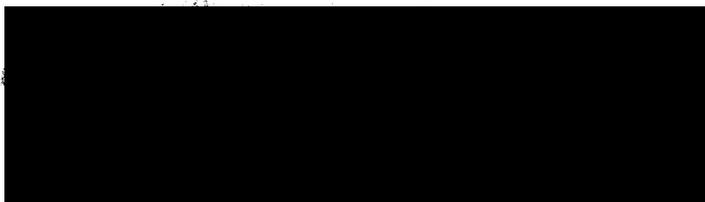


D7

U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



File:



Office: CALIFORNIA SERVICE CENTER

Date:

FEB 26 2004

IN RE:

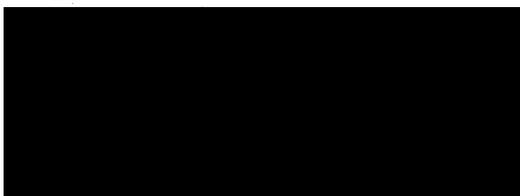
Petitioner:

Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



PUBLIC COPY

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center initially approved the employment-based visa petition. Upon subsequent review, the director properly issued a notice of intent to revoke, and ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in January 1996. It provides tourism services, advertising services, and engages in international trade. It seeks to employ the beneficiary as its vice-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 initially approved the petition. Upon subsequent review, including documentation submitted in response to a request for further evidence and in rebuttal to a notice of intent to revoke, the director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity. The director also determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer. After properly issuing a notice of intent to revoke, the director revoked the approval of the petition on March 7, 2003.

On appeal, counsel for the petitioner asserts that the beneficiary performs managerial duties for the petitioner and that the petitioner has established a qualifying relationship with the beneficiary's foreign employer.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this

classification. The prospective employer in the United States must furnish a job offer in the form of a statement that 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. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established that the beneficiary will be employed 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.

The petitioner's Form I-140, Immigrant Petition for Alien Worker, indicated that the beneficiary would hold the position of vice-president. The petitioner's letter in support of the petition indicated that the beneficiary "is now working as President of [the petitioner]." The petitioner has also consistently described the beneficiary's position as follows:

[The beneficiary] assist[s] the President in formulating and administering the policies and objectives of the company's business in tourism, advertising and foreign trade. He is in charge of developing organizational policies to coordinate functions and operations of different departments of the company. In addition, he reviews activity reports, promotion proposals and financial statements to determine progress and status in attaining objectives. [The beneficiary] is also directly in charge of [the] Department of Tourism and makes plans of international tourism. He hires managers and executives and evaluates their performance for compliance with established policies and objectives of the company. Finally, he maintains business activities coordination with the overseas parent company.

As discussed in detail below, the beneficiary, thus, has two inconsistent job titles: president and vice-president.

The petitioner also stated on its Form I-140 that it employed five individuals. The petitioner provided an employee list indicating that the five individuals held the positions of president, vice-president, computer system analyst, and two director's positions. The petitioner stated that the president was in charge of the overall management of the company's business activities and the vice-president assisted the president in the daily operation of the company business activities. The petitioner indicated that the two directors were in charge of the work in the tourism service department and the work in the international trade department and the computer system analyst was responsible for maintaining the computer network systems and testing software on the computer system. The petitioner provided its 1996 Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, for two individuals, the beneficiary and the individual holding the president's position. The IRS Forms W-2 showed that the salaries of the two individuals totaled \$27,400. The petitioner's IRS 1996 Form 1120, U.S. Corporation Income Tax Return showed that the petitioner had paid \$31,300 in salaries.

The director approved the petition based on this limited and inconsistent information.

Upon review of the record in conjunction with the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, the director issued a request for evidence. The director requested the beneficiary's position description, copies of California Forms DE-6, Quarterly Wage Report, and a statement indicating each employee's name, title, assigned duties, and hours worked.

In response, the petitioner stated that it employed five individuals. The petitioner provided an organizational chart showing that the individual formerly holding the position of president had been demoted to the position of sales. This individual now reported to the manager of the tourism department who in turn reported to the beneficiary as vice-president. The individual formerly holding the position of computer systems analyst now held the position of tourism department manager. The chart also reflected a tourism guide department with a manager and fifteen tourism guides. The petitioner's California Forms DE-6 showed three employees, the individuals holding the positions of president, vice-president, and tourism department manager or computer systems analyst, depending on the organizational chart considered.

The director issued a notice of intent to revoke approval of the petition on December 7, 2002. The director observed that the petitioner had substantiated the employment of three individuals. The director determined from a review of the petitioner's 2002 organizational chart and the petitioner's California Forms DE-6 that the beneficiary supervised one individual. The director determined that the petitioner had not established that the beneficiary supervised a professional employee and had not established that the beneficiary exercised or would exercise significant authority over generalized policy.

In rebuttal, counsel for the petitioner asserts that the director cannot re-adjudicate the beneficiary's classification unless the initial classification involved gross error. Counsel states that the beneficiary "has been working as President of the petitioning company." Counsel repeats the previously provided description of the beneficiary's duties and cites unpublished decisions in support of the claim that the beneficiary is performing duties that would be performed by a manager or executive.

The director determined that the petitioner had not submitted sufficient evidence to overcome the grounds for revocation.

On appeal, counsel for the petitioner provides the same statements and assertions submitted in rebuttal.

Counsel's assertions are not persuasive. First, the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

Second, counsel for the petitioner indicates that the beneficiary's title is president, although counsel describes the beneficiary's duties as assisting the president. The petitioner's organizational chart shows the beneficiary in the position of vice-president. The consistency of counsel's reference throughout the years to the beneficiary as president, and the ease with which the petitioner promotes and demotes the individuals it claims to employ raise questions regarding the legitimacy of the petitioner's organizational structure. 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).

Third, when examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(I)(3)(ii). The petitioner has generally described the beneficiary's duties. The petitioner indicates that the beneficiary assists the president in formulating and administering policies, is in charge of developing organizational policies, and hires managers and executives. These duties do not provide a comprehensive description of the beneficiary's daily duties. Moreover, these phrases borrow liberally from the definition of managerial and executive capacity. *See* section 101(a)(44)(A)(iii) and section 101(a)(44)(B)(ii) of the Act. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Finally, as the director observed, the petitioner has not provided evidence to substantiate that it has ever employed more than three individuals at any given time. The petitioner has not provided evidence that it employs a sufficient number of individuals, based on its reasonable needs, to relieve the beneficiary from primarily performing operational and administrative tasks. 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).

Furthermore, counsel's citation to unpublished cases carries little probative value. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished cases. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c).

In sum, the petitioner has not provided sufficient documentary evidence that the beneficiary directs the management or manages the organization or an essential function of the organization, rather than performs the petitioner's essential operation and administrative tasks. The petitioner has not provided evidence that the beneficiary supervises and controls other supervisory, professional, or managerial employees. The petitioner has not established that the beneficiary's assignment is primarily managerial or executive.

The second issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act.

The petitioner claims that it is a wholly owned subsidiary of the foreign entity. In support of this claim, the petitioner provided stock certificate number "1" issued to Hua Run International Advertising Co., Ltd., for 6,000 shares. The petitioner's stock ledger shows that this is the only stock issued. The petitioner's Notice of Transaction filed with the California Commissioner of Corporations shows that the stock was issued for a consideration of \$60,000 in money. The petitioner also provided a summary of wire transfers from various companies and individuals.

The director, in the notice of intent to revoke, observed that a number of individuals and companies had provided funds to the petitioner. The director questioned the relationship of the individuals and companies to the beneficiary's foreign employer and the resulting actual ownership and control of the petitioner.

In rebuttal to the notice of intent to revoke, counsel for the petitioner stated that most business entities in China are not authorized to wire foreign currency out of China, thus requiring Chinese entities to rely on business contacts outside of China to make initial investments for them. Counsel cited an unpublished decision to substantiate its claim that the initial investment is not required to be made directly from the parent company. The director determined that the petitioner had not offered evidence to explain the various transactions and thus had not overcome the grounds for revocation. On appeal, counsel asserts that the petitioner had properly cited the AAO's past decisions.

Counsel's assertion is not persuasive. As stated above, unpublished decisions carry little probative value and are not binding on CIS in its administration of the Act. See 8 C.F.R. § 103.3(c). Furthermore, as the director determined, the petitioner fails to explain the transactions. It is not possible to determine from the record which transactions were made in support of the claimed parent company's initial investment and which transactions were made as payment for the petitioner's services.

The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and a foreign entity for purposes of this immigrant visa classification. *Matter of Church Scientology International*, *supra*; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant proceedings). Moreover, as ownership is a critical element of this visa classification, CIS may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. In this regard, not only has the petitioner failed to provide explanations regarding the various wire transfers to document the investment made by the purported parent company, but the petitioner's IRS Forms 1120 contain unexplained information. The petitioner's initial IRS Form 1120 at Schedule L Line 22 shows that common stock had been issued and valued at \$60,076. The petitioner's later IRS Forms 1120 at Schedule L Line 22 show common stock issued and valued at \$90,076. There is no accompanying explanation regarding the increased stock value. As stated above, 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*, *supra*.

The petitioner has not provided sufficient evidence that its claimed parent company provided funds to establish actual ownership and control of the petitioner. The petitioner has not provided evidence to overcome the director's decision on this issue.

Counsel also asserts in rebuttal and on appeal that the director may not re-adjudicate a petition unless the initial classification involved gross error. Counsel's assertion is not persuasive. Section 205 of the Act, 8 U.S.C. 1155, states that "[t]he 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 § 204 [of the Act]." By itself, the

director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of a petition's approval, provided the record supports the director's revised opinion. *Matter of Ho, supra*. The decision to revoke will be sustained where the evidence on record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intent to revoke, would warrant such denial. In the present matter, the decision to revoke will be affirmed on the grounds that the petitioner has not established that the beneficiary has been primarily employed in a managerial or executive position and that the petitioner has not established a qualifying relationship with the beneficiary's overseas employer.

Beyond the decision of the director, the petitioner has not provided adequate evidence to establish that the beneficiary's primary assignment for the claimed parent company was in a managerial or executive capacity. The petitioner stated that the beneficiary worked as the manager of the development department for the foreign entity and concurrently worked as the president of a subsidiary of the foreign entity. Counsel asserts that both positions were executive positions. To substantiate that the beneficiary worked in an executive capacity, counsel re-stated portions of the definitions of managerial and executive capacity. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. *See Fedin Bros. Co., Ltd. v. Sava, supra*. As the appeal is dismissed for the reasons stated above, this issue is not examined further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.