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U.S. Citizenship and Immigration Services

[redacted]

B4

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 19 2005
WAC 97 112 51161

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 preference visa petition was approved by the Director, California Service Center. The director subsequently issued a request for additional evidence and a notice of his intent to revoke the approval of the petition pursuant to various adverse findings. The director ultimately revoked 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 California corporation engaged in the sales of goods manufactured by its claimed overseas parent company. 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 determined that the beneficiary would not be employed in a managerial or executive capacity. He also separately concluded that the petitioner failed to establish that it has a qualifying relationship with a foreign entity.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 first 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--

(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 support of the petition, the petitioner submitted a letter dated February 6, 1997, which provided the following description of the duties to be performed by the beneficiary under an approved petition:

[The beneficiary] has full control of the day-to-day business operations. Her responsibilities include to plan [sic], conduct[ing] research to find solution[s] for problems arising from production and distribution of gloves, implement[ing] all decisions made in the [b]oard meeting; sign[ing] all contracts with buyers and suppliers, administer[ing] and supervis[ing] all departments; develop[ing], enforc[ing] and administer[ing] company policies and standards; hir[ing], fir[ing] and train[ing] employees, evaluat[ing] performance of employees, determin[ing] further measures to be taken to promote business and increase company

> goodwill, act[ing] as [an] internal consultant between [the] parent company and [the] subsidiary. Furthermore, [the beneficiary] also develops budget and cost controls, obtain[s] information regarding types, quantities, [and] maintenance, conduct[s] survey audits for management to assess effectiveness of controls, [and] accuracy of financial records of departments.

The petitioner also submitted its organizational chart illustrating its composition at the relevant time period. The chart indicated that the beneficiary was at the top of the hierarchy with a manager as her only direct subordinate. The chart shows that the manager's subordinates include two marketing and sales individuals and an accountant/secretary. Thus, based on the organizational chart, the petitioner's organization was comprised of five employees.

In response to a request issued by the director on May 5, 1997, the petitioner provided a copy of its wage report for the first quarter of 1997, which accounts for the time period during which the petition was filed. The wage report names five individuals and provides the salaries paid to each during the relevant time period. Based on the information provided, the AAO is able to determine that the petitioner had a total of five employees, as claimed. However, the respective salaries of those five employees indicate that only two of the five employees were employed on a full-time basis. The remaining three employees received compensation commensurate with that of part-time workers.

On November 13, 2003, the director issued a notice of his intent to revoke (ITR) the approval that had been previously granted. The director stated that the beneficiary's job description and the petitioner's organizational chart do not adequately establish that the beneficiary would be employed in a qualifying capacity. The petitioner was allowed the opportunity to overcome the director's findings by complying with the director's request for a more detailed description of the beneficiary's job duties, including a description of the beneficiary's typical day of work.

The petitioner replied with a letter dated December 5, 2003, which included the following breakdown of the beneficiary's daily activities:

- Developing a strategic plan based on the parent company's directives, to advance the subsidiary's mission and objectives[,] and to promote revenue, profitability, and growth as an organization (20%);

- Implementing and optimizing the business strategies in accordance with the market changes and technology development (15%)

- Overseeing the business operations, approving company operational procedures, policies and standards, directing and controlling the work of subordinate managerial employees, who are responsible for optimizing daily operational functions (15%);

- Evaluating the performance of managerial employees for compliance with established policies and contributions in attaining objectives, and exercising authority over [the] organizational structure, and selection of managerial personnel (10%);

- Directing the organization's financial goals, objectives, and budgets; reviewing financial reports, overseeing the investment of funds and managing associated risks, allocating resources to various functions, executing capital-raising strategies to support the business expansion (10%);

- Reviewing progress reports to determine status in attaining objectives, reprioritizing key business projects, revising objectives and plans in accordance with current conditions (10%);

- Meeting with subordinates or key executive officers of business partners to facilitate sound, mutual solutions to major projects and transactions, and identify new or potential areas of development (10%);

- Representing both the parent organization and the U.S. subsidiary at important public events or conferences in the United States (5%);

- Reporting to the parent company's president and Board of Directors meetings, and working on the peer level with the key executive officers of the parent company to plan the necessary cooperation in the implementation of the multi-national business projects (5%).

The petitioner also reiterated the beneficiary's heightened degree of discretionary authority in overseeing all matters, both business and personnel, concerning the petitioner.

On January 16, 2004, the director issued a final notice revoking the approval of the petition. The director concluded that the description of the beneficiary's duties does not warrant the conclusion that the beneficiary would primarily perform tasks of a qualifying nature. In consideration of the petitioner's organizational structure, the director also stated that at the time of the petition's filing, the petitioner lacked a sufficient support staff to relieve the beneficiary from having to engage in the petitioner's daily operational tasks.

Notwithstanding the director's accurate observations, the director also noted that the employees under the beneficiary's supervision cannot be deemed managers "because *they* are not managing professional employees." (Emphasis in original). However, the definition of managerial capacity contained in section 101(a)(44)(A) of the Act applies to the beneficiary of the present petition and not to his subordinate employees. Based on the director's reasoning, no beneficiary would qualify as a manager if the organization's ultimate, lower tier subordinate was not a professional, managerial, or supervisory employee, regardless of how many layers of management lay between the beneficiary and the non-professional employee. According to the director, each tier of management would be disqualified as the first-line supervisor of non-professional staff. Additionally, the director noted that the beneficiary does not supervise professional employees. While this may be true, the position title and job description of the beneficiary's immediate subordinate indicates that this individual occupies a managerial position. There is no statute or regulation that requires the petitioner to have professional employees as the beneficiary's subordinates. Section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii), clearly states that the beneficiary's subordinates may be supervisory, professional, *or* managerial employees. There is no requirement that the beneficiary's subordinates must be professionals. As the director's comments do not accurately reflect the relevant statutory or regulatory provisions, they will hereby be withdrawn.

On appeal, counsel asserts that only 15% of the beneficiary's time is spent on nonqualifying tasks and restates the various items listed in the percentage breakdown, which was provided in response to the director's ITR. However, counsel fails to acknowledge that an overwhelming majority of the items listed in the petitioner's breakdown are the beneficiary's general responsibilities, not specific duties that illustrate a comprehensive description of the beneficiary's typical day on the job. 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). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. The AAO is unable to determine what duties are involved in developing business plans and objectives and optimizing business strategies, which cumulatively comprise 35% of the beneficiary's time. Furthermore, the petitioner provided no information about the purported project reports the beneficiary reviews; nor did the petitioner discuss the "key officers of business partners" with whom the beneficiary purportedly meets and the subject matter of such meetings. Overall, the petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *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).

While the petitioner provided an elaborate list of responsibilities generally indicating that the beneficiary's discretionary authority fits the definition of managerial or executive capacity, these definitions are meant to serve only as guidelines to be applied to a specific list of duties. Where, as in the instant case, the petitioner fails to provide CIS with a specific list of duties, a determination cannot be affirmatively made that the beneficiary primarily performs qualifying tasks.

Counsel also asserts that in addition to qualifying as a multinational executive, the beneficiary fits the description of a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. Aside from making the actual claim, counsel has failed to elaborate as to how the beneficiary qualifies as a function manager. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The other issue in this proceeding is whether the petitioner has a qualifying relationship with a foreign entity.

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.

In the statement appended to the petition the petitioner stated that it is wholly owned by the beneficiary's foreign employer. In support of this claim, the petitioner submitted the following documentation:

1. Articles of Incorporated filed on August 25, 1995. Part IV states that the petitioner is authorized to issue 10,000 shares of its common stock.

2. The petitioner's stock certificate issuing 10,000 shares to [redacted], its claimed parent entity.

3. The petitioner's stock transfer ledger indicating that on September 1, 1995 the petitioner sold 10,000 shares of its stock to [redacted] in exchange for $10,000.

4. The petitioner's 1996 tax return indicating that the petitioner is 100% foreign owned. Schedule L, item 22(b) of the tax return shows that $12,000 of common stock was issued by the petitioner during the second half of 1996.

In the ITR dated November 13, 2003, the director stated that the petitioner did not submit evidence to establish that the foreign entity made a capital contribution in exchange for its ownership of the petitioner's stock. As such, the petitioner was instructed to submit evidence establishing that the foreign entity purchased the petitioner's stock. Specifically, the director requested that the petitioner submit a wire transfer receipt(s), showing that the funds originated with the foreign entity, as well as copies of the petitioner's bank statements to corroborate the fund transfer from the foreign entity. The director also requested that the petitioner provide a Notice of Transaction Pursuant to Corporations showing the total amount of the petitioner's offering.

In response, the petitioner submitted a wire transfer receipt dated January 25, 1996 along with the corresponding bank statement showing the deposit of the wired amount into the petitioner's bank account. The petitioner submitted three additional wire transfer receipts showing transfers originating with the claimed parent company. The receipts are dated January 13, 1997, June 2, 1998, and September 30, 1998, respectively.

The petitioner also submitted its corporate tax return for 1997. However, the same conflicting information is found in Schedule L, item 22(b) in regard to the total amount of stock sold. The petitioner failed to submit its Notice of Transaction Pursuant to Corporations.

The director revoked approval of the petition stating that the January 1996 wire transfer receipt identifies the beneficiary, not the claimed parent entity, as the originator of the funds. The director acknowledged submission of the other three wire receipts, but noted that all three are dated at least one year after the purported sale of the petitioner's stock. The director also noted the inconsistency between the petitioner's stock transfer ledger and Schedule L, item 22(b) of the petitioner's tax return.

On appeal, counsel claims that the initial wire transfer, which took place in January 1996, was done through an agent on behalf of [redacted] However, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). As previously stated, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Furthermore, the amount of the wire transfer does not correspond to the petitioner's claim as to the value of common stock purchased by the foreign entity. In its stock transfer ledger, the petitioner claimed that an amount of $10,000 was received from the claimed parent entity on September 1, 1995 in exchange for 10,000 shares of the petitioner's stock. The amount shown in the January 1996 wire transfer receipt is for $59,988. Thus, neither the amount nor the time frame of the monetary exchange corresponds with the information provided by the petitioner in its stock transfer ledger. 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).

Although the AAO acknowledges the petitioner's submission of three additional wire transfers, all from the claimed parent organization, the first of those transfers took place more than 16 months after the date claimed in the petitioner's stock transfer ledger and the other two transfers took place approximately three years after the date claimed in the stock ledger and more than one year after the actual petition was filed. While these wire transfers suggest that the petitioner may have had some sort of a business relationship with [redacted] Ltd., the evidence does not establish a parent/subsidiary relationship as claimed by the petitioner.

Counsel further asserts that the director failed to inform the petitioner of the above-described deficiency in the ITR. However, counsel's expectation is simply unreasonable and a factual impossibility in light of the fact that the deficiency was not discovered until after the petitioner submitted documentation in response to the director's request made in the ITR. It would have been impossible for the director to provide an analysis in the ITR, if the documentation that was analyzed was actually submitted in response to the ITR.

Although counsel attempts to address the inconsistency between the petitioner's stock transfer ledger and Schedule L, item 22(b) of the petitioner's tax return, this discrepancy remains unresolved. Moreover, counsel's claim that the tax return merely indicates that the petitioner does not have a U.S. parent organization strongly suggests that counsel failed to understand the director's statements describing the inconsistency.

Finally, counsel vehemently asserts that the director's revocation of an approval of a petition, which had been approved years earlier, is an abuse of discretion. Counsel further noted that the director's action was not

based on allegations of fraud or misrepresentation. However, section 205 of the Act, 8 U.S.C. § 1155, states in pertinent part: "The Secretary of Homeland Security 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. at 590 (citing *Matter of Estime*, 19 I&N 450). A thorough review of the instant matter suggests that there was sufficient cause to deny the petition. As such, the director properly issued the notice revoking the approval of the petition.

Additionally, though not addressed by the director, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the prospective United States employer must establish that it has been doing business for at least one year.

The regulation at 8 C.F.R. § 204.5(j)(2) states that 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."

In the instant matter, the petitioner submitted invoices and shipping documents as evidence that it was selling merchandise on a "regular, systematic, and continuous" basis since May 1996. However, the petitioner provided no invoices or shipping documents to show that it was doing business in March and April of 1996 or in the last two months prior to the filing of the instant petition, January 18, 1997 through March 17, 1997. Thus, the petitioner failed to establish it met the requirements of 8 C.F.R. § 204.5(j)(3)(i)(D).

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). Therefore, based on the additional ground discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused it discretion with respect to all of the AAO's enumerated grounds. 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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.