

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B4



FILE: [REDACTED]
EAC 02 043 54698

Office: VERMONT SERVICE CENTER

Date: OCT 28 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

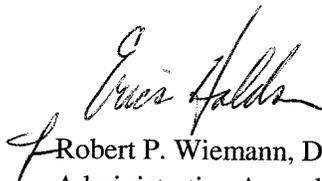
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



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, approved the instant employment-based petition. Following a subsequent review of the petition performed in connection with the beneficiary's I-485 Application to Adjust Status, the director issued a Notice of Intent to Revoke approval of the petition and properly provided the petitioner thirty days with in which to rebut the proposed revocation. The director ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition 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 corporation organized in the State of New Jersey that is engaged in the trade and wholesale of cosmetic raw materials. The petitioner seeks to employ the beneficiary as its executive manager.

The director approved the petition on May 22, 2002. The director subsequently issued a Notice of Intent to Revoke on August 30, 2004, following a review of the immigrant petition during the adjudication process associated with the beneficiary's I-485 application. The petitioner responded, claiming that the beneficiary's "main duties" of "[p]rocurement, [s]election, [s]ampling, and [p]ricing [i]mport & [e]xport of the merchandise to Brazil and [the] United States" qualify the beneficiary for the classification sought. On March 10, 2005, the director revoked approval of the petition concluding that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On April 11, 2005, the petitioner filed the instant appeal. The petitioner subsequently submitted a statement claiming that, in its denial, Citizenship and Immigration Services (CIS) did not consider the job descriptions provided for each employee, nor did CIS explain why the beneficiary's position was not managerial or executive in nature. The petitioner also claims that the company does not need lower-level sales associates, as noted by the director, as "[it] is not engaged in sales but the negotiation of price between the parent company and clients."

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.

Following approval of an immigrant or nonimmigrant petition, the director may revoke approval of the petition in accordance with the statute and regulations. 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 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)).

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. Notwithstanding the CIS burden to show "good and sufficient cause" in proceedings to revoke 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 Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

The AAO will consider the issue of whether the petitioner demonstrated that 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 immigrant petition on November 11, 2001 noting that the beneficiary would be employed as its executive manager at an annual salary of \$38,000. The petitioner also noted that it had a staff of three employees. The petitioner did not submit a supporting letter or a description of the beneficiary's duties.

The director issued a request for additional evidence on January 25, 2002, asking that the petitioner submit documentary evidence of the petitioner's business activities. The director did not request evidence specifically associated with the beneficiary's employment. Included in the petitioner's April 11, 2002 response was Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return, for the quarter ending December 31, 2001, the applicable time period herein, which reflected that the company did not have any employees during this pay period. However, on an attached statement, the beneficiary was identified as the sole employee. The petitioner also submitted the beneficiary's IRS Form W-2, Wage and Tax Statement, for the year 2002.

In its September 29, 2004 response to the director's Notice of Intent to Revoke approval of the petition, the petitioner stated that in the position of "executive manager," the beneficiary's job duties include

"[p]rocurement, [s]election, [s]ampling, and [p]ricing [i]mport & [e]xport of the merchandise to Brazil and [the] United States." The petitioner outlined the following additional job duties:

Market Survey:

Identify and locate the prospective products and markets for the merchandise. It requires at least 10-15 [hours] of a workweek.

Negotiation of Sale/Purchase:

The beneficiary is responsible for negotiations [and] setting the purchase/sales of the merchandise and also take care of incidental work associated with it this requires [approximately] 10-15 work hours a week.

Supervising [and] controlling:

Supervising and controlling the subordinate contractors/professional[s] and managers to execute shipping, handling, custom clearing, brokerage, accounting and bookkeeping for the shipments of the merchandise and it also requires 10-15 [hours] per workweek.

With regard to the petitioner's staffing levels, the petitioner explained that it previously employed three workers, one of whom is identified on an attached document as occupying the position of "director," but that the beneficiary was presently the sole employee. The petitioner stated that "the nature of the business does not require tremendous work force rather it is a *unique* field where *experience* and *ability* of the beneficiary is more vital than the *labor, like fashion designing, modeling or entertainment business.*" (Emphasis in original). The petitioner further explained that the limited staff is a result of the "down slide of adverse economic conditions," and noted that it subcontracts work, such as warehousing, trucking, shipping, brokerage, and marketing to outside independent contractors. The petitioner submitted purchase orders and invoices from the years 2003 and 2004 as evidence of its use of independent contractors. The petitioner claimed that the documentation demonstrated that the beneficiary supervises and controls the work of supervisory, professional, or managerial employees. The petitioner also submitted untranslated invoices, which, the petitioner claimed, were evidence of the managerial decisions made by the beneficiary.

The director concluded in his March 10, 2005 Notice of Revocation that the petitioner had not established the beneficiary's employment in the United States entity in a primarily managerial or executive capacity. The director stated that the beneficiary's job description is vague and does not specifically identify the managerial or executive job duties to be performed by the beneficiary. The director noted the limited documentation submitted with regard to the petitioner's staffing levels, also noting that the petitioner had failed to provide a requested organizational chart or description of the positions occupied by other employees. The director determined that the beneficiary would be engaged in the organization's sales and would not be directing the company. Consequently, the director concluded that the beneficiary would not be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel focuses on the evidence that has already been submitted by the petitioner in support of the beneficiary's employment in a qualifying capacity. In response to the director's findings, counsel claims that a subordinate staff is not necessary for the petitioner's business, as it involves negotiating prices with clients

and the foreign company, and does not entail selling directly to customers. Counsel also notes the financial records and invoices submitted by the petitioner, which counsel states "[show] that some of the more complicated work was being sub-contracted." Counsel restates that the petitioner's small staffing levels were due to an "economic downturn."

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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). Here, the petitioner has not clarified whether the beneficiary would be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Based on the job title given to the beneficiary, it appears the petitioner is attempting to qualify the beneficiary under both capacities. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

Also, the petitioner's extremely limited outline of the beneficiary's job duties fails to identify any managerial or executive job duties to be performed by the beneficiary. The AAO notes that it was not until the director issued his Notice of Intent to Revoke that the petitioner offered any description of the beneficiary's position as executive manager, and subsequently issued a vague claim that the beneficiary's "experience and ability" qualify her for the classification of multinational manager or executive. 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).

The additional job duties outlined by the petitioner support the director's finding that the beneficiary is performing non-qualifying functions of the business. Specifically, the beneficiary is personally responsible for the petitioner's marketing, negotiations and sales. Contrary to counsel's claim on appeal, the petitioner stated in its September 29, 2004 letter that the beneficiary is responsible for "setting the purchase/sales of the merchandise." Additionally, it would appear from the petitioner's invoices and purchase orders that at least a portion of its business involves selling, whether it is to companies or directly to the public. Based on the time allocations offered by the petitioner, the AAO can reasonably conclude that the beneficiary is primarily engaged in the non-managerial and non-executive functions of the petitioner's 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).

Moreover, the petitioner has not demonstrated that it employs a staff sufficient to support the beneficiary in a primarily managerial or executive capacity. Relevant case law dictates that a "temporarily reduced work force" as a result of economic conditions does not influence the analysis of a beneficiary's employment capacity. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) (finding that a petitioner must establish eligibility at the time of filing, and that a petition cannot be approved at a future date after the petitioner or

beneficiary becomes eligible under a new set of facts). The petitioner has failed to substantiate its claim that the beneficiary supervises and controls supervisory, professional and managerial employees who would relieve the beneficiary from performing the non-qualifying tasks of the business. Although the petitioner submitted invoices and purchase forms, the documentation is dated in 2003 and 2004, at least two years after the filing of the petition. *See id.* Even if the AAO were to consider the documentation, the petitioner has not explained its relationship with any outside contractors. In fact, [REDACTED] the petitioner's purported "contractor for shipping," is not identified on any of the shipping documents. Moreover, the invoices and purchase forms merely confirm the beneficiary's employment in a primarily non-managerial and non-executive capacity, as the beneficiary is referenced as a "purchasing contact." 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)).

Based on the above discussion, the petitioner has failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the director's revocation of approval of the petition was based on "good and sufficient" cause. The appeal, therefore, will be dismissed.

Beyond the decision of the director, the petitioner has not demonstrated that the beneficiary was employed abroad in a primarily managerial or executive capacity. The petitioner stated in its September 29, 2004 letter that the beneficiary was employed as the foreign entity's managing director, and provided untranslated income tax returns as evidence of her prior employment. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. Despite the director's request in his Notice of Intent to Revoke, the petitioner did not offer additional evidence of the beneficiary's employment capacity, including a description of the discretionary authority exercised by the beneficiary and the job duties performed by her subordinate employees. The petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The limited list of the foreign company's employees and their job titles does not establish that the beneficiary was employed abroad in a primarily managerial or executive capacity. 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. at 165. The petition is denied for this additional reason.

An additional issue not addressed by the director is whether the petitioner has the ability to pay the beneficiary her proffered annual salary of \$38,000 as required in the regulation at 8 C.F.R. § 204.5(g)(2). In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner did not establish that it had previously employed the beneficiary at the proffered wage.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. 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 *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054. Although counsel references the petitioner's 2001 tax return, none has been provided for the record. As a result, the AAO cannot examine whether the petitioner has a sufficient net taxable income from which to pay the beneficiary's proffered salary. Accordingly, the petitioner has not satisfied this essential requirement. For this additional reason, the petition is denied.

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 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.