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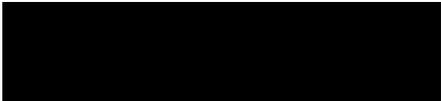
Office: CALIFORNIA SERVICE CENTER

Date: FEB 01 2006

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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 preference visa petition was initially approved on February 12, 2001. Upon further review, the Director, California Service Center, issued a notice of his intent to revoke the approval. A final notice of revocation was issued on October 24, 2002. However, the proceeding was reopened after the petitioner filed a valid motion indicating that the previously issued notice of intent to revoke had not been received. Accordingly, the director reissued the prior notice of intent to revoke the petition and allowed the petitioner adequate time in which to respond. The director ultimately revoked approval of the petition on February 15, 2005. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Washington, D.C. corporation engaged in importing and exporting merchandise and providing consulting services. It seeks to employ the beneficiary as its executive director. 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 revoked the petition based on two independent grounds of ineligibility: 1) the beneficiary would not be employed in the United States in a managerial or executive capacity; and 2) the petitioner did not have the ability to pay the beneficiary's proffered wage at the time the petition was filed.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

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 petitioner would employ the beneficiary 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 support of the petition, the petitioner submitted a letter dated June 14, 2000, which provided the following description of the duties to be performed by the beneficiary under an approved petition:

- Offers consultancy services to U[.]S[.] companies intending to utilize FSU/Russian State Debt Funds and clearing currency system in their international trading operations;

- Identifies and sources commodities, processed food and food processing equipment systems for exports to the markets of India and Russia;
- Establishes "Agency Rights" for [the] marketing of U[.]S[.] manufactured [f]iber [o]ptic [t]elecom products for exports [sic] to India;
- Sources environmental, pollution control and hazardous waste treatment equipment for exports to developing markets of India and FSU;
- Facilitates technology transfer in the area of satellite communications and energy alternatives from the U.S. to the developing markets;
- Offers project consultancy on small projects for recycling of used tires and waste recycling;
- Imports home-textiles, soft furnishings and cotton made-ups [sic] from India and sets up distribution network as prime source supplier to country markets in the U.S.;
- Develops electronic commerce using EDI with various federal and private contracting agencies.

The petitioner also stated that the beneficiary supervises managerial personnel and has full authority over hiring, firing, training, and task assignment.

In response to the first request for additional evidence (RFE) dated December 7, 2000, the petitioner provided a schedule of the beneficiary's weekly activities, which included planning the daily work agenda, sending faxes and emails, working on e-commerce and computer networking, establishing business contacts, generating business, marketing and sales, evaluating job performances, and maintaining the petitioner's bank records and business finances.

In the notice of intent to revoke (NOIR), which was initially issued on July 2, 2002 and resubmitted in 2003 in response to the petitioner's motion, the director informed the petitioner that despite the beneficiary's position title, the duties attributed to the position were vague and failed to establish that the beneficiary was or would be primarily performing in a managerial or executive capacity. The director discussed the petitioner's quarterly wage reports and personnel structure and determined that the petitioner failed to submit sufficient evidence to show that the beneficiary would be relieved from having to perform primarily nonqualifying tasks.

After the petitioner's motion was granted on March 14, 2003, the petitioner responded to the NOIR with a letter dated June 6, 2003. Counsel for the petitioner disputed the director's determination that the description of the beneficiary's duties was too vague. Counsel provided the following statements describing the beneficiary's position in the United States:

[The beneficiary's] duties include the exercise of authority over the generalized policy of the organization, setting the course of business, creating short- and long-term goals, choosing a working team, and planning for the future.

In the course of building the organization, [the beneficiary] was involved in in-depth market study and coordination with the U.S. Department of Commerce, the U.S. Chamber of Commerce . . . . [He] has attended numerous trade fairs, seminars, and symposiums. His responsibility as CEO is to study and apply the data he acquires and to lay a solid foundation of market knowledge upon which the company can grow.

Counsel stressed the beneficiary's role in negotiating various business agreements and making significant business contacts to ensure the petitioner's growth. Additionally, the petitioner submitted correspondence indicating that the beneficiary is a member of various business organizations, including the U.S. Chamber of Commerce. Some of the other correspondence to and from the beneficiary indicated that the beneficiary was the catalyst in making various business contacts to ensure the petitioner's growth. While these various letters strongly suggest that the beneficiary has been a prominent figure in the petitioner's growth and development, they do not address the issue of the beneficiary's proposed duties at the time the petition was filed. 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).

On August 15, 2003, the director issued another RFE instructing the petitioner to submit its organizational chart describing the company's managerial hierarchy and staffing levels as of the date the petition was filed in September 2000. The petitioner was instructed to clearly identify the beneficiary's subordinates providing their names, job titles as well as their job duties and educational levels. Additional documentation was also requested in the form of the petitioner's wage reports for the third and fourth quarters of 2000, all four quarterly reports for 2001 and 2002, and the first two quarters of 2003.

In response, the petitioner provided a letter from counsel dated November 4, 2003. Counsel indicated that the beneficiary supervised independent contractors in addition to individuals that were directly employed by the beneficiary. The petitioner submitted the requested organizational chart showing the beneficiary at the very top of the petitioner's organization. The chart also shows four individuals that were employed from 2000 to 2001, one other individual, who was employed only in 2001, and one individual, whose employment commenced in 2003. It is noted that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, any individuals that were not employed by the petitioner at the time the I-140 petition was filed cannot be considered in determining whether the petitioner is eligible to classify the beneficiary as a multinational manager or executive. Based on the organizational chart, the beneficiary's subordinates at the time the petition was filed consisted of a corporate secretary/technical advisor, a supervisor, a long haul driver, and a short trip driver. The remaining two individuals, by the petitioner's own admission, were not employed at the time the petition was filed and, therefore, will not be considered.

In a separate employee list, the petitioner named each employee and provided his/her brief job description, educational levels, salaries, and dates of employment. Based on the list, none of the employees achieved educational levels beyond high school.

The petitioner also submitted a separate organizational chart containing the names of independent contractors that have been and, in some cases, continue to be employed by the petitioner in its trucking and transportation

division. However, based on the dates indicated on the chart, none of the independent contractors commenced doing work for the petitioner prior to 2001.

Finally, the petitioner provided its quarterly wage report for the third quarter of 2000 during which the petition was filed. While the report names three individuals, including the beneficiary, the beneficiary is the only employee shown as having received payment. Thus, there is no indication that the petitioner had any employees at the time the petition was filed to relieve the beneficiary from having to engage in the nonqualifying tasks that are necessary for the petitioner's daily operation. Although the petitioner submitted a Form 1099 for the year 2000 showing that it paid nearly \$100,000 in miscellaneous income, there is no explanation as to who was/were the recipient(s) of these funds and what duties they performed to relieve the beneficiary from having to engage in nonqualifying tasks.

On February 15, 2005, the director issued the final notice revoking the prior approval of the petition. Specifically, the director referred to the beneficiary's weekly schedule of duties that were listed in a chart that was submitted in response to the initial RFE. The director stated that various duties named in the chart strongly suggest that the effort of additional employees is needed to perform such tasks as marketing, budgeting, accounting, and advertising. However, as properly pointed out by the director, the petitioner did not identify any employees who carry out these duties. The director also noted that the nominal amount paid in employee salaries during the year 2000 indicates that the petitioner offered little support to relieve the beneficiary from having to perform nonqualifying duties on a daily basis.

On appeal, counsel refers to the growth experienced by the petitioner since 2001 up through present day. However, as previously noted, the petition was filed in September of 2000. As such, the petitioner must establish its eligibility as of that date. *See Matter of Katigbak*, 14 I&N Dec. at 49. The fact that the petitioner experienced its most significant growth after the petition was filed strongly suggests that the petitioner was not ready to employ the beneficiary in a primarily managerial or executive capacity at the time of filing the Form I-140.

In examining the executive or managerial capacity of the beneficiary, CIS 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 stressed the beneficiary's overall discretionary authority and leadership role in guiding the petitioner to successful growth in its business. However, these factors do not define the beneficiary's duties at the time the petition was filed. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103. Furthermore, the petitioner's organizational chart is not supported by its quarterly wage report for third quarter of 2000, which shows the beneficiary as the only paid employee. It is noted that 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 the instant matter, the record strongly suggests that the petitioner lacked a sufficient support staff to relieve the beneficiary from having to daily engage in the nonqualifying operational tasks. Therefore, the AAO cannot conclude that at the time the petition was filed the beneficiary would have been employed primarily in a qualifying managerial or executive capacity.

The other issue in this proceeding is whether the petitioner has the ability to pay the beneficiary's proffered wage of \$40,222 annually.

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 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 has submitted a number of W-2 statements it issued to its employees. According to the beneficiary's W-2 statement for 1999, the petitioner paid the proffered wage of \$40,222. The petitioner also submitted several of its tax returns. Schedule E of the 1999 tax return also indicates that the beneficiary was compensated \$40,222 as a company officer. However, the beneficiary's corrected W-2c statement for the year 2000 indicates that the beneficiary was compensated \$36,585, which is nearly \$4000 less than the proffered wage and the beneficiary's compensation in 1999. Additionally, Schedule E of the petitioner's 2001 tax return shows that the beneficiary was compensated \$30,150 the year during which the petition was approved. This figure is more than \$10,000 less than the proffered wage. This factor coupled with the fact that the petitioner showed a negative net income of \$2,798 the year the petition was approved strongly suggests that the petitioner did not have the ability to compensate the beneficiary the proffered wage. Although the beneficiary was clearly compensated the proffered wage in 1999, the petition was not filed until September of 2000. Thus, the AAO must focus its attention on the petitioner's tax return for the year 2000, which reiterates the information found in the beneficiary's W-2c statement for 2000. Although the petitioner is not required to establish that it was paying the beneficiary's proffered wage prior to the petition's approval, the record clearly shows that even after the petition was approved the petitioner continued to compensate the beneficiary way below the proffered wage and showed a negative income, which strongly suggests that the petitioner was simply unable to compensate the proffered wage. Therefore, it must be concluded that the petitioner failed to establish that it was able to pay the proffered wage from the date the petition was filed.

Additionally, though not discussed in the director's decision, the record does not contain sufficient evidence to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity for one out the three years prior to entering the United States as a nonimmigrant. *See* 8 C.F.R. § 204.5(j)(3)(i)(B). Similar to the petitioner's description of the beneficiary's proposed duties, the description of the beneficiary's duties abroad lack sufficient detail to enable the AAO to gauge the nature of the beneficiary's daily activities. As previously stated, specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103.

While also not discussed in the director's decision, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner is required to submit evidence that the prospective United States employer has been doing business for at least one year.

The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

In the instant matter, the record contains numerous invoices that indicate business activity in 1998. However, the petition in this case was filed in September of 2000. As such, the petitioner must establish that it was engaged in "the regular, systematic, and continuous" course of business from September 1999 to September 2000. This relevant documentation has not been submitted. Therefore, the AAO cannot affirmatively conclude that the petitioner met the requirements of 8 C.F.R. § 204.5(j)(3)(i)(D).

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 two additional issues of ineligibility discussed above, this petition cannot be approved.

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 450 (BIA 1987)). In the instant matter, the circumstances described in the above precedent case are also present. Accordingly, revocation of the petition's approval was warranted in the instant matter.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 appeal is dismissed.