

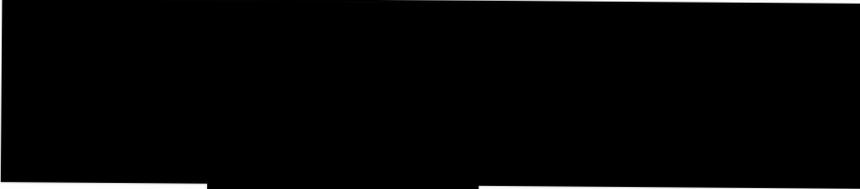
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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File: [Redacted]
WAC 99 136 52481

Office: CALIFORNIA SERVICE CENTER

Date: MAR 22 2006

IN RE: Petitioner:
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:



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 visa petition. Upon subsequent review the director issued a notice of intent to revoke approval of the petition and ultimately revoked approval. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner is a corporation organized in the State of Nevada in June 1996. It was authorized to conduct business in the State of California in June 1997. It claims it imports foodstuffs and exports health foods and cosmetics. 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 petition was filed April 12, 1999 and was approved October 12, 2000. The beneficiary was interviewed on February 26, 2002 in connection with his Form I-485, Application to Register Permanent Resident or Adjust Status. Upon subsequent review of the record based on information obtained in the February 26, 2002 interview and on information obtained from California Corporate Records that the petitioner had submitted a Certificate of Surrender to do business in California on June 20, 2003, the director issued a notice of intent to revoke approval on July 20, 2005. The petitioner submitted a rebuttal statement on August 18, 2005. The director revoked approval of the petition on September 7, 2005, determining: (1) that the petitioner had not established that the beneficiary had been and would be employed in a primarily executive or managerial capacity; or (2) that the petitioner conducted business in the United States in a regular, continuous, and systematic fashion.

On the Form I-290B Notice of Appeal, filed September 22, 2005, counsel for the petitioner indicated that a brief and/or evidence would be submitted within 30 days. Upon receipt and review of counsel's brief dated October 18, 2005, the AAO observes that it is a replica of the counsel's statement submitted in rebuttal to the director's notice of intent to revoke, save for the title page, the date, and references to the "director's" statement rather than the "notice's" statement.

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 regulation at 8 C.F.R. §103.3(a)(1)(v) states, in pertinent part: "An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal."

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General 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 un rebutted, 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. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

On the issue of the beneficiary's managerial or executive capacity, the record contains the petitioner's description of the beneficiary's job duties in a February 22, 1999 letter appended to the petition and on a list of the petitioner's employees found at Exhibit B-13 of the petition. The petitioner stated that:

As Vice President, [the beneficiary], is directly responsible for assisting the President in strategic planning and implementing the goals and objectives of the U.S. subsidiary; overseeing the daily operations and personnel of the Trading Department; developing quarterly and annual purchasing plans; reviewing customers' requirements; overseeing the import of foodstuffs and the export of health foods, cosmetics, and other products; locating new suppliers; studying new products and consumer information; negotiating key purchasing contracts; supervising workers in the preparation of export and customs documents;

hiring/terminating workers; and representing our parent company's interests in the United States

The petitioner added that the beneficiary also acted as the petitioner's president when the president was absent.

The petitioner's list of employees and accompanying job descriptions provided the following job description for the beneficiary's position:

Under the supervision of the President, he conducts concrete plans regarding the company's international trading. He is responsible for checking the amounts of products going in and out of the company, and for inspecting the quality of the products transported.

The petitioner's organizational chart showed the beneficiary in the position of vice-president over three subordinate employees, one each in the departments of international trading, transportation, and quality control.

The general descriptions provided suggest that the beneficiary performs operational tasks. The organizational chart submitted shows that the beneficiary is at most a first-line supervisor of non-professional employees. Despite the questionable nature of the beneficiary's position as a *bona fide* manager or executive, the director approved the petition.

As the director observed in his notice of intent to revoke and ultimate revocation decision, when the beneficiary was interviewed on February 26, 2002 in regard to his Form I-485 application, the beneficiary acknowledged that the petitioner employed only two people including himself. The director also observed that the beneficiary referred to himself as a "clerk" on his IRS Forms 1040, U.S. Individual Income Tax Return, for the 1999 and 2000 years. The director determined, based on this information, that the beneficiary was not performing primarily managerial or executive tasks, but was performing the operational and administrative tasks of the company.

Counsel does not address either of these observations in his rebuttal or on appeal. Instead, counsel infers from the director's decision that the director does not believe a small company is statutorily qualified to file a visa petition for this visa classification. Counsel also asserts that requiring a "manager" to manage professional employees is not in accordance with the law. Counsel contends as well that the director has attempted to apply a new and different interpretation of who qualifies as a function manager.

Counsel's inferences and assertions are not on point. The AAO acknowledges that if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In this matter, however, the petitioner has failed to clarify who carries out the operational and first-line supervisory tasks in the organization. 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)). An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

In addition, counsel should note that it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Further, the petitioner clearly placed the beneficiary in a first-line supervisory position on its organizational chart. The petitioner did not provide evidence that the beneficiary's three subordinates held positions that qualified as professional, supervisory, or managerial positions. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. Neither did the petitioner claim that the beneficiary held a functional manager position. In that regard, 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). Furthermore, 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.

A review of the initial record in this matter establishes that approval of the petition was gross error on the part of the director. Counsel for the petitioner has provided no pertinent argument, assertion, or statement that identifies specifically an erroneous conclusion of law or a statement of fact as a basis for the appeal. Thus, the regulations mandate the summary dismissal of the appeal. 8 C.F.R. § 103.3(a)(1)(v).

The next issue in this matter is the director's determination that the petitioner is no longer doing business as the most current Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax, was for the year 2000 which showed no income for the year and the State of California Corporate Records showed that a Certificate of Surrender by Foreign Corporation was transacted on June 20, 2003.

Again, counsel does not address either of these concerns expressed by the director, either in rebuttal or on appeal. Counsel states "there is nothing in section 203(b)(1)(C) which requires that a branch office always continue with the same name and/or product line or service as in the past." Counsel also references Section 106(c) of the American Competitiveness in the Twenty-First Century Act (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000). Counsel, however, fails to sufficiently elucidate the pertinence of this reference to the failure of the petitioner to explain whether it continues to do business and if so to provide some documentary evidence to demonstrate how, where, and when it provides goods and/or services in a regular,

systematic and continuous manner. *See* 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 record does not establish that the petitioner continues to do business as required by the regulation. Counsel has failed to specifically identify an erroneous conclusion of law or statement of fact regarding this issue as a basis for this appeal. For this additional reason, the regulations require the summary dismissal of the appeal.

Counsel's statement in rebuttal and on appeal also suggests that he is requesting an equitable form of relief. However, the AAO, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of Citizenship and Immigration Services (CIS) from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). This type of equitable relief is available only through the courts. The Secretary of the United States Department of Homeland Security limits the jurisdiction of the AAO to that authority specifically granted to the Secretary. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, the AAO has no authority to address counsel's request for equitable relief.

Moreover, the AAO specifically observes 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*, 19 I&N Dec. 582 (BIA 1988). Further, a director's decision to revoke the approval of a petition will be affirmed, notwithstanding the submission of evidence on appeal, where a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intention to revoke. *See Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1988). The approval of the petition based on the limited information submitted in this matter was clearly a matter of gross error. The petitioner has not provided evidence, either in rebuttal or on appeal, to rectify the deficiencies in the original submission regarding the beneficiary's managerial or executive capacity for the petitioner or as the director determined, and counsel seemingly acknowledged, that the petitioner no longer continues to conduct business.

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). When the application for adjustment of status was filed, this beneficiary was not eligible for the classification sought. The notice of intent to revoke approval was properly issued for "good and sufficient cause" because the evidence of record at the time the notice was issued, warranted a denial of the visa petition based upon the petitioner's failure to meet its burden of proof. *Matter of Esteime*, 19 I&N Dec. 450 (BIA 1987). Furthermore, 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).

The AAO observes in brief, that the initial record did not establish that the beneficiary's position for the foreign entity had been in a managerial or executive capacity or that the petitioner had established its ability to pay the beneficiary the proffered wage. For these additional reasons, the director's approval was in gross error.

Inasmuch as counsel does not identify specifically an erroneous conclusion of law or a statement of fact as a basis for the appeal, the regulations mandate the summary dismissal of the appeal.

The approval of the petition will be revoked for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 summarily dismissed.