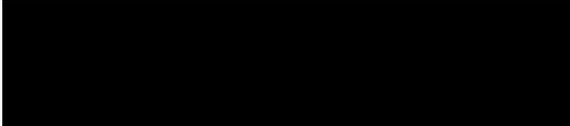




U.S. Citizenship
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Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 17 2005
WAC 97 034 51864

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]

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, initially approved the employment-based petition. Upon subsequent review, the director issued a notice of intent to revoke approval and ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal.¹ The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in August 1994. It claims to import and export equipment and pharmaceuticals, as well as engage in real estate investment. It seeks to employ the beneficiary as its 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.

On March 20, 2003, the director notified the petitioner of his intention to revoke approval of the petition. The director determined that the petitioner had not submitted sufficient evidence to establish that: (1) the beneficiary would be employed in a managerial or executive capacity for the United States entity; (2) a qualifying relationship between the petitioner and the beneficiary's foreign employer; (3) it had the ability to pay the beneficiary the proffered wage; or, (4) it was regularly, systematically, and continuously conducting business in the United States. The petitioner provided rebuttal on May 27, 2003. Upon review of the record, including the information submitted in rebuttal, the director revoked approval of the petition for the reasons detailed in the notice of intent to revoke on February 4, 2004.

On appeal, the petitioner asserts that the definition of managerial capacity precludes Citizenship and Immigration Services (CIS) from considering the petitioner's number of employees as the sole basis for determining a beneficiary's managerial capacity. On the issue of managerial capacity, the petitioner cites several unpublished decisions and claims that the beneficiary manages the work of other functional/department supervisors who manage non-supervisory employees. The petitioner also notes that the beneficiary occupies the highest level in the petitioner's organizational hierarchy. The petitioner observes that the beneficiary has relied on the Form I-140 approval and contends that, absent fraud, the approval of the Form I-140 petition should not be revoked. Finally, the petitioner asserts that CIS (formerly INS) "routinely" approved Form I-140 petitions for multinational supervising three to five employees in 1995 and 1996 and contends that CIS should not apply a more stringent rule retroactively. Neither counsel nor the petitioner addresses the issues of the petitioner's qualifying relationship with the beneficiary's foreign employer, its ability to pay the proffered annual wage of \$26,000, or its regular, systematic, and continuous conduct of business in the United States.

Preliminarily, the AAO observes that 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). The petitioner's reliance on an approval of a Form I-140 petition is not relevant to an adjudication of the beneficiary's eligibility for this visa classification. Notwithstanding the CIS burden to show "good and sufficient cause" in proceedings to revoke the approval of

¹ The Administrative Appeals Office (AAO) initially rejected the appeal as untimely filed because the California Service Center struck the initial date stamp receipt and stamped a subsequent receipt date on the Form I-290B. However, upon further review of the record and evidence provided by the petitioner, the initial date stamp receipt should not have been struck. The AAO will consider the appeal timely submitted.

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).

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

In this matter the petitioner's October 6, 1996 letter submitted in support of the petition, stated that the beneficiary's duties for the petitioner would be to:

- Set up corporate policies and operational guidelines and implement the same from time to time as such becomes necessary;
- Review business report[s] and authorize actions;
- Review accounting reports to implement budget and expenses;
- Authorize employment of managerial and/or supervisory personnel;
- Participate in important business and social functions;
- Report to parent company on financial and operational matters.

The petitioner also provided some evidence that it had employed four individuals in addition to the beneficiary.

The director approved the petition based on this limited information. The approval of a petition with a general description of the beneficiary's duties, insufficient evidence regarding the beneficiary's subordinates, and a failure to define the petitioner's organizational structure or clarify who carried out the routine sales, operational, and administrative tasks of the petitioner's business is gross error.

The director's notice of intent to revoke approval of the petition on March 20, 2003, outlined the deficiencies in the evidence submitted in support of the petition. The director observed that the petitioner had not provided an adequate description of the beneficiary's duties for the petitioner, had not provided an organizational chart, and had not clarified if the beneficiary would perform primarily managerial duties under section 101(a)(44)(A) of the Act or primarily executive duties under section 101(a)(44)(B) of the Act. The director requested the petitioner's

organizational chart as of the date of filing the petition, which should include a brief description of job duties and educational levels for all employees under the beneficiary's supervision.

In rebuttal, counsel for the petitioner indicated that in the year the petition was filed (1996), the petitioner employed four to seven individuals varying in each quarter, and thereafter in 1997 and 1998 the petitioner employed three to five individuals varying in each quarter. The petitioner provided its California Forms DE-6, Employer's Quarterly Tax Return, to substantiate counsel's claims regarding the petitioner's number of employees. Counsel also noted that the beneficiary was the highest paid employee, was the signatory/endorser on company leases and contracts, and that the beneficiary was identified as the president of the petitioner in the record. Counsel asserted that this evidence coupled with the petitioner's initial description of the beneficiary's duties provided a fairly clear idea of what the beneficiary had been doing and would be doing as the petitioner's president. Counsel contended that CIS had not required copies of organizational charts in 1996 when the petition was filed and that it was unfair to revoke a petition on a guideline practice that was adopted after the approval of the Form I-140. Nonetheless, the petitioner provided its organizational chart showing the beneficiary as president, an individual in the position of marketing and sales manager, an individual in the position of office manager, and two individuals holding sales positions.

On February 4, 2004, the director revoked the approval of the petition reiterating that the description provided for the beneficiary's job description was vague and insufficient to demonstrate the beneficiary's managerial or executive responsibilities. The director also considered the petitioner's organizational structure and compared the organizational structure with the petitioner's California Forms DE-6 for the quarter in which the petition was filed. The director determined that the petitioner employed the beneficiary as president as well as an office manager to oversee a part-time marketing and sales manager and a part-time salesperson. The director concluded that it was reasonable to believe that with the petitioner's organizational structure the "beneficiary will have to be assisting in the performance of the numerous menial tasks involved in the business because there aren't enough employees left to perform them." The director also noted that the record did not demonstrate that the beneficiary's subordinates held professional positions and that the record did not demonstrate that the beneficiary would manage a function rather than be involved in performing the routine operational activities of the business.

On appeal, as noted above, the petitioner asserts that the definition of managerial capacity precludes CIS from considering the petitioner's number of employees as the sole basis for determining a beneficiary's managerial capacity. On the issue of managerial capacity, the petitioner cites several unpublished decisions and claims that the beneficiary manages the work of other functional/department supervisors who manage non-supervisory employees. The petitioner also notes that the beneficiary occupies the highest level in the petitioner's organizational hierarchy.

The AAO notes the petitioner's assertion that CIS cannot consider the petitioner's number of employees as the sole basis for determining the beneficiary's managerial capacity. However, the director in this matter also considered the beneficiary's job description and found it insufficient to establish that the beneficiary would be performing primarily managerial or executive duties. 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). The petitioner's job description for the beneficiary is not specific. The description of the beneficiary's duties includes establishing policies and procedures, reviewing reports, "[a]uthorizing

employment of managerial and/or supervisory personnel," and "[p]articipat[ing] in important business and social functions. However, reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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).

In addition, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In this matter, the petitioner has not adequately explained how the beneficiary's part-time subordinate employees perform all the necessary tasks to operate the petitioner's business without the beneficiary assisting with routine operational and administrative tasks. 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).

Further, while performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. In the present matter, the petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial and non-executive. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Furthermore, 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). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. 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. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. Again, 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. at 604. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

The petitioner's assertion that the beneficiary manages the work of other functional/department supervisors is also not persuasive. First, the petitioner does not provide sufficient descriptions for the beneficiary's subordinates to enable CIS to conclude that the beneficiary's subordinates are "functional supervisors." Second, the AAO is uncertain of the petitioner's definition of "functional supervisor " and how the term elevates the beneficiary's position to a managerial or executive position. Lastly, without documentary evidence to support the claim, the assertions of the petitioner will not satisfy the petitioner's burden of proof. 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)).

Finally, the petitioner's citation to unpublished cases carries little probative value. The petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished cases. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. See 8 C.F.R. § 103.3(c). The petitioner's implication that the CIS routinely approved Form I-140 visa petitions for "managers" who supervised three to five employees is not persuasive. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The test is basic to ensure that a person not only has requisite authority, but that a majority of his or her duties relate to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company. Whether individual officers of CIS ignored this clear precedent in the past and allowed ineligible individuals access to this visa petition is not relevant to the matter at hand. In this matter the petitioner has not established that the beneficiary's duties comprise primarily managerial or executive tasks. For this reason, the petition will not be approved.

Neither counsel nor the petitioner has addressed the issues of the petitioner's qualifying relationship with the beneficiary's foreign employer or its ability to pay the proffered wage or its regular, continuous, and systematic conduct of business. Inasmuch as the petitioner has not provided further evidence or argument addressing the director's decision on these issues, the AAO declines to proffer its opinion on these issues. The director's decision will be affirmed.

The approval of the petition will be revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation. 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.