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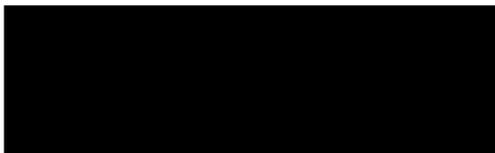
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE:

EAC 05 178 50930

Office: VERMONT SERVICE CENTER

Date:

OCT 02 2007

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The approval of the preference visa petition was revoked by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation seeking to employ the beneficiary as its president and general manager.<sup>1</sup> 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 determined that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity and revoked the approval of the petition.

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 primary issue in this proceeding is whether the petitioner established that it would employ the beneficiary in a managerial or executive capacity.

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<sup>1</sup> It should be noted that, according to the Texas Comptroller of Public Accounts, the petitioner is not currently in good standing in Texas due to its failure to satisfy all state tax requirements. Therefore, regardless of whether the petitioner's tax issues in Texas can be easily remedied or not, it raises the critical issue of the company's continued existence as a legal entity in the United States.

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 Form I-140, the petitioner submitted a letter dated February 17, 2005 signed by an official of the foreign entity claiming to have a qualifying relationship with the petitioning entity. The letter stated that the petitioner currently has ten employees and consists of three retail enterprises—a grocery store, a restaurant, and a beer and beverage store. The letter also included the following statements regarding the beneficiary's proposed employment:

[The beneficiary] manages all three of the business currently owned by [the petitioner]. But [sic] he does not work in the grocery store, the restaurant, or the beverage store. He devotes

100% of his time to the management and direction of the business and the discovery and acquisition of additional businesses. All business managers report to him. He is responsible for all accounting. He has exclusive authority to hire and[,] if necessary[,] release employees. He is ultimately responsible for all buying although he generally follows the recommendations of his in[-]store managers. He approves all vendors. He is responsible for the payment of all bills. He deals with all professional[s] providing services to the company, including bankers, accountants, lawyers, insurance providers and other agent[s]. he is responsible for maintaining all necessary government licenses and permits and deals directly with agencies of government interacting with the businesses. He makes all decisions relating to advertising and other promotions.

The petitioner also provided an organizational chart identifying nine employees and corresponding positions within the petitioner's hierarchy, which is headed by the beneficiary, who is depicted at the highest management level. The beneficiary's three direct subordinates are shown to be a manager, a cashier, a secretary, and three consultants. In a separate chart, which applies specifically to the petitioner's beer store, the beneficiary is again identified as the senior-most employee carrying the title of president/manager. His direct subordinates with regard to this hierarchy include a bartender/cashier, who was previously identified as a manager in the first chart, and a secretary, who was also identified as the secretary within the prior organizational hierarchy. The petitioner did not explain how either of the organizational charts submitted applies to the claimed restaurant business, as none of the position titles named in either chart is suggestive of employees who work in the food service industry.

On October 5, 2005, Citizenship and Immigration Services (CIS) received the petitioner's response to the request for additional evidence (RFE), which instructed the petitioner to provide a more detailed description of the beneficiary's proposed job duties, including an hourly breakdown of time that would be spent on each of the listed duties. It is noted that rather than complying with the director's specific instructions for an hourly breakdown, the petitioner provided a percentage breakdown, which accounts for only 90% of the beneficiary's time. The position breakdown included the following:

- 5% Promotes [the] organization in the marketplace[.]
- 5% Acts as liaison between the company and its Indian parent company[.]
- 5% Analyzes [the] division or department budget requests to identify areas in which reductions can be made, and allocates [the] operating budget[.]
- 3% Confers with administrative personnel, and reviews activity, operating and sales reports to determine changes in programs or operations required.
- 5% Confers with company officials to plan business objectives, to develop organizational policies to coordinate functions and operations between divisions and departments[.] and to establish responsibilities and procedures for attaining objectives.
- 20% Coordinates activities of divisions, such as convenience store division, deli division, beer division, consultancy division, etc. to effect operational efficiency and economy[.]

- 8% Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity[.]
- 10% Directs and coordinates promotion of the services of the company to develop new markets, increase [the] share of [the] market, and obtain [a] competitive position in the industry[.]
- 5% Directs preparation of directives to division or department administrators outlining policy, program, or operations changes to be implemented[.]
- 5% Evaluates [the] performance of executive[s] for compliance with established policies and objectives of the firm and contributions in attaining objectives[.]
- 5% Plans and develops organization policies and goals, and implements goals through subordinate administrative personnel[.]
- 4% Plans and develops public relations policies designed to improve the company's image and relations with customers, employees, and the public[.]
- 5% Plans, develops, and establishes policies and objectives of the business organization in accordance with [b]oard directives and the corporate charter[.]
- 5% Reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions[.]

Despite the fact that the petitioner's Form I-140 was initially approved, the record was reviewed again and a notice of intent to revoke (NOIR) was issued on May 19, 2006. The petitioner was informed that based on further review of the documentation submitted, the petition may have been approved in error. In order to determine whether the beneficiary would be employed in a qualifying managerial or executive capacity, the director instructed the petitioner to provide the following: 1) additional evidence establishing the management and personnel structure of the U.S. entity; 2) the job title and job duties of the beneficiary's subordinate employees; 3) the W-2s issued by the petitioner in 2004 and 2005; and 4) the petitioner's first two quarterly wage reports for 2005.

In response, counsel submitted a letter dated June 16, 2006 in which she stated that the beneficiary "manages and oversee[s] various functions such as accounting and interfacing with other professionals on matters relating to the business[,] such as lawyers, bankers, insurance providers and vendors["] representatives at the corporate level." She further stated that the beneficiary seeks out and negotiates contracts for the purchase of new businesses. While the AAO takes note of the additional graph representing the hourly breakdown of the beneficiary's job responsibilities, which has been provided in response to the NOIR, a review of this document shows that the prior percentage breakdown is identical to the one more recently submitted. The only difference is that the more recent submission is a breakdown of hours, which shows that the beneficiary's day consists of a total of 36 hours, while the prior submission was a percentage breakdown. No further

information has been added to describe the actual job duties performed by the beneficiary in his proposed position with the U.S. petitioner.

On September 11, 2006, the director issued a final decision revoking the prior approval of the petition. While the AAO concurs with the director's overall determination regarding the petitioner's eligibility, the director made certain observations, which the AAO must specifically address. First, the director determined that the petitioner failed to comply with a request for an hourly breakdown of the duties of the beneficiary's subordinates. The director's comment suggests that such a request was actually made. However, a review of the record indicates that the director did not request this information with regard to the beneficiary's subordinates. Second, the director noted that the descriptions of subordinate employees' duties do not indicate that they occupy managerial or executive positions. However, section 101(a)(44)(A)(ii) of the Act requires that the beneficiary's subordinates must be managerial, professional, or supervisory employees. There is no statutory requirement that the beneficiary's subordinates must be executive-level employees. As such, these erroneous comments by the director are hereby withdrawn.

Notwithstanding the director's flawed analysis, the AAO finds that based on the facts and documentation presented in the present matter, the revocation was warranted.

On appeal, counsel challenges the director's decision, claiming that the petitioner's failure to submit its 2005 tax return and a more detailed description of the beneficiary's duties is not a sufficient basis for revoking a prior approval. However, counsel's argument lacks merit. First, there is no indication that the petitioner's failure to provide a 2005 tax return was a contributory factor in the revocation. In reviewing the director's statements, it is clear that the director was merely making note of the fact that a 2005 tax return was not submitted. There is no indication that this factor led to any of the adverse findings cited in the decision. Second, contrary to counsel's erroneous statement, providing a detailed description of the beneficiary's proposed employment is essential when seeking to classify an alien as a multinational manager or executive. As such, 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). The significance of this information is further stressed in preceding case law, which clearly states that 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). Counsel's failure to assess the direct relevance of a detailed description of proposed job duties may explain the petitioner's failure to provide the necessary information. However, counsel's lack of understanding does not excuse the petitioner's neglect in providing information that is crucial for the adjudication of the present visa petition.

Next, counsel argues that CIS has imposed unreasonable time limits for rebutting its adverse findings, suggesting that CIS acted *ultra vires* to the relevant statutory provisions. In support of this argument, counsel asserts that administrative agencies are not given deference, where the issue is the plain meaning of a federal statute. However, the relevant time limit for rebutting the director's findings in the case of a final revocation is spelled out in 8 C.F.R. § 205.2(d). Counsel has provided no evidence to establish that this section of the federal regulations in any way conflicts with precedent case law or the relevant statutory provisions. Section 205 of the Act, 8 U.S.C. § 1155, 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 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 final portion of counsel's brief, counsel asserts that CIS violated the petitioner's and the beneficiary's constitutional due process rights first, by revoking an approval upon which the beneficiary has relied for over five years and second, by discriminating against small companies in favor of large ones. Again, counsel's arguments are without merit. With regard to the beneficiary's detrimental reliance and implied estoppel argument, the approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 582. With regard to the discrimination argument, counsel has failed to establish CIS's unequal treatment of companies based on their size. As previously discussed, one of the most crucial factors in establishing eligibility for the immigrant classification sought in the present matter is the provision of a detailed description of the beneficiary's proposed job duties. Thus, regardless of company size, all petitioners must provide sufficient specificity as to the daily job duties before any decision can be made regarding the beneficiary's employment capacity.

In the present matter, the description of the beneficiary's proposed employment is entirely lacking in detail and uses broad, overreaching terminology that is suggestive of a complex organizational hierarchy, which has not been established. Contrary to counsel's assertions, the first step to establishing eligibility is providing an adequate description of the beneficiary's proposed daily job duties. In the present matter, counsel has disregarded this crucial factor almost entirely and, as evidenced by the deficient description provided thus far, so has the petitioner. Namely, the petitioner has failed to specifically discuss what goals and policies the beneficiary would establish within the petitioner's modest retail operation, what specific public relations policies he would devise, or how exactly he would work through an administrative staff (which appears to be deficient based on the organizational chart). Although the petitioner also indicated that the beneficiary would evaluate the performance of executives, it is unclear who within the petitioner's given organizational structure would be considered an executive employee. The petitioner has also failed to specify what financial programs the beneficiary would coordinate and oversee, nor has the petitioner stated how, without actually participating in the retail operations' daily functions, the beneficiary would coordinate the activities of the convenience store, the deli, and the beer store. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives, as the petitioner has done in the present matter, is not sufficient.

Furthermore, even if the petitioner were able to provide a more detailed set of proposed job duties, the petitioner must still establish who, within the context of its particular business operation, performs the daily operational tasks such that the beneficiary is permitted to primarily carry out duties of a qualifying managerial nature. Thus, contrary to counsel's argument, CIS does not favor large organizations over small ones. Rather,

the issue of a support staff must be addressed in order to establish whether the petitioner is adequately prepared to relieve the beneficiary from having to primarily perform operational, or non-qualifying tasks. In addition, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003).

In the present matter, where the petitioner has failed to provide a specific set of job duties, but instead has provided vague job responsibilities that refer to an organizational hierarchy, whose existence is not corroborated by the evidence of record, the director has no choice but to question the validity of the petitioner's claim. While the size of the petitioning entity cannot be the sole factor considered in determining a petitioner's eligibility, when considered in light of other factors, such as the beneficiary's duties, the nature of the petitioner's business, and the supporting documentation submitted, the totality of the circumstances presented by the petitioner strongly suggest that the beneficiary would be required to primarily participate in the daily operational functions of the petitioner's retail operations. 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 "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Based on the evidence and information furnished, the AAO cannot conclude that the beneficiary would primarily perform duties within a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

*Affiliate* means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

\* \* \*

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50

joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the present matter, the petitioner claims to be a wholly owned subsidiary of Rinku Commercial Carrier, Ltd., the beneficiary's foreign employer, and submits a stock certificate showing that this foreign entity has been issued all of the petitioner's outstanding shares. However, Schedule E of the petitioner's 2003 and 2004 tax returns both show the beneficiary as owner of 100% of the petitioner's stock. 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. at 591-92. No documentation has been provided to resolve this considerable inconsistency. As such, the revocation is proper for this additional reason.

Second, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. 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 present matter, the petitioner filed its Form I-140 in May 2005. Therefore, the petitioner must establish that it had been doing business since May 2004, 12 months prior to filing its Form I-140. In the present matter, while a few purchase invoices have been submitted, only one appears to account for the relevant time period. Other invoices submitted, reflect business transactions that took place after the petition was filed. However, 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). In light of the retail nature of the petitioner's business, it is unclear why the record lacks documentation to show that the petitioner was purchasing and selling merchandise on a "regular, systematic, and continuous" basis for the requisite one year period. See 8 C.F.R. § 204.5(j)(2). Nevertheless, as the petitioner has failed to establish that it has been doing business as required by the regulations, the petition should not have been approved, and it must be revoked for this additional reason.

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 grounds of ineligibility discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown 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 at 1043, *aff'd*, 345 F.3d 683.

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.