U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 02 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The Director, Vermont Service Center, initially approved the employment-based petition. Upon subsequent review of the record, the director properly issued a Notice of Intent to Revoke and ultimately revoked approval. The petitioner submitted an appeal to the Administrative Appeals Office (AAO) on May 10, 2001. The AAO affirmed the director's decision. The matter is now before the AAO on a motion to reopen and reconsider the previous decision. The motion will be dismissed.

The petitioner is a New Jersey corporation organized in May 1997. It imports, sells, and distributes textiles. The petitioner 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 petitioner filed the petition in November 1998. The petitioner indicated that it employed the beneficiary as president, a business manager, and two supporting staff. The director requested additional evidence in March 1999. The director requested that the petitioner establish the petitioner was more than the foreign entity's agent and further detail regarding the beneficiary's position with the foreign entity, including the job titles and duties of the beneficiary's subordinates and the foreign entity's organizational chart.

The director also observed, in the March 1999 request, that the record did not show that the United States business had acquired a subordinate staff that would perform the operational duties of the business thereby relieving the beneficiary to perform primarily managerial or executive duties. The director specifically requested in regard to the issue of the beneficiary's managerial and executive capacity for the United States entity:

(1) An adequate specification of the beneficiary's duties with the U.S. organization;
(2) A detailed description of the beneficiary's executive/managerial duties to include a breakdown of the number of hours [that] was devoted to each of the beneficiary's proposed job duties on a weekly basis;
(3) Additional evidence showing the management structure and personnel structure of your U.S. entity, to include an organizational chart depicting the executive and management structure within the United States organization and those positions [that] the beneficiary managed.

The director also requested answers to specific questions relating to the United States entity:

(1) How many subordinate supervisors are under the beneficiary's management?
(2) What are the job titles and job duties of the employees managed?
(3) What executive and technical skills are required to perform the duties?
(4) How much of the time spent by the beneficiary is allotted to executive duties and how much to other non-executive functions?
(5) What degree of discretionary authority in day-to-day operations does the beneficiary have in the job?
(6) Who will operate the business in absence of the beneficiary?

The petitioner provided a response to the request for evidence on April 16, 1999. The petitioner re-described the beneficiary's duties in the response. The petitioner indicated that there were five positions subordinate to the

beneficiary. In addition to the previous positions identified, the petitioner added a finance manager and an assistant to the sales manager.[1] The director approved the petition in April 1999.

Upon subsequent review of the record, the director issued a Notice of Intent to Revoke dated October 27, 2000. The director observed that the petitioner's description of the beneficiary's duties did not show that the beneficiary's position with the United States entity would be executive or managerial. The director also observed that the petitioner had not shown that it employed sufficient staff to relieve the beneficiary from primarily performing the mundane duties of the organization. The director requested additional evidence establishing that the beneficiary would be engaged in a primarily managerial or executive position.

The director specifically requested in regard to the issue of the beneficiary's managerial and executive capacity:

> A complete position description for all of your employees in the United States, including one for the beneficiary's position. Submit a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis.
>
> In addition, please submit the minimum education requirements, if any, of the positions that will be under the beneficiary's control. Please indicate how the specific education requirements are required to perform the beneficiary's subordinates's duties.
>
> If the company has used contractors rather than employees to perform any functions in 1999 and 2000, submit evidence documenting the number of contractors utilized, the wages paid, and the duties performed.
>
> Submit a copy of your Form I-9s for all of your employees in the United States, to include a copy of all documentation that was presented by them to demonstrate their eligibility to seek employment in the United States.
>
> Submit a copy of your Form 941, Employer's Quarterly Tax Return, for the last two quarters of 1999 and the first and second quarters of 2000, to include the page that lists your employees by name.
>
> Submit a copy of all 1998 and 1999 Form W-2s and Form 1099s issued by your business.
>
> Submit the 1998 and 1999 U.S. federal income tax return(s) with all schedules and attachments, for your business. As your business is organized as a corporation, submit the corporate tax return.

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[1] The record contains the petitioner's April 16, 1999 response letter but does not contain the exhibits referenced in the response letter. The petitioner, during the course of this proceeding, has re-submitted the response letter as an exhibit but has not included the attachments (exhibits) to the letter. Thus, the record does not include a dated organizational chart circa April 1999 with detailed descriptions of the subordinate positions or a list of employees for the April 1999 period.

The petitioner provided rebuttal to the director's Notice of Intent to Revoke. Upon review of the submitted evidence the director observed that:

(1) The petitioner employed the beneficiary, a finance manager, a sales manager, and an assistant, based on the payroll documentation for the first quarter of 2000;
(2) Two of the petitioner's employees were employed part-time;
(3) The beneficiary, by participating in trade shows for three hours a week, was selling the petitioner's product;
(4) The beneficiary's duties did not appear realistic. For example, the petitioner's claim that the beneficiary spent one hour a week hiring and firing employees was disingenuous as the petitioner's staffing had not substantially changed since filing the petition;
(5) The description of duties for the beneficiary's subordinate "managerial" employees was not indicative of managerial or professional positions;
(6) The petitioner's H-1B finance manager was paid approximately a quarter of the salary proffered in the H-1B petition for that employee.

The director determined that the petitioner:

(1) Had materially misrepresented the H-1B finance manager's duties;
(2) Had not shown who performed the preponderance of the mundane duties required to support and execute the international trade activities described in the petition, if not the beneficiary and the other [sales/business] manager;
(3) Had not persuasively demonstrated that in an organization the petitioner's size that the beneficiary had been or would be engaged in primarily managerial or executive duties; rather than primarily engaged in performing the non-managerial, day-to-day operations involved in providing the services rendered by the petitioner to its customers.

On appeal, counsel for the petitioner submitted a brief and the documentation submitted in rebuttal to the director's Notice of Intent to Revoke. Counsel asserted that [Citizenship and Immigration Services (CIS)] must provide the grounds for revocation and cited the regulations (8 C.F.R. § 214.2(L)(9)(iii)) detailing the requirements of revocations for L-1, intrcompany transferees. Counsel asserted that [CIS] findings were clearly erroneous because the evidence of the record conclusively established that the beneficiary holds a managerial and an executive position.

The AAO determined that counsel's assertion that CIS must provide the grounds for revocation and citation to the regulations governing revocations of L-1 intracompany transferee approvals were inapplicable in the immigrant employment-based context. The AAO also reviewed the descriptions of the beneficiary's duties and determined that the descriptions did not provide sufficient detail. The AAO observed that some of the duties were indicative of an individual performing the petitioner's operational duties. The AAO also noted that the finance manager had not been employed when the petition was filed, leaving the day-to-day financial functions to be performed by the beneficiary. The AAO acknowledged that the petitioner had provided sufficient evidence of employees performing the petitioner's sales function. The AAO further observed that the petitioner paraphrased elements of the definitions of managerial and executive capacity. The AAO concluded that the petitioner had not submitted

sufficient evidence that the beneficiary's assignment would be to primarily perform executive or managerial duties. For these reasons, the AAO affirmed the director's decision.

The regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding. Furthermore, the regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [CIS] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

On motion, counsel for the petitioner does not submit new evidence or state reasons for reconsideration supported by pertinent precedent decisions establishing that the AAO's decision was based on an incorrect application of law or policy. Counsel simply raises several points regarding CIS's cause to issue the Notice of Intent to Revoke and argues that the AAO did not adequately consider the record when it determined that the beneficiary's assignment would not be in a primarily managerial or executive capacity.

For clarifying purposes only, AAO will address several of counsel's concerns, however of note, motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. In this matter as stated above, the petitioner has not provided new evidence and has not provided pertinent precedent decisions that would establish that the AAO's decision was based on an incorrect application of law or policy.

Counsel acknowledges that he erroneously referred to the regulations relating to revocations of L-1 nonimmigrant petitions in his appeal brief. Counsel asserts, however, that this reference should imply that counsel is questioning CIS's "good and sufficient cause" to revoke the immigrant petition. Counsel's assertion is not persuasive.

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. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

In this matter, the petitioner initially did not provide documentary evidence to substantiate its employment of permanent staff. The director in the initial request for evidence asked for clarification of the beneficiary's duties and apparently accepted the petitioner's response without requiring documentation. However, when examining the record in conjunction with the beneficiary's application to adjust status, the director became aware that the petitioner had employed its financial manager for only three months. Upon closer review of the record, the record showed that the financial manager was not employed when the petition was filed, but was employed for only a three-month period after the petition was filed.

As the AAO previously observed, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, CIS regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. *See* 8 C.F.R. § 245.1(a). If the beneficiary of an approved visa petition is no longer eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." Notwithstanding the CIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

In this matter, the petitioner's failure to establish that it employed an individual to perform the petitioner's day-to-day bookkeeping, cash management, budgeting, financial analysis, and negotiating with banks indicates that the petitioner did not have sufficient staff to relieve the beneficiary from performing those operational duties. Additionally, a review of the record reveals no documentary evidence independently documenting the petitioner's employment of any individuals subordinate to the beneficiary. The director had good and sufficient cause to issue a Notice of Intent to Revoke, based on the record when the Notice of Intent to Revoke was issued. The director also had good and sufficient cause to request further detail on the beneficiary's subordinates' positions and documentary evidence to substantiate that the petitioner actually had sufficient staff to relieve the beneficiary from performing primarily operational tasks.

Counsel also asserts that the AAO misinterpreted and misapplied the Act by requiring that the petitioner establish that the beneficiary meet each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if the petitioner is representing the beneficiary is both an executive and a manager. However, the AAO simply points out that section 101(a)(44)(A) and 101(a)(44)(B) set forth different criteria and that a petitioner must clearly describe the duties to be performed by the beneficiary. *See* 8 C.F.R. § 204.5(j)(5). The petitioner must also demonstrate whether such duties are either in an executive or managerial capacity, or in both capacities. *Id.*

Counsel also takes issue with the AAO's failure to give "due consideration" to testimonial letters from chief executive officers of companies in the same industry as the petitioner. The AAO may, in its discretion, use advisory opinions submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The testimonial letters from various chief executive officers were not submitted as expert testimony. Counsel did not provide sufficient foundation to establish that "experts" wrote the letters; instead the letters appeared to have been written by individuals doing business with the beneficiary. Moreover, the letters while praising the beneficiary and the petitioner are not statements explaining or supporting a conclusion that the beneficiary's duties comport with the specific managerial or executive definitions set forth in the Act.

On motion, counsel claims that the beneficiary is responsible for the Number 1 Import/Export Department of the petitioner's Chinese parent company. However as the AAO observed, this responsibility appeared for the first time on appeal and appeared to be inconsistent with the petitioner's described duties. The petitioner indicated that the beneficiary allocated 13 hours per week to: holding meetings, discussing the progress of each department's business activities, reviewing reports prepared by department manager, studying and understanding the matters concerning the company's business trends, suggesting resolutions to problems, and discussing these issues with managers. Counsel claims this portion of the description included the beneficiary's supervision of the manager of the sourcing operations in China and counsel's statement on appeal was an elaboration of the beneficiary's specific duties regarding the 13 hours. However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel states that the AAO did not consider that the petitioner had sufficient sales and marketing employees to relieve the beneficiary from performing the sales and marketing function of the petitioner. However, the AAO specifically stated in its decision: "the sales manager, sales assistants, and outside contractors appear to perform the everyday sales function of the petitioner." The AAO's concern, as indicated in the next portion of the sentence, is that: "the petitioner has not established who performs all other mundane activities of the petitioner."

Counsel claims that the AAO did not discuss the director's "misreading of evidence" regarding the beneficiary's allocation of time to the organization's personnel matters. However, the petitioner has not provided a consistent picture of its number of personnel substantiated by documentary evidence. Counsel also acknowledges that the director observed that the petitioner had materially misrepresented the finance manager's duties. Counsel, however, finds the AAO's decision regarding the finance manager's duties inadequate. Counsel points out that the financial manager's employment was a true representation of evidence at the time of filing. However, at the time of filing the petitioner did not claim to employ the financial manager; it was not until the petitioner responded to the director's request for evidence that the petitioner added the financial manager and another employee to its staff. The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. *See* 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot change the beneficiary's responsibilities or level of authority within the organizational hierarchy.

In this matter, the petitioner increased the number of the beneficiary's subordinate employees from three to five, from the time of filing to the time it responded to the director's request for evidence. Although this is not a large increase in numbers, an increase in numbers strengthens the possibility that the beneficiary could be relieved from performing primarily operational tasks. When it is discovered that the increase in numbers of staff was for a brief period of time, CIS must question the legitimacy of the organizational hierarchy and the beneficiary's eligibility for this visa classification. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Finally, counsel's concern that CIS overlooked the existence of petitioner's non-managerial employees and failed to consider that a major part of the petitioner's business is sourcing Chinese home textile products to sell and distribute in the United States is unfounded. The record in this matter contains a great deal of verbiage regarding the beneficiary's duties but lacks supporting documentation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). CIS correctly questioned whether the petitioner employed sufficient personnel to relieve the beneficiary from performing primarily operational tasks. The petitioner did not provide sufficient consistent documentation to establish that the beneficiary could devote her time to primarily executive or managerial duties. 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).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.