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Washington, DC 20529

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 0 2 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

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 December 1995. It purchases building materials for its claimed parent company and other Chinese contractors and invests in projects in the United States. It 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.

The director initially approved the petition. Upon subsequent review, including information obtained in conjunction with the beneficiary's I-485, Application to Register Permanent Residence or Adjust Status, the director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. In rebuttal, the petitioner submitted documentation showing that it had purchased shares of a separate entity in June 1999 and asserted that this evidence was sufficient to overcome the grounds of revocation. The director determined that the petitioner's purchase of an interest in a separate entity was not relevant as the purchase was subsequent to filing the petition. The director also cited *Matter of Katigbak* that holds that 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). The director revoked the approval of the petition on January 27, 2003, noting that the petitioner's evidence did not overcome the grounds of revocation.

On appeal, counsel for the petitioner asserts that the case law cited by the director is inapplicable to this matter, asserting that the beneficiary's managerial capacity had been established when the petition was filed. Counsel also asserts that there is no restriction on when "the affiliation" must be established. Counsel finally asserts that the petitioner should be given an opportunity to submit an amended petition.

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):
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> * * *
>
> (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).

Citizenship and Immigration Services (CIS) regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. 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).

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

The beneficiary stated in her November 21, 2000 I-485 interview, that the petitioner had not been doing business since 1998. The beneficiary noted that a separate entity, a restaurant, had been established in 1998 and had opened in 1999. However, as the director 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, supra.* Counsel's assertion that this case law is inapplicable because the

beneficiary's managerial capacity had been established is not persuasive. First, contrary to the director's initial and erroneous approval, the petitioner has not established that the beneficiary's position would be in a managerial capacity. Second, the petitioner apparently stopped purchasing building material for its claimed parent company and generated no or little income subsequent to 1997, the year in which the petition was filed. The petitioner's claimed purchase of an interest in a restaurant and the beneficiary's employment for the restaurant are material changes to the petition. The documentation submitted in rebuttal to the director's Notice of Intent to Revoke does not sufficiently establish that the beneficiary worked or will work in a managerial capacity or that the petitioner is properly affiliated with the separate entity.

In a letter accompanying the petition, the petitioner stated that:

> [The beneficiary] has been in charge of making executive decision [sic] of overall operation; reviewing budget and financial control; negotiating contracts; souring [sic] and purchasing raw materials and equipment; evaluating and setting up purchasing channels; hiring and firing workers; and directing and coordinating activities to obtain optimum efficient business and maximize profit of this company.

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
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> 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;
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> 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
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> 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 this matter, the petitioner's brief and general description does not establish that the beneficiary's position is a managerial or an executive position. For example, the petitioner states that the beneficiary is responsible for "making executive decision of overall operation," and "directing and coordinating activities to obtain optimum efficient business and maximize profit of this company." The petitioner did not, however, further define the executive decisions or clarify the activities the beneficiary allegedly directed and coordinated. 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). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Moreover, rather than providing a specific description of the beneficiary's duties, the petitioner paraphrased a portion of the statutory definition of managerial capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as responsible for "hiring and firing workers." Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava, supra; Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Finally, the petitioner indicated that the beneficiary would be responsible for reviewing the budget and for financial control, negotiating contracts, purchasing raw materials and equipment, and evaluating and setting up purchasing channels. Since the beneficiary actually performs these duties, she is performing tasks necessary to provide a service or product, duties that are not considered managerial or executive. 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 petitioner's description of the beneficiary's duties does not establish that her position has been or will be in a managerial or an executive capacity.

The director also determined in the Notice of Intent to Revoke that the petitioner had not generated sufficient income in 1999, 2000, or 2001 to pay employees. The AAO agrees that the lack of income undermines the beneficiary's managerial capacity because this evidence suggests that the petitioner does not have employees to relieve the beneficiary from primarily performing the operational and administrative tasks of the petitioner. However, this evidence coupled with the beneficiary's statements also suggests that the petitioner is no longer doing business as required at 8 C.F.R. § 204.5(j)(2) which states in pertinent part: "*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." The petitioner's failure to continue doing business in 1998 and 1999 also removes the beneficiary from eligibility for this visa classification.

Beyond the decision of the director, the petitioner did not provide an adequate description or documentary evidence of the beneficiary's position with the overseas entity. For this additional reason, the petition will not be approved. 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).

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.