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U.S. Citizenship and Immigration Services

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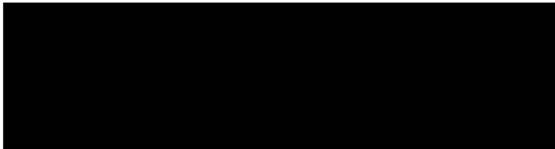


FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: JUN 19 2009

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)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, Texas Service Center. On 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 Florida corporation engaged in the importing and exporting of motor parts and diesel fuel system parts. It seeks to employ the beneficiary as its marketing 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.

The director revoked the petition on the basis of two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a managerial or executive capacity; and 2) the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's findings and submits a brief in support of her assertions.

Upon further review, the AAO finds that the record contains sufficient evidence to establish that the beneficiary was more likely than not employed abroad in a qualifying managerial or executive capacity. Therefore, the remainder of this discussion will focus primarily on the beneficiary's proposed position with the U.S. entity.

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 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 to be considered in this proceeding is whether, at the time the Form I-140 was filed, the petitioner was able to employ the beneficiary in a managerial or executive capacity.

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 Form I-140, the petitioner provided a letter dated February 12, 2002, which included the following statements describing the beneficiary's proposed employment:

This position of [m]arketing [m]anager will work straight with the markets [sic] analysis in a level of public relations between the clients and the enterprise. The [m]arketing [m]anager is the person who coordinates the needs of the market and manages the updates and requests of a demanding clientele in the matter of the products commercialization. The control and the management of the items lists the inclusion of new products, according to the market research of different manufacturer sources, the knowledge of the available inventory in the plant of production . . . specially applied to the Central America area, that is the key-sector for the commercial aims of the [c]ompany. This position is responsible for the development of the export market of the company to the Central and South American markets. . . . [The beneficiary] will be responsible for the development of this [d]epartment and for the expansion of the parent [c]ompany . . . in the United States. She has been assigned the entire project to exercise full discretionary decision-making powers and management of the [m]arketing [d]epartment at the Florida's subsidiary.

This position requires [the beneficiary] to establish the marketing strategies of the company, coordinating, organizing and overseeing all marketing matters exercising full responsibility for the [c]ompany's marketing policies. She will report to the Colombian main [c]ompany the measures and policies she will adopt. She will manage the [m]arketing [d]epartment as she considers necessary to carry out the business of [the petitioner], creating another business success such as the parent companies in Colombia. . . .

On January 30, 2004, approximately 18 months after the petition had been approved, the director issued a notice of his intent to revoke the approval of the petition. The director provided a thorough explanation of the events that prompted his decision. Specifically, the director explained that the attorney of record who filed the petitioner's Form I-140 and supporting documentation was convicted of several federal offenses related to the filing of fraudulent immigrant worker visa petitions. The director further explained that these circumstances caused U.S. Citizenship and Immigration Services (USCIS) to reevaluate the credibility of any immigration claim and supporting documents filed by the convicted attorney. Consequently, the director's notice included a comprehensive request for evidence, which instructed the petitioner to submit, *inter alia*, a description of the beneficiary's U.S. employment, including a list of her specific job duties, and the percentage of time the beneficiary is expected to spend performing each duty. The director expressly stated that the information provided should not list areas of responsibilities, but rather should include specific job duties.

In response, [REDACTED], the company's vice president, submitted a letter dated February 24, 2004 on the petitioner's behalf. [REDACTED] stated that the beneficiary possesses the technical knowledge required of her position and further claimed that the beneficiary has managerial authority

over professional employees. [REDACTED] specified that the beneficiary's authority extends to professional and managerial staff employed abroad by the two entities that jointly own the petitioner. Additionally, [REDACTED] provided the following information about the beneficiary's duties in the United States:

- Production of marketing sales analysis reports to determine prospective customer needs and develop marketing plans to increase sales.
- Analysis of marketing data to show the parameters to get the best achievements about competitive pricing structures, industry trends and forecast of economic conditions for the U.S., Central and South America.
- General [c]oordinator of [the m]arketing department of the entire [m]ultinational [s]tructure, hiring and training for marketing purposes and public relations personnel.
- Preparation of periodic reports on sales activities and the effectiveness of promotional campaigns of company's products.
- Management and direction of public relations. Planning and execution of the company's public relation policies.
- Confer with staff and other departmental managers to direct and identify opportunities for modification or new products development that will improve the company's capabilities to meet client needs.

* * *

- Production and review of analysis reports 25% approx.
- Review of activity reports 25% approx.
- Management [m]eetings 20% approx.
- Management of subordinate [m]anagers 30% approx.

On June 6, 2008, the director issued a decision revoking the prior approval of the petitioner's Form I-140. The director found that the above description of the beneficiary's U.S. employment was overly broad and failed to convey a meaningful understanding of the beneficiary's day-to-day duties. The director further observed that at the time the Form I-140 was filed the petitioner had three employees, including the beneficiary, and found that the limited support staff at the time of filing indicates that the beneficiary would have been performing the marketing tasks.

On appeal, counsel for the petitioner expresses her dismay at the fact that the current adverse decision is based on information that was present in the record of proceeding at the time of the petition's initial approval in August 2002. Counsel is confused as to how the director can now issue a finding of ineligibility when the same information resulted in a different finding when initially reviewed. Counsel asserts that the earlier finding of eligibility should not be revoked in the absence of a finding of fraud to justify the revocation. Counsel's assertion, however, is erroneous. By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the

issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Furthermore, 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)).

Thus, contrary to counsel's assertion, a finding of fraud is not a prerequisite for the revocation of a prior approval, so long as the circumstances meet the above criteria. Moreover, with regard to counsel's mention of guidelines issued to U.S. consular posts by the State Department with regard to revoking prior approvals, this information merely services as guidelines for service personnel; it does not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)). There is no evidence or indication that the guidelines to which counsel refers on appeal are enforceable in a court of law. Accordingly, the AAO will continue by discussing the merits of the director's revocation.

In the present matter, the director expressly stated that the petitioner failed to provide an adequate description of the beneficiary's proposed U.S. employment, finding that the lack of detail regarding the beneficiary's day-to-day job duties precludes a determination that the beneficiary would be employed in a managerial or executive capacity. The need for a detailed description of the job duties entailed in the proposed employment is expressly stated at 8 C.F.R. § 204.5(j)(5). Precedent case law places further emphasis on this regulatory requirement, establishing that the actual duties themselves 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 counsel attempts to supplement the record on appeal by providing a more comprehensive description of the beneficiary's U.S. employment, her description fails to overcome the director's adverse findings, as there is no indication that the supplemental information counsel provides on appeal applies to the beneficiary's job duties at the time of filing. Rather, counsel's statements are in the present tense, thereby indicating that they apply to the duties the beneficiary is currently performing. It is important to note, however, that eligibility must be established at the time of filing. A petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts.

Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). As properly determined by the director, the description of the beneficiary's U.S. employment that was submitted at the time of filing is deficient in that it lacks the degree of specificity that is necessary to determine the nature of the job duties the beneficiary was expected to perform.

Although a supplemental job description was provided by the petitioner's vice present in response to the notice of intent to revoke, that description was also deficient. [REDACTED] claimed that 25% of the beneficiary's time was spent generating and reviewing analysis reports to determine customer needs and to make an effective marketing plan. However, there is no explanation as to how producing reports, which suggest the underlying need to conduct market research, can be deemed a qualifying task. [REDACTED] also stated that the beneficiary is the marketing department coordinator, which includes hiring and training public relations employees for marketing purposes. However, there is no information that would clarify what specific tasks the beneficiary planned to assume in order to fulfill her responsibility to coordinate the company's marketing department, which appeared to consist of a single employee, i.e., the beneficiary, at the time the Form I-140 was filed. A further underlying question, in light of [REDACTED] mention of public relations personnel, is who within the petitioner's organizational hierarchy was available to perform the public relations tasks at the time of filing. The petitioner appears to have had no one other than the beneficiary herself to carry out these seemingly non-qualifying operational tasks. That being said, the petitioner provided no details elaborating as to the means by which the beneficiary planned to manage and direct public relations. This general job responsibility is not self-explanatory, particularly when the petitioner appears to have had no public relations employees at the time of filing.

In light of the above, the job description falls far short of establishing that the beneficiary's job duties at the time of filing would have been primarily within a qualifying managerial or executive capacity.

Next, the AAO will address counsel's claim that the beneficiary's subordinates include five employees from Cali, Colombia, two employees from Venezuela, and another seven employees from Bogota, Colombia. Counsel asserts that this scenario is normal given the "international reach of the petitioner." She further states that it is common for multinational companies such as the petitioner to utilize foreign employees for financial benefit. However, the record shows that the petitioner is a separately incorporated entity and therefore exists apart from the two entities that joined together in order to create it. As such, for purposes of establishing that the beneficiary is acting in a managerial or executive capacity, merely claiming that the beneficiary has been and continues to manage foreign employees is insufficient. The petitioner must submit supporting documentary evidence in order to meet 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)). Thus, if the petitioner claims that it derives some benefit from services that are provided by employees of other institutions, there must be evidence showing that these employees are somehow compensated for the work that they do. This evidence is not only crucial to corroborate the claim as to whom the beneficiary supervises, but it is also significant for the purpose of establishing whether, at the time of filing, the petitioner had staff, comprised of either in-house employees or outside contractors, to perform the daily operational tasks that are associated with the department or function the beneficiary was hired to manage. That being said, the AAO notes that in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are

substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). Furthermore, it is appropriate for USCIS 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).

In the present matter, the director pointed out that at the time the Form I-140 was filed, the record showed that the petitioner had only three employees, including the beneficiary. The director also expressly stated that the petitioner's limited staffing at the time of filing led USCIS to question who was available to perform the non-qualifying operational tasks. As stated above, eligibility must be established at the time of filing. A petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. at 49. Thus, while the petitioner's current staffing may be relevant for the purpose of determining whether the petitioner maintained eligibility beyond the date the petition was approved, the petitioner must first establish that it was eligible for the benefit sought at the time the petition was initially filed. Without probative evidence showing that the petitioner compensated anyone outside of the employees listed in its quarterly wage reports, the record shows that the petitioner had a total of three employees at the time of filing.¹ Although the petitioner indicated at the time of filing that it intended to hire four additional employees, as previously stated, eligibility must be established at the time of filing. *Id.* Therefore, the director was justified in questioning the petitioner's ability to relieve the beneficiary from having to primarily perform non-qualifying operational tasks on a daily basis when its total staff at the time of filing was comprised of three people. Given the deficient job description and the limited support staff, counsel's statements do not establish that the petitioner was eligible at the time the petition was initially filed.

Therefore, the approval of the petition will remain revoked for the above stated reasons. 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.

¹ See Part 5 of the Form I-140, which was filed by the petitioner on February 28, 2002.