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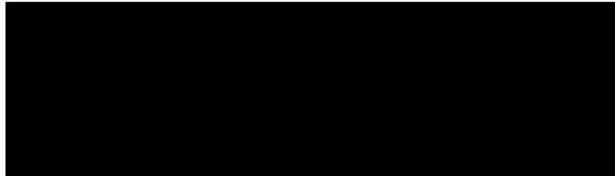


File: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **MAY 18 2007**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

IN 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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center approved the employment-based visa petition. Upon subsequent review of the record, the director issued a Notice of Intent to Revoke and 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 originally claimed to be engaged in import, export, and international trading. It seeks to employ the beneficiary as its vice-president of sales and marketing. Accordingly, it endeavored 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. According to counsel, the original petitioner no longer intends to employ the beneficiary, since the petitioner ceased operations and the beneficiary's division was merged into a new company.¹ Counsel asserts that the beneficiary is now be employed by a third, unrelated company.

The petition was filed on May 21, 1998 and the director approved the petition on May 11, 1999. The beneficiary filed an I-485, Application to Register Permanent Residence or Adjust Status in August 1999. The director requested further evidence to support approval of the I-485 in February 2001 and in September 2002. Upon review of the totality of the record, the director issued a Notice of Intent to Revoke on February 27, 2003. The petitioner provided a rebuttal on April 21, 2003. After review, the director determined that the petitioner had not established its ability to pay the beneficiary the proffered wage and that the beneficiary's current position was not in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the foreign entity's payment of the beneficiary's wage while the beneficiary was in L-1A intracompany transferee status is not relevant and does not constitute "good and sufficient cause" to revoke an approved I-140 petition. Counsel also asserts that the petitioner's lack of payment to the beneficiary as a "permanent residence (EB1-3)" does not constitute "good and sufficient cause" to revoke an approved I-140. Counsel finally asserts that the director erred in revoking the I-140 petition on the basis that the beneficiary's new job is not in the same or similar classification as the beneficiary's job with the petitioner.

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

¹ Counsel's assertions raise additional issues that should have been addressed by the director. If the petitioner terminated its business operations in 1999, the approval of the petition would have been revoked automatically and retroactively back to the date of the petition's approval, without any need for a notice. 8 C.F.R. § 205.1(a)(3)(iii)(D).

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).

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)).

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. *See* 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).

The issue in this proceeding is the petitioner's ability to pay the beneficiary the proffered wage of \$40,000 per year. 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In analyzing a petitioner's ability to pay the proffered wage, the fundamental focus is whether the employer is making a "realistic" or credible job offer and has the financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977).

In the Notice of Intent to Revoke, the director observed that the record did not substantiate that the petitioner had ever employed the beneficiary. The director concluded that the beneficiary had been unemployed prior to attempting to utilize the benefits provided under the "portability provision" of section 204(j) of the Act, 8 U.S.C. § 1154(j), as added by section 106(c) of the American Competitiveness in the Twenty First Century Act of 2000 (AC21).² The director concluded that the beneficiary was not eligible for the classification sought and issued the Notice of Intent to Revoke on March 25, 2003.

In rebuttal, counsel for the petitioner asserted that the source of the beneficiary's remuneration was not important and that the beneficiary could continue to be paid by a foreign-based subsidiary, affiliate, or parent company even after being assigned to the United States. Counsel referenced, without providing, Immigration and Naturalization Service (now CIS) regulations and the Board of Immigration Appeals' precedent decisions.

The director determined that the petitioner had not paid the beneficiary's proffered salary as either an "E13 or as an L-1" beneficiary.

On appeal, counsel for the petitioner asserts that the foreign entity's payment of the beneficiary's wage while the beneficiary was in L-1A intracompany transferee status is not relevant and does not constitute "good and sufficient cause" to revoke an approved I-140 petition. Counsel also asserts that the petitioner's lack of

² The "portability provision" at section 204(j) of the Act provides that an applicant whose application for adjustment of status pursuant to section 245 has been filed and remained adjudicated for 180 days or more shall remain valid with respect to a new job, if the individual changes jobs or employers, and the new job is in the same or a similar occupational classification as the job for which the petition was filed. The beneficiary filed the I-485 application August 6, 1999 and obtained an offer of employment, once his legal status was verified, from a new employer on August 12, 2002. Counsel also provided the beneficiary's pay stub, issued by the new employer, for the period beginning September 16, 2002 and ending September 30, 2002 showing the beneficiary's gross pay of \$1,667.

payment to the beneficiary as a "permanent residence (EB1-3)" does not constitute "good and sufficient cause" to revoke an approved I-140.

Counsel correctly observes that the foreign entity's payment of the beneficiary's salary in L-1A intracompany transferee status, even if it had been established, is not relevant to the revocation of an approved I-140 petition. However, counsel's assertion that the petitioner's lack of payment to the beneficiary does not constitute good and sufficient cause to revoke the petition, does not directly address the issue in this matter.

As stated previously, the regulations require that the petitioner establish its ability to pay the beneficiary the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). When determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. The priority date is May 21, 1998. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the beneficiary's salary.

In this matter, the petitioner has not supplied documentary evidence that it has employed the beneficiary at a salary equal to or greater than the proffered wage. Generally, the 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).

Counsel for the petitioner asserts that the petitioner's parent company, the foreign entity in this matter, paid the beneficiary the proffered wage while the beneficiary was in L-1A intracompany status. The record contains evidence that the beneficiary was approved to work for the petitioner in L-1A valid intracompany transferee status from October 16, 1998 to May 1, 2001. The record also contains a May 1, 1998 letter signed on behalf of the foreign entity that indicates the beneficiary worked for the foreign entity from March 1, 1996 to May 1, 1998. Other than these assertions and the evidence of the beneficiary's L-1A intracompany status, the record is devoid of documentary evidence that the beneficiary has been paid the proffered wage by either the foreign entity or the petitioner.

The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

Moreover, the pertinent regulation states the type of evidence that will establish the petitioner's ability to pay. The regulation states "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." 8 C.F.R. § 204.5(g)(2). As such, CIS will initially examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses.

Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D. N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D. N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084.

The record contains the petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for its fiscal year beginning July 1, 1996 and ending June 30, 1997 and the petitioner's IRS Form 1120 for its fiscal year beginning July 1, 1999 and ending June 30, 2000. The petitioner's 1996 IRS Form 1120 shows \$23,500 paid in salaries and a negative income of \$12,661. The petitioner's 1999 IRS Form 1120 shows \$14,000 paid in salaries and a net income of \$12,498. However, the record does not contain any evidence of the petitioner's ability to pay the beneficiary when the petition was filed in May 1998 and continuing until the Notice of Intent to Revoke was issued on February 27, 2003.³

The complete lack of documentary evidence substantiating that the petitioner had paid or has the ability to pay the beneficiary the proffered wage constitutes good and sufficient cause to revoke this petition. The petitioner has not provided evidence to overcome the director's decision on this issue. For this reason, the appeal must be dismissed.

Beyond the decision of the director, the petitioner never established that the beneficiary's position was a managerial or executive position. The initial description of the beneficiary's duties for the petitioner paraphrased the statutory requirements of both managerial and executive capacity. See section 101(a)(44)(A)(iii) and 101(a)(44)(B)(ii)(iv) of the Act. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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, the petitioner indicated that the beneficiary would be developing business relations, developing new markets, and exploring and identifying local

³ The record includes the petitioner's June 22, 1999 letter that states it still intended to employ the beneficiary as its vice-president of sales and marketing. The record also includes the beneficiary's I-485 application filed August 6, 1999. The record further includes counsel's explanation that the petitioner's "LAN" department was spun off and merged with a California corporation that had been established August 30, 1999. It is noted that the California Secretary of State website, the "California Business Portal," indicates that the petitioner is no longer an active corporation. See <http://kepler.ss.ca.gov/list.html> (accessed May 18, 2007). Given the timing of these events, the facts raise the serious question as to whether the petitioner actually intended to employ the beneficiary at the time the I-485 was filed.

While counsel ultimately explained and provided evidence that the petitioner's parent company had purchased a controlling interest in the new company that would now employ the beneficiary, these facts are not material to this petition. Instead, the facts represent a substantial and material change in the approved petition that would require the filing of a new petition by the new employer.

markets. These duties more specifically describe an individual performing market research and obtaining sales rather than managing these tasks through the work of others. The actual duties themselves reveal the true nature of the employment. *Id.* 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). For this additional reason, the petition should not have been approved.

In addition to the vague description of the beneficiary's duties, the petitioner did not independently document its staffing levels or the beneficiary's actual role in the petitioner's hierarchy. The petitioner's organizational chart, without independent evidence of the employment of individuals in various roles, is not sufficient. Further, the petitioner's organizational chart shows that the beneficiary's purported duties would have included only a small role in the petitioner's successor after the spin off and merger.

Finally, citing section 204(j) of the Act, 8 U.S.C. § 1154(j), titled "Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence," counsel asserts that CIS may not deny the beneficiary's adjustment of status application because it had been pending for more than 180 days at the time of adjudication. Contrary to counsel's assertions, the director's decision does not clearly indicate whether he considered the description of the beneficiary's duties for the September 2002 employer as a basis for revoking the I-140 petition. However, the AAO finds that the beneficiary's new job and the portability considerations of AC21 are separate issues that should be addressed in the adjudication of the beneficiary's I-485 application, not in the I-140 revocation decision.

Although 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), the AAO will comment on the issue.

The operative language in section 204(j) of the Act is the following phrase: "A petition . . . shall remain valid with respect to a new job if the individual changes jobs or employers" The term "valid" is not defined by the statute, nor does the congressional record provide any guidance as to its meaning. *See* S. REP. 106-260; see also H.R. REP. 106-1048. Critical to establishing eligibility under section 204(j), the 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).

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.

As previously discussed, the present petition's approval was revoked because the petition was not valid at the outset. Again, in analyzing a petitioner's ability to pay the proffered wage, the fundamental focus is whether the employer is making a "realistic" or credible job offer and has the financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. at 145. In the present case, the petitioner failed to submit evidence to establish that it had the financial ability to pay the wage or otherwise make a valid offer of employment.

In the present matter, the petition was filed on behalf of an alien who was not "entitled" to the classification and the petition was ultimately revoked. Section 106(c) of AC21 does not repeal or modify section 204(b) or section 205 of the Act, which require CIS to approve a petition prior to granting immigrant status or adjustment of status and further provides the authority to revoke that approval. Accordingly, this petition cannot be deemed to have been "valid" for purposes of section 204(j) of the Act.

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.