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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 01 2005

WAC 96 139 51495

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 initially approved by the Director, California Service Center. After an investigation and upon 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 California corporation operating as a weekly Filipino newspaper publication. The petitioner suggests that at the time the petition was filed, it was the parent company of a Filipino subsidiary. It seeks to employ the beneficiary as its operations 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. Pursuant to the various findings of a U.S. Embassy investigation of the petitioner's alleged Filipino subsidiary, the director determined that the petitioner failed to establish that it had a qualifying relationship with the beneficiary's foreign employer.

On appeal, the petitioner disputes the director's findings and submits a brief in support of its 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 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 issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that it had and continues to have 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.

In support of the petition, the petitioner submitted the following documentation:

1. A letter dated February 23, 1996, in which the petitioner implied that it has a qualifying relationship with the California Examiner in the Philippines, which was opened in June 1987. It is noted that the petitioner did not specify the type of qualifying relationship it purportedly has with the foreign entity.

2. A stock certificate dated March 31, 1983 indicating that [redacted] the petitioner's president, is the owner of 20,000 shares of the petitioner's stock.

3. The petitioner's 1994 Form 1120 corporate tax return, including Schedule E, which indicates that [redacted] owns 100% of the petitioner's common stock.

4. Certificate of Authority identifying the foreign entity as a branch of the petitioning entity. This document allows the petitioner to operate in the Philippines as a branch of a U.S. business.

5. The foreign branch office's 1995 tax return.

The record also contains a memorandum dated September 6, 1997 from the Los Angeles District Supervisor requesting that an on-site investigation be conducted at the foreign branch office. Pursuant to the on-site investigation, the director issued a notice on March 1, 2004 informing the petitioner of his intention to revoke the approval of the petition. The director stated that the on-site investigation revealed that the foreign branch office ceased operations in early 1996. In light of this finding, the director determined that the beneficiary is statutorily ineligible for classification as a multinational manager or executive.

The petitioner responded with the following documentation:

1. Certification attesting to the beneficiary's employment abroad as operations manager from December 1991 to August 15, 1994. The certification indicates that the foreign entity was operating from the second floor of the Calvo building in Escolta, Manila.

2. The beneficiary's 1992 and 1993 wage and tax statements and income tax returns reflecting income earned during his employment with the foreign entity.

3. A letter dated July 29, 1994 informing the beneficiary of his transfer to the United States to fill the position of operations manager with a salary of $2,000 per month

4. The beneficiary's tax documentation reflecting income earned in the United States in 1994, 1995, and 1997.

On June 3, 2004, the director issued a notice revoking the approval of the petition. The director stated that an overseas investigation indicated that there was insufficient evidence to establish that the beneficiary was employed abroad during the relevant statutory period and suggested that the petitioner has failed to maintain a continuing parent/subsidiary relationship with the overseas entity.

On appeal, the petitioner asserts that the beneficiary "worked legitimately" for the claimed overseas branch in the Philippines and asked that the petition be approved. However, without documentary evidence to support the claim, assertions will not satisfy the petitioner's burden of proof. Assertions 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). In the instant matter, the petitioner clearly indicates in a letter dated June 16, 2004 that the foreign branch ceased operations in 1996. Therefore, by the petitioner's own admission, a qualifying relationship with the beneficiary's overseas employer ceased to exist the same year that the petition was filed.

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." A Notice of Intent to Revoke 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 Estime*, 19 I&N Dec. 450 (BIA 1987).

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). Based on the evidence of record and the representations of the petitioner itself, the foreign branch office ceased operations some time in 1996. At that point, any qualifying relationship the petitioner may have established with the beneficiary's foreign employer was terminated. Accordingly, based on the petitioner's failure to maintain a qualifying relationship with the beneficiary's foreign employer, this petition cannot be approved.

Beyond the decision of the director, the record lacks sufficient evidence to establish that the beneficiary was employed abroad and would be employed by the U.S. petitioner in a qualifying managerial or executive capacity. 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). It is noted that reciting the beneficiary's vague job responsibilities or broadly cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. 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). Although the petitioner clearly suggested that the beneficiary had and would continue to have a high degree of discretionary authority in his overseas position, as well as in his prospective position in the United States, this single factor is insufficient in establishing the nature of the beneficiary's prior and proposed daily activities. The petitioner has not provided adequate information to convey an understanding about the type of duties the beneficiary had been and would be primarily performing.

Additionally, the evidence of record suggests that the petitioner failed to establish its ability to pay the beneficiary's proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The record of proceeding contains the following documents, which address the issue of the beneficiary's salary:

1. Letter dated July 29, 1994 indicating that the beneficiary's salary would be $2,000 per month, which is equivalent to $24,000 per year.

2. I-140 petition, filed on April 15, 1996, indicating that the beneficiary's salary would be $500 per week, which is equivalent to $26,000 per year.

3. The beneficiary's 1995 W-2 wage and tax statement showing that the beneficiary was paid $12,650 that year.

4. The beneficiary's 1997 W-2 wage and tax statement indicating that the beneficiary was paid $14,777 that year.

It is noted that the petitioner did not submit a W-2 wage and tax statement for the beneficiary for 1996 to show the amount of remuneration during the year in which the petition was filed. However, in light of the conflicting information contained in the July 29, 1994 letter and the petition itself, the AAO cannot determine the beneficiary's proffered wage. 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). Furthermore, 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). Inconsistencies aside, even if the AAO were to assume that the petition was the most accurate indicator of the beneficiary's proffered wage, the beneficiary's 1997 W-2 wage and tax statement clearly shows that the beneficiary's salary one year after the petition was filed fell more than $10,000 short of the $26,000 indicated in the petition. As such, the AAO concludes that the petitioner failed to establish the ability to remunerate the beneficiary his proffered wage.

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 grounds discussed above, the director's decision cannot be overturned.

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.