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

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy
PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 21 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

DISCUSSION: The Director, California Service Center initially approved the employment-based immigrant visa petition. Subsequently, the beneficiary applied for adjustment of status. On the basis of new information received and 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 Notice of Intent to Revoke the approval of the preference visa petition, and his reasons therefore, and ultimately denied the petition on August 11, 2003. The matter is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further consideration.

The regulation at 8 C.F.R. § 205.2(d) indicates that revocations of approvals must be appealed within 15 days after the service of the Notice of Revocation. The record indicates that the Notice of Decision was mailed on August 11, 2003. The appeal was filed on September 12, 2003, 32 days after the decision was mailed. Thus, the appeal was not timely filed.

It is noted that the director erroneously allowed the petitioner 30 days to file the appeal (33 days if the notice was delivered by mail). Additionally, the director did not reference the Notice of Intent to Revoke in the Notice of Decision. The director's error does not, and cannot, supersede the regulation regarding the time allotted to appeal a revocation.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(*2*) states that, if an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. § 103.5(a)(2), the appeal must be treated as a motion, and a decision must be made on the merits of the case.

The regulation at 8 C.F.R. § 103.5(a)(2) requires that a motion to reopen state the new facts to be provided in the reopened proceeding, supported by affidavits or other documentary evidence. Review of the record does not show any new facts submitted on appeal. However, counsel for the petitioner points out that the director relied upon an error in fact when making his decision. Moreover, the director improperly labeled the decision a Notice of Decision, rather than a Notice of Revocation. For these reasons, the AAO will remand the petition.

Although the petition will be remanded, examination of the record reveals a number of issues that must be addressed at this time.

The petitioner is a corporation organized in the State of California in May 1998. It initially stated that it imported and exported minerals, chemicals, and garments. It later claimed to buy and sell domestic products for use in garment manufacturing.[1] It seeks to employ the beneficiary as its treasurer and chief financial officer. 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.

---

[1] The record also contains a copy of escrow instructions dated October 15, 1998 transferring a dry cleaning company to the beneficiary. The record contains an assignment of lease dated October 9, 1998 for the same dry cleaning premises, assigning the premises to the petitioner. The pertinence of these documents to this proceeding is unexplained.

The petition was filed August 22, 2000 and was approved January 21, 2001. The beneficiary applied to adjust status on March 19, 2001. The director requested further evidence in connection with the adjudication of the I-485, Application to Register Permanent Residence or Adjust Status, on October 16, 2001. The director issued a Notice of Intent to Revoke the approval on November 1, 2002. The director cited the reasons for the Notice of Intent to Revoke as: (1) the petitioner had failed to establish that the beneficiary's proffered position would be primarily managerial or executive; and, (2) the petitioner had not established a qualifying relationship with the beneficiary's foreign employer.

The petitioner provided rebuttal to the Notice of Intent to Revoke on January 14, 2003. The director followed up with a request for further evidence on March 27, 2003. The petitioner responded to the request for further evidence on June 18, 2003. The director then issued his Notice of Decision. The director determined that the beneficiary did not qualify for the benefit sought because the evidence failed to establish that: (1) the beneficiary is employed in the United States in a managerial or executive capacity; and, (2) there is a qualifying relationship between the petitioner and the foreign company.

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 to be examined 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 indicates that the beneficiary directs the preparation of financial reports, financial goals, objectives, and budgets, and oversees the investment of funds, supervises cash management, monitors and controls the flow of cash receipts and disbursements, and deals with mergers and acquisitions. The petitioner also indicated that the beneficiary advises the president and board of directors on investments and loans and prepares financial reports for the board. The petitioner's organizational chart shows the beneficiary directly above a sewing director, a label and button director and a computer technician. The organizational chart also shows four sewing clerks reporting to the sewing director and two button clerks and two labeling clerks reporting to the button and label director. One individual is identified as holding the position of both sewing clerk and sewing director.

Upon review of the petitioner's California Form DE-6, Employer's Quarterly Report, for the quarter in which the petition was filed and the petitioner's August 2000 organizational chart, the AAO identifies individuals in the positions of president, treasurer/chief financial officer, computer technician, and two individuals in the positions of labeling clerk, two individuals in the positions of button clerk, and four individuals in the positions of sewing clerk. The California Form DE-6 for the third quarter 2000 does not list a name that corresponds to the individual identified on the organizational chart as the button/label director. The California Form DE-6 lists five individuals that are not identified on the 2000 organizational chart, although two of the individuals are listed on the petitioner's 2001 organizational chart. The California Form DE-6 suggests, based on the salaries provided, that several of the clerks are employed part-time.

The petitioner indicated that the computer technician installs and maintains computer hardware and software, and the sewing director and label/button director study production schedules, estimate hour requirements, interpret company policy to workers, and enforce safety regulations. The petitioner indicates that each of the clerks work at various sewing, labeling, or button machines.

Counsel asserts that the beneficiary's duties show that she meets the criteria set forth in the definition of both managerial and executive capacity. Counsel also points out that the organizational chart shows that the beneficiary is a second-line supervisor. Counsel also claims that the Citizenship and Immigration Services (CIS) director's determination that the beneficiary would be assisting with day-to-day non-supervisory duties is not substantiated in the record.

When 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. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991) (Emphasis in original).

The petitioner does not provide a comprehensive description of the beneficiary's duties as required by 8 C.F.R. § 204.5(j)(5). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Moreover, it is not possible to discern whether the beneficiary's listed tasks comprise managerial or executive duties or whether the beneficiary is providing the operational duties associated with basic bookkeeping. 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).

In addition, the record does not support counsel's claim that the beneficiary is a second-line supervisor. It is noted that the petitioner has structured the managerial hierarchy to show that the beneficiary is a second-line supervisor; however, the beneficiary's job description does not indicate that the beneficiary spends any time supervising subordinates. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava, supra.* 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).

Finally, as observed above, the beneficiary's duties appear to comprise primarily bookkeeping tasks, rather than managerial or executive duties. Although the beneficiary may not be providing actual sewing services to the petitioner, the beneficiary's bookkeeping tasks as described do not elevate the beneficiary's position to one of a manager or executive as defined by the Act.

The second issue that must be addressed by the director before a new decision is entered is whether the petitioner has established 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.

The AAO observes several inconsistencies and documents that raise concern regarding the petitioner's actual affiliation with the beneficiary's foreign employer. They are:

> A statement dated October 13, 1998 by the general manager of the petitioner's claimed 50 or 51 percent owner that indicated: "Because [the beneficiary] has left her former employer to take up this new operation, the Provincial International Economic Development Company has not cooperated in providing a letter of reference about her work experience."
>
> The same October 13, 1998 statement indicated: "Our [c]ompany, Kingstar Corporation, is the shareholder of record of 50% of the issued and outstanding shares of stock of [the petitioner]."
>
> An undated statement from the same person indicated: "[The petitioner] is a joint venture, 50% owned and controlled by and 50% owned and controlled by
>
> The same undated statement indicated: capitalized [the petitioner] with $56,000 USD. I understand that this money was deposited into a bank account of [the petitioner] as follows:
>
> a. An American businessman, owed $28,322.97 to Kingstar through an unrelated business transaction. We asked to repay this debt by depositing that amount in the bank account of the new business
> b. $28,560 was given to [the beneficiary] in cash to bring to the USA. Normally we would issue a check with a named payee. However, at the time the funds were disbursed before their departure from China, we did not know the legal name under which the US business would be established.
> c. On June 15, 1998, [the beneficiary] and purchased an official check for $56,882.97 from n San Francisco, CA
> d. On June 15, 1998, [the beneficiary] deposited the official check for $56,882.97 into the newly opened bank account of [the petitioner] at Bank of America. The deposit was split, with $26,882.97 going into business checking account [number redacted] and $30,000 going into business interest maximixer account [number redacted].
>
> The petitioner's statement dated June 28, 1998 showing that (Group . owned 51 percent of the petitioner; Jin Chen owned 17 percent of the petitioner; the beneficiary owned 16 percent of the petitioner; and, Yaping Ouyang owned 16 percent of the petitioner.

The petitioner also submitted copies of stock certificates numbers "1" through "16," an accompanying stock ledger, and minutes of meetings of the organization. The stock certificates and stock ledger show a myriad number of transactions, missing stock certificates, and cancelled stock certificates. The petitioner indicates

that as of June 2003 the only valid stock certificates are stock certificates "10," "14," "15," and "16." Stock certificate "10" was issued to and is dated November 1999. Stock certificates 14 through 16 are undated and are also issued to The stock ledger shows that stock certificates 14 through 16 were issued in 2001, after the petition was filed.

The petitioner supplied copies of illegible checks that it claimed supported the foreign entity's ownership in the petitioner.

The petitioner has not provided consistent evidence of its ownership and control. 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, supra.* If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Moreover, the indication by the foreign entity's general manager that the beneficiary's foreign employer would not cooperate in providing the beneficiary a reference undermines any sort of "affiliate" relationship between the two concerns. Further, the foreign entity's general manager's statement that it gave cash to the beneficiary and requested an individual to repay his debt by providing funds to the petitioner are not credible, especially when the beneficiary and the individual are issued the petitioner's stock. Absent the general manager's statement, CIS has no evidence that a foreign entity invested funds in the petitioner. As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii).

In this matter, the petitioner has provided inconsistent and questionable evidence that an affiliate relationship exists between the petitioner and any foreign entity.

The last issue in this matter to be examined is the beneficiary's duties for the claimed foreign entity and whether her assignment was primarily managerial or executive. The petitioner provided a general description of the beneficiary's duties and no documentary evidence of the number of individual's allegedly supervised by the beneficiary. 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). The petitioner has not provided sufficient evidence to establish that the beneficiary's foreign employment was in a managerial or executive capacity.

Accordingly, this matter will be remanded for the purpose of a new decision. The director shall render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility.

ORDER: The director's decision of August 11, 2003 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.