is adhered to, review and develop marketing methods and distribution methods, and review personnel matters. She is responsible for all decisions regarding company policy in marketing, sales, distribution and personnel.

Counsel submitted the requested quarterly tax returns for the petitioning organization, including the petitioner's return for the quarter ending December 31, 1999, the period during which the petition was filed, wherein the petitioner identified three workers, including the beneficiary.

beneficiary's subordinate employees. Despite the petitioner's failure to provide the requested documentation, the petition was approved.

In his Notice of Revocation, dated April 6, 2004, the director determined that the petitioner had not established that the beneficiary had been and would be employed in the United States in a primarily managerial or executive capacity. The director considered the beneficiary's revised job description submitted by the petitioner in response to the director's notice of intent to revoke, and stated it does not demonstrate that the beneficiary's employment satisfies the regulatory criteria outlined in the definition of "managerial capacity." With regard to the petitioner's personnel structure, the director noted that one employee identified on the organizational chart was not reflected on the company's payroll, while another was employed only as a part-time worker. The director stated "[t]he petitioner has not established that the nature of the petitioner's business would require as many managers to run this business," and also noted "[i]t is unreasonable to believe that the beneficiary as President and General Manager, with the organizational structure provided, would not be assisting with the day to day non-supervisory duties." The director further concluded that the beneficiary was not employed as a functional manager, as "it appears that the beneficiary is involved in the performance of routine operational activities of the entity rather than in the management of a function of that business." Consequently, the director revoked approval of the employment-based petition.

In an appeal filed on April 22, 2004, counsel contends that the director erred in revoking approval of the petition, and claims that the beneficiary has been and would be employed by the United States entity as a manager. Counsel states that the director failed to consider that: (1) the majority of the beneficiary's time is spent managing the company's marketing functions; and (2) the beneficiary supervises and manages a subordinate staff of subcontractors who conduct market research and negotiate sales and payment terms. Counsel also states that the director should have taken into account the complexity of the foreign organization and its needs "to develop large scale marketing functions in the United States."

Upon review, the director properly revoked the petition based on the petitioner's failure to demonstrate that the beneficiary has been and would be employed by the United States entity in a primarily managerial or executive capacity. 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. at 590. The director's decision to revoke approval of the immigrant petition will be sustained where the record at the time the decision is rendered would warrant such a denial. *Id.*

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). As correctly noted the director, the petitioner submitted with the petition a broad description of the job responsibilities performed by the beneficiary as president and general manager of the United States entity without identifying the actual job duties that the beneficiary would perform in this capacity. In response to the director's notice of intent to revoke, the petitioner submits an equally nondescript explanation of how the beneficiary's employment in the United States satisfies the regulatory definitions of "managerial capacity" or "executive capacity." The petitioner's vague claims that the beneficiary "is solely in charge of day to day operations of the business functions," possesses the authority to hire and fire employees, "has the sole responsibility to establish goals and policies", and "makes marketing decisions" do not provide a clear depiction of the actual job duties to be performed by the beneficiary in conjunction with these responsibilities. Reciting the beneficiary's vague and broadly cast job responsibilities is not sufficient; the regulations require a detailed description of the beneficiary's job duties. The actual duties themselves reveal the true nature of the employment. *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).

It appears that the additional job description offered by the petitioner in response to the director's notice of intent to revoke pertains to the "typical" job duties currently performed by the beneficiary rather than those performed by the beneficiary at the time the petition was filed. The petitioner's statement includes a description that the beneficiary directs the activities of two employees, the company's marketing manager and the sales manager, whereas at the time of filing the petition, the beneficiary directed one individual, who held the dual position of the marketing and sales manager. As the job duties do not apply to the beneficiary's position at the time of filing the petition, the additional job description will not be considered herein. 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).

Additionally, while counsel relies on the petitioner's organizational chart to support the claims that the beneficiary maintains a managerial position within the organization and that the beneficiary exercises managerial control over independent subcontractors utilized by the petitioning entity, there is conflicting evidence that the petitioner employs two of the workers identified. The petitioner indicated on its organizational chart that it employed four workers, including a sales employee, named [REDACTED] and an administrative assistant. However, the administrative assistant does not appear of the petitioner's quarterly tax return for the quarter ending December 31, 1999. Moreover, the tax return reflects the employment of a worker named [REDACTED]. The petitioner has not clarified whether [REDACTED] actually the sales employee identified on the organizational chart as [REDACTED]. 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. at 591-92.

Also, there is no evidence in the record that the petitioner utilized independent contractors at the time the petition was filed as claimed by counsel on appeal. The petitioner does not identify any independent contractors on its organizational chart. Nor has the petitioner submitted any documentation, such as Internal Revenue Service (IRS) Form 1099-MISC, Miscellaneous Income, or tax returns identifying payments made for independent labor, confirming the use of independent contractors. Absent this information, the AAO cannot conclude that the beneficiary is managing the work of independent employees, as claimed by counsel. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). While the record does contain an agency agreement between the petitioner and Maxima Trading, Inc., the agreement was signed on February 16, 2001, approximately fourteen months after the petition was filed. Again, 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. at 49.

Moreover, counsel has not provided evidence in support of the petitioner's claim on appeal that the beneficiary manages the petitioner's marketing functions. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the

beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Here, counsel has failed to specifically define the marketing function managed by the beneficiary, and, as discussed previously, does not provide a detailed description of the daily job duties associated with managing the marketing function. Moreover, as the exact number of workers employed by the petitioner is unclear, it is reasonable to conclude that a portion of the beneficiary's time would be devoted to actually performing the marketing operations of the business. 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). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Furthermore, inconsistent evidence in the record pertaining to the location of the beneficiary's employment creates doubt as to the validity of the beneficiary's employment as the president and general manager of the United States entity. On the immigrant petition, the petitioner identified its business location as City of Industry, California. The petitioner, however, indicated on the page two of the petition that the beneficiary would be employed at [REDACTED]. This address is also listed on the petition as the beneficiary's residential address. Although the petitioner stated in its December 15, 1999 letter that it maintained sales offices in California and Nevada, there is no accompanying documentary evidence, such as a lease agreement or business statements, confirming the petitioner's claim of a Nevada office. Neither counsel nor the petitioner clarify how the beneficiary is employed in a primarily managerial or executive capacity while working in a state other than where the petitioner's business is operating. 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.

Based on the foregoing discussion, the director's notice of revocation was properly issued for "good and sufficient cause," and therefore, the revocation will be sustained. *See Matter of Ho*, 19 I&N Dec. at 590. Accordingly, the appeal is dismissed.

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. Accordingly, the director's decision to revoke approval of the petition will be affirmed.

ORDER: The appeal is dismissed.