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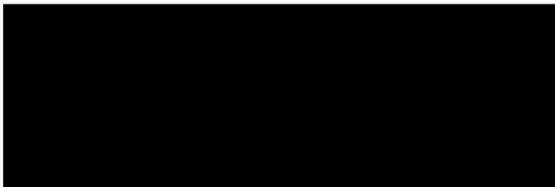
Petitioner:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the Commonwealth of Massachusetts that is operating as a convenience store and a money remittance agency. According to counsel, prior to the denial of the instant petition, the petitioning entity was sold and the beneficiary, with his wife, began operating a new business in the State of Connecticut. Under the present petition, the petitioner sought to employ the beneficiary as its president.¹

On August 7, 2006, the director issued a notice of intent to deny, noting that the petitioner had not demonstrated the beneficiary's eligibility for classification as a multinational manager or executive. In response, counsel contended that Citizenship and Immigration Services (CIS) imposed a higher evidentiary standard of proof on the petitioner. Counsel also stated that pursuant to AC21², the beneficiary "qualifies to port to new employment as an employee and/or as a self-employed individual."

In a decision dated October 4, 2006, the director denied the petition concluding that the petitioner had not demonstrated that the beneficiary had been or would be employed by either the foreign or United States entities in a primarily managerial or executive capacity.

On appeal, counsel maintains the beneficiary's eligibility for the requested immigrant visa classification, stating that the petitioner had provided a list of job duties sufficient to establish the beneficiary's former and proposed employment in a primarily managerial or executive capacity. Counsel challenges the director's review of the petition, again claiming that CIS failed to apply the "preponderance of the evidence" standard. Counsel takes issue with CIS' failure to address AC21 and the beneficiary's eligibility to transfer to new employment while the I-140 petition was pending.

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):

¹ On December 26, 2001, the petitioner filed its first I-140 immigrant petition seeking employment of the beneficiary as its president. Citizenship and Immigration Services denied the petition on July 30, 2002. Despite certification under the penalty of perjury, the petitioner indicated in Part Four of the most recently filed Form I-140 that the beneficiary had not previously had an immigrant visa petition filed on his behalf.

² In 2000, Congress passed the American Competitiveness in the Twenty-First Century Act (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17 2000). Section 106(c) of AC21 amended section 204 of the Act. The "portability provision" at section 204(j) of the Act provides that "an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same of a similar occupational classification as the job for which the petition was filed." CIS has not issued regulations governing this provision.

* * *

(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 or 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, 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 record does not contain evidence that the beneficiary qualifies for this visa classification. Based on the limited record of proceeding, the petitioner had not established that the beneficiary's former or proposed employment with the foreign or petitioning entities was in a primarily managerial or executive capacity. The initial evidence provided by the petitioner in its September 20, 2002 letter broadly stated the job duties associated with the beneficiary's proposed employment as president of the petitioning entity and only briefly identified the beneficiary's position of commercial manager in the foreign entity without mentioning any related managerial or executive responsibilities. 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).

Additionally, counsel failed to address the beneficiary's former and proposed employment in the petitioning entity following the director's request in his August 7, 2006 notice of intent to deny. Rather, counsel focused only the beneficiary's purportedly eligibility under AC21 to port to new employment with the new Connecticut-based company. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Accordingly, the petitioner failed to offer a sufficient description that the beneficiary's employment in either the foreign or petitioning entity was comprised of primarily managerial or executive job duties.

Moreover, the sale of the petitioning entity in 2004 severed any existing qualifying relationship between the petitioner and the beneficiary's foreign employer. In order to establish eligibility for classification as a multinational manager or executive for immigrant visa purposes, the petitioner must establish that it maintains a qualifying relationship with the beneficiary's foreign employer; the foreign corporation or other legal entity

that employed the beneficiary must continue to exist and have a qualifying relationship with the petitioner at the time the immigrant petition is filed. 8 C.F.R. § 204.5(j)(3)(i)(C). A multinational manager or executive is one 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." Section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C).

Furthermore, counsel's claim that CIS imposed a higher standard of proof on the petitioner is not persuasive. The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Here, the submitted evidence is not probative and credible. As noted previously, the record of proceeding contains limited documentation on the job duties performed by the beneficiary in the foreign or petitioning entities, thus restricting the analysis of whether the beneficiary occupied a primarily managerial or executive position in either organization. The director's decision will be affirmed.

Furthermore, counsel contends that based on section 106(c) of AC21, the underlying immigrant visa petition should remain valid to allow the beneficiary to port to new employment as the application for adjustment of status was pending for more than 180 days. Of note, the beneficiary's new job and the portability considerations of AC21 are separate issues that must be addressed in the adjudication of the beneficiary's I-485 application, not in the I-140 decision. No appeal lies from the denial of an application for adjustment of status under section 245 of the Act, 8 C.F.R. § 245.2(a)(5)(ii).

However, the AAO observes that for the portability provisions to apply, the underlying petition must be "valid" to begin with if it is to "*remain* valid with respect to a new job." Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added). In this matter, the record does not establish the beneficiary's initial eligibility for this visa classification.

Section 204(b) of the Act, 8 U.S.C. § 1154(b), governs CIS' authority to approve an immigrant visa petition and grant immigrant status:

After an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 1153(b)(2) or 1153(b)(3) of

this title, the Attorney General [now Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is . . . eligible for preference under subsection (a) or (b) of section 1153 of this title, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

Accordingly, pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien "entitled" to immigrant classification under the Act "may file" a petition for classification. Section 204(a)(1)(F) of the Act. However, section 204(b) of the Act mandates that CIS approve that petition only after investigating the facts in each case, determining that the facts stated in the petition are true and that the alien is eligible for the requested classification, and consulting with the Secretary of Labor when required. Section 204(b) of the Act. Congress specifically granted CIS the sole authority to approve an immigrant visa petition; an alien may not adjust status or be granted immigrant status by the Department of State until CIS "approves" the petition.

Therefore, to be considered "valid" in harmony with the thrust of the related provisions and with the statute as a whole, the petition must have been filed for an alien that is "entitled" to the requested classification and that petition must have been "approved" by a CIS officer pursuant to his or her authority under the Act. *See generally*, § 204 of the Act, 8 U.S.C. § 1154. A petition is not made "valid" merely through the act of filing the petition with CIS or through the passage of 180 days. And if the approval of a petition is ultimately revoked, the revocation serves as the CIS notice that the petition was not valid. To interpret this provision in any other manner would subvert the statutory scheme of the U.S. immigration laws.³

Considering the statute as a whole, it would severely undermine the immigration laws of the United States to find that a petition is "valid" when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien that was never "entitled" to the requested visa classification. It would be irrational to believe that Congress intended to throw out the entire statutorily mandated scheme regulating immigrant visas whenever that scheme requires more than 180 days to effectuate. It would also be absurd to suppose that Congress enacted a statute that would encourage large numbers of ineligible aliens to file immigrant visa petitions, if the legislation was actually meant to be an impetus for CIS to reduce its backlogs. To construe section 106(c) to include unadjudicated, denied, and revoked petitions would create a situation where ineligible aliens would gain a "valid" visa simply by filing frivolous visa petitions and adjustment

³ The problematic issues presented by this case are primarily the result of immigration procedures that have arisen since the enactment of section 106(c) of AC21. CIS implemented the "concurrent filing" process on July 31, 2002 whereby an employer may file an employment-based immigrant visa petition and an application for adjustment of status for the alien beneficiary at the same time. *See* 8 C.F.R. § 245.2(a)(2)(B) (2004); *see also* 67 Fed. Reg. 49561 (July 31, 2002). CIS implemented the concurrent filing process as a convenience for aliens and their U.S. employers; CIS in no way suggested that an unadjudicated I-140 could be the basis for I-485 approval under the portability provisions of section 106(c). Prior to this date, only immediate relatives and family-based preference cases could concurrently file a visa petition and an adjustment application. Accordingly, at the time that Congress enacted AC21, no alien could assert that a denied or unadjudicated immigrant visa petition "shall remain valid" through the passage of 180 days, since the application for adjustment could not be filed until after the petition was approved by CIS. It is presumed that Congress is aware of INS regulations at the time it passes a law. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

applications, thereby increasing CIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.

In the present matter, the petition was filed on behalf of an alien who was not "entitled" to the classification as the beneficiary was not shown to have been employed by the foreign entity as a manager or executive or to occupy a primarily managerial or executive position in the United States entity. Section 106(c) of AC21 does not repeal or modify section 204(b), section 205, or section 245 of the Act, which all require an approved petition prior to CIS granting immigrant status or adjustment of status and further provide that CIS may revoke the approval at any time for good and sufficient cause. Accordingly, this petition cannot be deemed to have been "valid" for purposes of section 106(c) of AC21.

The AAO notes for the record that even under counsel's interpretation of § 106(c) of AC21, the original immigrant visa petition would not remain valid with respect to the beneficiary's new employment. Section 106(c) of AC21 states, in relevant part, that in the case of a filed application for adjustment of status under section 245 of the Act that has remained unadjudicated for 180 days or more, the underlying petition under section 204(a)(1)(F) of the Act "shall remain valid with respect to a new job if the individual changes jobs or employers *if the new job is in the same or a similar occupational classification as the job for which the petition was filed.*" (emphasis added).

When determining whether similarities exist between the beneficiary's employment in the petitioning entity and his present employment, CIS will review the descriptions offered for each position, and consider whether the job duties associated with each position are "the same or [] similar." Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Where the language of a statute is clear on its face, there is no need to inquire into Congressional intent. *INS v. Phinpathya*, 464 U.S. 183 (1984).

Here, the original position offered to the beneficiary as president of the petitioning entity was said to comprise such responsibilities as: directing the commercial and day-to-day operations of the company; preparing and maintaining the annual budget, expenditures, and financial documentation; making personnel decisions; developing diversification and marketing plans; supervising staff members; setting and maintaining objectives; and acting as a liaison between stockholders, directors, and managers. In contrast, the job duties related to the beneficiary's new employment include: managing the organization; preparing and negotiating purchase contracts; determining inventory; ordering supplies; making bank deposits; performing bookkeeping functions; ensuring the company's adherence to state and federal regulations; interacting with customers; and resolving service issues. Especially relevant are the beneficiary's additional tasks of initiating money remittances to overseas locations and making travel arrangement for clients. The AAO notes that these tasks involve the performance of the services offered by the new company, which is operating as a travel and money remittance agency. Also, the beneficiary is noted as being the sole employee of his present employer.

A review of the job duties associated with the beneficiary's current position restricts a finding that he would be employed in the same or similar occupational classification as his former employment in the petitioning entity. While the beneficiary was assigned the title of president of each organization, the related job duties differ significantly, particularly with respect to his performance of the travel and money remittance services offered by his present United States employer. In his current employment, and as the sole employee, the beneficiary is personally performing significantly more non-managerial and non-executive tasks that are essential to the operation of the organization. Accordingly, based on the representations made for the

beneficiary's former and present employment in the two United States companies, the beneficiary's new job would not be deemed to be in the same or similar occupational classification as the job for which the immigrant visa petition was filed.

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.