

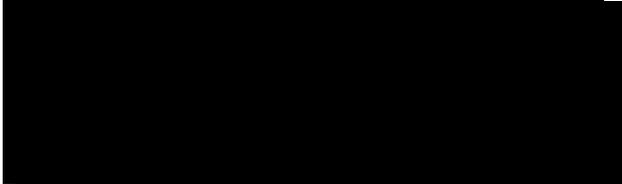


U.S. Citizenship
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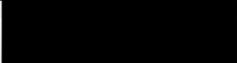
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Office: CALIFORNIA SERVICE CENTER

Date: JUN 01 2006

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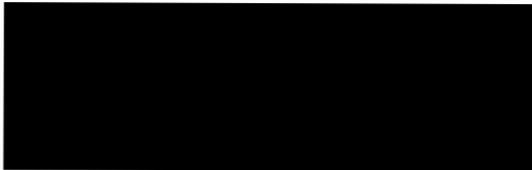
Petitioner:



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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was approved on October 5, 1998. Upon further review, the Director, California Service Center, issued a notice of his intent to revoke and subsequently revoked the approval of the petitioner's Form I-140. The matter is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded for further consideration.

The petitioner was incorporated in 1995 in the state of California. In a letter dated September 3, 1998, the petitioner stated that it is a subsidiary of [REDACTED] located in China. 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.

Pursuant to an overseas investigation conducted on November 19, 2002, a report was issued on December 4, 2002 to discuss the investigator's findings, which were based on interviews conducted with the foreign entity's secretary and personnel manager.

On July 5, 2005, the director notified the petitioner of his intent to revoke the approval of the petitioner's Form I-140, citing various facts from the investigation report. The same facts subsequently served as the basis for the director's final revocation of the approval of the petitioner's Form I-140.

However, upon review of the record, the AAO concludes that the director has failed to fully comply with 8 C.F.R. § 103.2(b)(16)(i), which states, in part:

If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered

Accordingly, this matter is remanded back to the service center, where the director shall review the report of investigation and either present the petitioner with a copy of the report or include all relevant facts in a notice to the petitioner, thereby allowing the petitioner a meaningful opportunity to respond to the adverse findings.

Additionally, a review of the record shows that the petitioner may also be ineligible to classify the beneficiary as a multinational manager or executive based on a number of issues that were not addressed by the director. More specifically, the record, as presently constituted, does not establish that the beneficiary would be primarily employed in a managerial or executive capacity as defined in sections 101(a)(44)(A) and (B) of the Act, respectively.

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, the petitioner has provided Citizenship and Immigration Services (CIS) with a cursory review of the beneficiary's position without providing an adequate understanding of what actual duties the beneficiary would have performed at the time the Form I-140 was filed. While the petitioner generally indicates that the beneficiary's discretionary authority fits the definition of managerial or executive capacity, these definitions are meant to serve only as guidelines to be applied to a specific list of duties, which the petitioner has not provided. 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 director shall also be cautioned to take note of the petitioner's organizational hierarchy and staffing levels at the time the Form I-140 was filed. Part 5 of the Form I-140 indicates that the petitioner had a total of three employees, including the beneficiary, at the time of filing. While the petitioner's staffing levels and organizational hierarchy should not be the sole basis for a determination regarding the petitioner's eligibility, these factors can and should be considered for the purpose of determining whether the petitioner was adequately staffed to relieve the beneficiary from having to perform primarily nonqualifying tasks.

The AAO further notes that in the September 3, 1998 letter submitted in support of the Form I-140, the petitioner stated that it was in the process of moving its business operation from California to Indianapolis, Indiana at the time of filing. The petitioner stated that it would "start full business operation" once the move was completed, which the petitioner projected would have taken place by October of 1998. As the Form I-140 was filed prior to the completion of the move, the petitioner's statement indicates that it may not have been fully operable as of September 11, 1998 when the Form I-140 was filed. Thus, it is unclear what duties the beneficiary would have performed at a time when the petitioner was not fully operable.

Furthermore, the petitioner's statements suggest that the petitioner may not have been doing business for one year prior to filing the Form I-140 as required in 8 C.F.R. § 204.5(j)(3)(i)(D). Pursuant to 8 C.F.R. § 204.5(j)(2) *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. The record lacks sufficient evidence to suggest that the petitioner met this requirement at the time of filing the Form I-140.

Finally, the record contains conflicting evidence as to the petitioner's date of incorporation. Various correspondence throughout the record indicate that the petitioner was incorporated on October 23, 1995. However, the petitioner's letter from September 23, 1998 indicates that the petitioner was incorporated in December of 1995. Although the record contains an articles of incorporation, the document is in reference to another company with no apparent relation to the petitioner. The director shall instruct the petitioner to provide documentation resolving the inconsistency regarding its date of incorporation.

Accordingly, the AAO will withdraw the director's decision. However, the record as presently constituted does not warrant an approval of the petition. Therefore, the case will be remanded for a new decision, which shall take proper notice of the issues discussed above. The director is instructed to issue a new notice of intent to revoke, fully complying with 8 C.F.R. § 103.2(b)(16)(i). The director may also request any additional evidence he deems necessary in order to determine the petitioner's eligibility.

ORDER: The decision of the director dated December 13, 2005 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision, which, if adverse, shall be certified to the AAO for review.