U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 19 2004

IN RE: Petitioner:
Beneficiary: [redacted]

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 preference visa petition was initially approved by the Director, Vermont Service Center. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice of his intention to revoke the approval of the preference visa petition, and his reasons therefore. The director 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 New York corporation claiming to be engaged in the importing, exporting, and wholesale of diamonds. It claims to be a subsidiary of Shalin Gems, the beneficiary's overseas employer, which is located in India. The petitioner seeks to employ the beneficiary as its general manager. 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. Upon further review of the record, the director determined that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity and revoked the petition. On appeal, counsel disputes the director's findings and submits a brief in support of his assertions.

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 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 issue in this proceeding is whether the beneficiary would be performing in a capacity that is managerial or executive.

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--
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> (i) directs the management of the organization or a major component or function of the organization;
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> (ii) establishes the goals and policies of the organization, component, or function;
>
> (iii) exercises wide latitude in discretionary decision-making; and
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> (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the initial petition, the petitioner stated that the beneficiary's foreign employer had eight full-time employees and ten independent contractors. The petitioner also stated that it employs

a president, a general manager, and an administrative assistant, as well as two independently contracted sales representatives. The petitioner provided the following description of the beneficiary's proposed job duties:

> As General Manager of [the petitioning organization], [the beneficiary] has full executive and managerial control over its activities in coordination with the activities of [the foreign entity]. He is responsible for all aspects of the business operations, financial administration, planning and implementation of marketing strategy, developing business plans, negotiating contracts with suppliers and buyers, selecting merchandise and quality control. [The beneficiary] exercises wide breadth of decision-making authority for all decisions within his purview. He is responsible for the formulation of all business plans, short and long term, for the affiliate in coordination with the activities of the parent company, he handles all contractual negotiations, and develops client contacts through frequent and direct client meetings including following-up to gather feedback to ensure client satisfaction. [The beneficiary] supervises the professional activities of the firm's administrative assistant, accountant and the independent sales representative it utilizes. He has the authority to hire, promote and terminate this staff as required.

Upon further review of the record and the information submitted by the petitioner, the director issued a notice of his intent to revoke the prior approval of the petition based on the determination that the petitioner failed to adequately establish that the beneficiary would be employed in a managerial or executive capacity. The director also noted that based on the tax documentation submitted, the petitioner employs not eight, but three individuals. The petitioner was given 30 days in which to respond to the director's concerns.

In response to the notice of intent, counsel reiterated the petitioner's prior claim of employing three, rather than the perceived eight, individuals. A review of the record indicates that the director's observation regarding the petitioner's number of employees was incorrect, as pointed out by counsel. As such, the director's comments in regard to this issue, both in the notice of intent to revoke and in the final revocation, are hereby withdrawn.

Counsel also put forth the claim that the beneficiary manages an essential function, thereby making it unnecessary to establish that he supervises professional, managerial, or supervisory employees. Counsel provided the following hourly breakdown of the beneficiary's duties:

1. Meeting with clients such as jewelry manufacturers and retail diamond dealers. Discusses their needs including type of gems, size, color, clarity and karat amount. Negotiates contracts for these products. Duties here include travel to see clients throughout New York City, New York State, New Jersey, Connecticut and Texas. (approx. 30 hrs. per week).

2. Overseeing and controlling the company's inventory of gems. Inspects assorted products for quality control and pricing. (approx 8 hrs. per week)

3. Creating and overseeing the implementation of sales strategies for the company's salespeople to use in selling their products including diamonds and other gems. (approx. 5 hrs. per week)

4. Developing Phone and mail marketing/advertising campaigns for products. (approx. 3 hrs. per week)

5. Executing purchase orders from clients/dealers. (approx. 2 hrs. per week)

6. Supervising all employees besides the President in their work (performs continuously throughout the week).

7. Meeting with the President to consult, coordinate and review business strategy and activity (performs continuously throughout the week).

Although counsel stated earlier in his response to the intent to revoke that the beneficiary manages an essential function, he added later in the same statement that independent contractors are to be considered when analyzing the number of employees the beneficiary supervises. The AAO notes that if the beneficiary supervises a function, counsel's focus on the number of employees the beneficiary purportedly manages is misplaced, since a function manager does not need to manage individuals. In the alternative, if the beneficiary manages employees rather than a specific function, the beneficiary's subordinate staff becomes a key factor in determining whether he fits the statutory definition of manager or executive. In either case, the petitioner must establish that individuals other than the beneficiary are performing the daily operational tasks, regardless of whether those individuals are directly employed by the petitioner or whether their services are provided on a contractual basis. The key is for the beneficiary to primarily perform managerial or executive duties.

Counsel asserts that revocation is inappropriate in the instant case because at the time the notice of intent to revoke was issued the evidence of record would not have warranted a denial of the petition. He follows this assertion by citing to 8 C.F.R. § 205.2(b), which, according to counsel's interpretation, requires that "the notice of intent to revoke must include a *specific statement* not only of the facts underlying the proposed action, but also of the supporting evidence for the decision to revoke." (Emphasis added in original text.) Contrary to counsel's interpretation, the regulation at 8 C.F.R. § 205.2(b) only requires that the petitioner be given notice of the director's intent to revoke the prior approval of the petition, and an opportunity to offer evidence in support of the petition and/or in opposition to the grounds alleged for revocation of approval. There is no language in the pertinent section of the regulations that places any evidentiary burden on the director.

Upon reviewing the record and the evidence submitted, the director revoked the approval of the petition basing his decision on the determination that the beneficiary would not be employed in a managerial or executive capacity.

On appeal, counsel asserts that the director erred in revoking the prior approval of the petition and cites *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987), where the Board of Immigration Appeals stated that a notice of intent 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. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). 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 intent to revoke, would warrant such denial. *Id.*

Counsel also correctly notes that observations that are conclusory, speculative, equivocal, or irrelevant do not provide good and sufficient cause for the issuance of a notice of intent to revoke the approval of a visa petition and cannot serve as the basis for revocation. *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988).

However, it must be noted that counsel's claims regarding the standard of review are incorrect. Citing a federal district court decision, *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), counsel argues that CIS's "revocation of the petition nearly three years after it had initially been approved is arbitrary, capricious and an abuse of discretion." This assertion, however, is erroneous. The Board has held that 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. *Matter of Ho*, *supra.*

Counsel also incorrectly states that CIS bears the burden in revocation proceedings. In proceedings to revoke the approval of a visa petition, the burden of proof to establish eligibility for the benefit sought is on the petitioner. *Id.* at 589; *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968); *see also Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The Board's decision in *Matter of Ho* is also relevant to this matter in clarifying that, by itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*, *supra* at 590.

Furthermore, based on the general description of the beneficiary's proposed job duties, the AAO determines that the director met the statutorily imposed burden. Although counsel is correct in pointing out that the petitioner's credibility was not in question, the fact remains that the evidence of record simply did not warrant the determination that the beneficiary would be primarily performing managerial or executive job duties. 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 case, the hourly breakdown of the beneficiary's proposed duties suggests that more than 60 percent of the beneficiary's time would be spent meeting with clients and negotiating contracts in an effort to sell the petitioner's product. 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 employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Since a majority of the beneficiary's time would be spent providing services for the petitioner, the AAO cannot conclude that the beneficiary's duties would be primarily of a managerial or executive nature. As such, the instant petition cannot be approved.

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.