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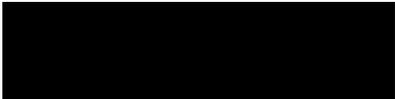
Date:

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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 approved on November 26, 2002. Upon further review, the Director, California Service Center, determined that approval many not have been warranted and properly issued a notice of his intent to revoke (NOIR) the approval of the petition. After reviewing the petitioner's response to the NOIR, the director issued a notice revoking the approval. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation engaged in the business of importing sports caps from its foreign affiliate and selling the merchandise to businesses throughout the United States. 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. The director revoked approval of the petition on the following independent grounds of ineligibility: 1) the beneficiary would not be employed in the United States in a managerial or executive capacity; 2) the beneficiary was not employed abroad in a qualifying managerial or executive capacity; and 3) the petitioner failed to establish its ability to pay the beneficiary's proffered wage.

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 has established that the beneficiary's employment abroad and proposed employment in the United States meet the statutory definitions of 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 May 3, 2002, which provided descriptions of the beneficiary's proposed job duties in the United States and the duties she performed during her employment abroad. As these descriptions have been included in the NOIR and in the final revocation notice, the AAO need not repeat them in this discussion.

In the request for additional evidence dated August 23, 2002, the director instructed the petitioner to provide a more detailed description of the beneficiary's duties abroad. The petitioner was instructed to be more specific.

Although counsel acknowledged the director's specific request for a more detailed description of the beneficiary's duties abroad, he responded by insisting that the prior description that was provided along with the I-140 petition contained enough information to establish that the beneficiary was employed in a qualifying capacity. As such, no additional information was provided.

During the course of follow-up procedures related to the beneficiary's filing of Form I-485 to adjust her status to that of a permanent resident, Citizenship and Immigration Services (CIS) reviewed the instant record of proceeding and determined that the petitioner may not have submitted sufficient evidence to warrant approval of the I-140 petition.

Accordingly, on January 3, 2005, the director issued a NOIR, informing the petitioner that CIS has received information about the petitioner and the beneficiary, which may warrant revocation of the petition's approval unless the petitioner is able to overcome the various grounds of ineligibility discussed in the notice.

Counsel objects to the NOIR, stating that any adverse information obtained by CIS and used as a basis for revoking the approval must be shared with the petitioner in order to allow the petitioner a meaningful opportunity to respond. While counsel's statement is correct, his objection is without merit, as the NOIR is based only on evidence and information that the petitioner provided. Although the AAO acknowledges that the director's ambiguous wording may have resulted in counsel's interpretation, a thorough reading of the notice indicates that the director's intent to revoke the petition's approval is based either on information submitted by the petitioner or the petitioner's failure to submit certain needed information. The notice does not discuss any adverse evidence or information that was previously unknown to the petitioner.

Specifically, the notice repeats the description of duties provided in the initial support letter dated May 3, 2002 and states that while the petitioner "seeks to make it appear" that the beneficiary's duties are within a qualifying capacity, the petitioner's organizational structure and nature of business must also be considered. While the director's general statement is valid, the AAO acknowledges counsel's objection to the choice of wording, which can be interpreted in a way that suggests fraudulent intent on the part of the petitioner to make an invalid claim seem valid. However, in the context of the director's entire statement, it appears that the director simply meant to express his understanding of the petitioner's apparent wish to provide a job description that establishes the beneficiary's employment within a qualifying capacity. A closer review of the overall statement surrounding the questionable wording indicates that the director sought to inform the petitioner of his intent to consider other factors, aside from a description of job duties, prior to making the final determination as to whether the beneficiary would be employed in a qualifying capacity.

Namely, the director stated that the petitioner failed to provide information about the job duties of employees working for the petitioner at the time of the petition's filing. The director also stated that the petitioner did not indicate the education required for the subordinate positions or the hours worked by the subordinate employees. Although counsel responded, acknowledging the director's comments, he concluded that information regarding the beneficiary's support staff is irrelevant and questioned the director's knowledge of the law in light of the director's subsequent statements emphasizing the petitioner's failure to establish that the beneficiary's subordinates are professionals within the regulatory definition. *See* section 101(a)(32) of the

Act, 8 U.S.C. § 1101(a)(32) and 8 C.F.R. § 204.5(l)(2) defining profession and professional, respectively. Counsel properly pointed that the director cited an incorrect section of the Code of Federal Regulations. However, his argument that the definition found in 8 C.F.R. § 204.5(l)(2) applies *only* to skilled workers, professionals, and other workers seeking benefits under section 203(b)(3) of the Act is without merit. The term profession is defined in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and, wherever that term is relevant, applies uniformly to anyone seeking an employment-related immigration benefit. The definition states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). The definition of professional, as discussed in 8 C.F.R. § 204.5(l)(2) merely reiterates what has been established by precedent case law and is entirely consistent with the definition of profession as defined in the Act. Thus, while counsel may argue that the terms profession and professional are irrelevant in this matter, there is no legal ground for the argument that the application of these definitions is restricted to a certain category of workers.

In the instant matter, counsel asserted that the petitioner is not required to establish that the beneficiary manages professional subordinates if it can be established that the beneficiary manages an essential function and functions at a senior level. Counsel stated that the beneficiary is at the highest level of the petitioning organization and has discretion over all "major areas of the business." However, 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. 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. 593, 604 (Comm. 1988)). Despite counsel's assertions, counsel failed to provide the necessary information to allow CIS to conclude that the beneficiary would be employed in the capacity of a function manager. Regardless of the various deficiencies in the NOIR, the notice made several mentions of the petitioner's failure to provide a detailed description of the beneficiary's proposed job duties and a detailed description of the beneficiary duties abroad.

However, throughout the response, counsel maintained that the evidence and information previously provided was sufficient to establish the petitioner's eligibility to classify the beneficiary as a manager or executive. Counsel did not add any further information regarding any of the beneficiary's past or proposed duties.

On February 10, 2005, the director issued the final revocation notice concluding that the petition was approved in error, as the petitioner failed to establish eligibility at the time of filing. Although the record supports the director's decision, the director made various erroneous comments that do not accurately reflect the statutes or regulations. Namely, on page four of the decision, the director stated that the petitioner failed to establish that the beneficiary is managing professionals and noted that "the beneficiary appears to be serving as a first-line supervisor because the organizational chart indicates that she has direct contact with the

subordinate staff." This statement fails to acknowledge that the beneficiary's subordinates may be managers or supervisors and erroneously implies that merely having contact with subordinate staff renders the beneficiary a first-line supervisor.

The director also noted that the petitioner failed to provide detailed information regarding the specific goals and policies the beneficiary established and the discretionary decisions she exercised within the six months following her entry into the United States. While this information may be relevant for the purpose of establishing the beneficiary's eligibility to continue classification as an L-1A intracompany transferee, there are no statutory or regulatory requirements that require a petitioner to establish the beneficiary's eligibility as of the date of entry into the United States. There is no indication as to the significance of this information for the purpose of determining the petitioner's eligibility to classify the beneficiary as a multinational manager or executive under section 203(b)(1)(C) of the Act.

Accordingly, both of the erroneous statements discussed above are hereby withdrawn. Notwithstanding the withdrawal of the director's errors, the revocation accurately points out the petitioner's failure to provide sufficient information regarding the beneficiary's proposed duties in the United States and the duties performed during her employment abroad. The director specifically stated that the job descriptions provided were too general and failed to convey an understanding of what the beneficiary would be doing on a daily basis and what the beneficiary had been doing on a daily basis during her employment abroad.

On appeal, counsel expresses his strong disagreement with the director's conclusion and places great emphasis on the director's various blunders. However, even after the AAO's acknowledgement and withdrawal of the director's various improper comments, the petitioner is left with job descriptions that are not detailed enough to allow the AAO to gauge what the beneficiary had been doing abroad and would be doing in the United States on a daily basis. 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).

In the instant matter, counsel is so preoccupied with the director's mistakes that he fails to acknowledge and address the valid points made in the NOIR and subsequently in the revocation regarding the real deficiencies that prevent the petitioner from establishing eligibility to classify the beneficiary as a multinational manager or executive. Rather than providing additional details to define the broad job responsibilities provided thus far, counsel merely insists that the descriptions provided are sufficient and should be accepted as such. The petitioner fails to state what actual duties are involved in directing, guiding, coordinating, and developing the company's policies. The petitioner also indicated that the beneficiary would establish the guidelines and plans for the future growth of the business. While these are all responsibilities, which strongly suggest that the beneficiary has a heightened degree of discretionary authority, none of them assist in the AAO's understanding of what the beneficiary would be doing in his proposed position. 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Furthermore, while the petitioner provided an organizational chart, which indicates that the beneficiary's immediate subordinate is a general manager, and supporting tax documentation, which indicates that the petitioner has a support staff, there is no indication as to the duties they performed or an explanation as to how they will help relieve the beneficiary from having to perform nonqualifying tasks. Indeed, counsel has a

valid point in stating that the beneficiary is not required to have any subordinates in order to qualify for the benefit sought. However, the petitioner must establish that its daily operational tasks are primarily being performed by someone other than the beneficiary. This essential point has not been made clear in the record of proceeding. The AAO cannot assume that the beneficiary primarily performs qualifying duties simply based on the fact that the petitioner's organizational chart shows a subordinate staff. The petitioner must, when asked, provide information regarding the duties performed by the beneficiary's support staff as well as the duties of the beneficiary herself. This has not been done in the instant proceeding.

Similarly, the record lacks a detailed description of the beneficiary's duties abroad. As with the description of the beneficiary's proposed duties, the petitioner provides a description that is replete with general responsibilities that convey the notion that the beneficiary had a heightened degree of discretionary authority during her overseas employment. However, the petitioner fails to clarify the actual duties involved in maintaining control and direction over the foreign entity's policies and business strategy. Although the petitioner makes reference to "the managers and other responsible staff" that purportedly carry out the daily operational tasks, the petitioner fails to clarify the duties of the beneficiary's subordinates overseas. Such information is relevant and even necessary in order to determine how the beneficiary was relieved from having to primarily perform nonqualifying tasks. As previously stated, the AAO cannot assume that the beneficiary's duties are primarily managerial or executive by relying on the foreign entity's organizational chart. As previously stated, the actual duties themselves reveal the true nature of the employment. *Id.*

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been employed abroad and would be employed in the United States in a primarily managerial or executive capacity. The record fails to provide adequate descriptions of the beneficiary's duties and the duties of her subordinates both abroad and in the United States. As such, the petitioner has failed to establish that the beneficiary's duties have been and would be primarily directing the management of the organization.

The other issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary's proffered wage. 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 part six of the I-140 petition, the petitioner stated that the beneficiary would be paid \$750 per week, which is equivalent to \$39,000 on an annual basis.

In the NOIR, the director stated that the petitioner has not submitted sufficient evidence to establish its ability to pay the beneficiary's salary since the petitioner's priority date in 2002 continuing through to 2004. The director specifically noted that the petitioner did not submit its quarterly tax returns, the issued W-2 wage and tax statements, or its W-3 statements for any of those years.

In response, the petitioner submits the various available tax documentation, with the exception of a Form 1120 U.S. Corporation Income Tax Return for 2004. However, counsel vehemently disputed the director's inference that such documentation should have been submitted earlier and points out that much of the mentioned tax documentation was not available in May of 2002 when the I-140 petition was filed. Counsel's point is well taken. The director cannot require the petitioner to submit documentation that is unavailable and to account for its finances for a time period that had not yet occurred at the time of filing. Thus, the petitioner was reasonable in initially submitting the only tax return it had available at the time of filing—the tax return for 2001. However, the fact remains that the petitioner is nevertheless responsible for providing sufficient documentation establishing its ability to pay the beneficiary's proffered wage as of May 2002 and continuing until such time as the beneficiary obtains lawful permanent residence.

In the instant matter, the petitioner has submitted the relevant tax documentation. Namely, the petitioner has submitted the beneficiary's W-2 statement for 2002, which indicates that the beneficiary was compensated \$38,500 the year the petition was filed and approved. The petitioner also provided the beneficiary's W-2 statement for 2003 showing that the beneficiary was compensated \$58,200. While both W-2 statements indicate that the beneficiary was paid the proffered wage, they conflict with the information provided in the petitioner's 2002 and 2003 tax returns. Specifically, the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2002 indicates that the beneficiary was compensated \$48,700 and the same document for the following year indicates that the beneficiary was compensated \$60,000 in 2003. Thus, while the submitted documents suggest that beneficiary was paid at least the proffered wage in 2002 and 2003, the discrepancies between the amounts indicated in the tax returns as opposed to those provided in the wage statements lead to questions regarding the credibility of the information provided therein. Regardless of the assertions made in the relevant documentation, the AAO cannot rely on inconsistent documentation to affirmatively determine the petitioner's ability to pay the beneficiary's proffered wage. 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. 582, 591-92 (BIA 1988). In the instant matter, the record lacks any plausible explanation for the considerable inconsistencies cited above.

Counsel emphatically disapproves of the director's conclusion and challenges his right to revoke approval of the instant petition, claiming that the director failed to show good and sufficient cause for the revocation. However, this argument is without merit. Despite the errors in the NOIR and in the final notice of revocation, the director clearly based his decision in large part on the petitioner's failure to submit adequate descriptions of the beneficiary's duties as required.

Counsel continues, asserting that the officer who adjudicated the instant matter had no specific authority to revoke the approved petition. However, pursuant to the regulation at 8 C.F.R. § 205.2(a), "Any Service officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground . . . when the necessity for the revocation comes to the attention of [CIS]." Thus, this argument is also without merit.

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

Beyond the decision of the director, the record contains conflicting documentation regarding the petitioner's ownership. Namely, schedule E of the petitioner's 2003 tax return shows that the beneficiary is the owner of 100% of the petitioner's shares. This conflicts with the petitioner's stock certificates, which indicate that the petitioner's ownership is comprised of four different individuals, each directly owning a portion of the petitioner's stock. As previously stated, the petitioner must 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.

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 additional issue discussed in the above paragraph, this petition cannot be approved.

Despite counsel's vehement objections to the director's revocation of the previously approved petition, the record shows that good and sufficient cause warranted the director's action and, as stated above, the director was vested with the authority necessary to take such action.

When the AAO denies a petition or revokes approval of 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 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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.