

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: **MAY 16 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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:
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The director of the Texas Service Center revoked the approval of the preference visa petition. The director dismissed a subsequently filed motion to reopen. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition approval will remain revoked.

The petitioner, a Texas corporation, operates a Chinese restaurant and seeks to employ the beneficiary as its 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 approval of the petition on the following grounds: (1) the petitioner failed to establish that the beneficiary's employment abroad was within a qualifying managerial or executive capacity; (2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and, (3) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel disputes the director's findings and provides an appellate brief laying out the grounds for challenging the denial. Counsel submits a brief and additional evidence in support of the appeal.

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.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary of Homeland Security 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 Dec. 450 (BIA 1987)).

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. *Id.*

I. Beneficiary's Employment Abroad

The first issue in this matter is whether the beneficiary's employment abroad was within a qualifying managerial or executive capacity. An analysis of the record does not lead to an affirmative conclusion that the beneficiary was employed abroad in a qualifying 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.

The petitioner claimed in its March 16, 2010 letter that the beneficiary served as general manager for the foreign company, which operates a travel services business. The petitioner explained that the foreign company "has the agency for air ticket and for charter flights in Southeast Asia," and that they have "three sales networks which are located in [REDACTED] business center and the [REDACTED]." The petitioner did not provide a description of the beneficiary's duties. Despite the petitioner's failure to provide this material information, the petition was approved.

In response to the notice of intent to revoke the approval, the petitioner stated that the beneficiary's duties with the foreign company included: "established and implemented policies, goals, objectives, and procedures, conferring with board members, organization officials, and staff members as necessary (10%)"; "directed and coordinated the departments of Sales, Marketing, Tours, Ticketing, IT, Human Resources, and Finance (20%)"; "managed staff, and assigned specific duties (15%)"; "directed and coordinated organization's financial and budget activities to fund operations, maximize investments, and increase efficiency (15%)"; "reviewed financial statements, sales and activity reports to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement (20%)"; and, "represented management in business negotiations (20%)." This description provides little insight into what the beneficiary primarily did on a day-to-day basis as general manager of the foreign entity. The petitioner did not explain the strategies of development the foreign company

had. The petitioner also did not explain what employees and departments assisted the beneficiary in performing his job duties. In addition, representing management in negotiations is an operational duty that cannot be classified as a managerial or executive task. Furthermore, 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. Again, the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

In addition, the petitioner did not submit an organizational chart of the foreign company. Instead, the petitioner presented two employee contracts for positions held in the foreign company by individuals that would assist the beneficiary. The petitioner failed to submit a list of duties performed by employees supervised by the beneficiary. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Without sufficient evidence of the employees of the foreign company, it is not clear if the beneficiary had to perform the tasks necessary to provide services rather than supervise employees that performed the day-to-day tasks. While the AAO acknowledges that the beneficiary is not required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary performed are only incidental to his position. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Based on the limited job description provided and the lack of evidence of the staffing and personnel structure in place at the foreign entity during the beneficiary's period of employment abroad, the petitioner has failed to establish that the beneficiary was employed by the foreign company in a qualifying managerial or executive capacity. Accordingly, the approval of the petition was properly revoked and the appeal will be dismissed.

II. Beneficiary's Employment in the United States

The second issue is whether the petitioner provided sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

In support of the Form I-140, counsel submitted a letter dated March 16, 2010, stating that the beneficiary will work in the position of general manager, will have "managerial and supervising responsibility" for the company, and will be responsible for "marketing and promotion of our service." The petitioner further indicated that he will be responsible for "inventory management, kitchen and customer service." The petitioner stated that it operates a Chinese restaurant with nine

(9) employees including the beneficiary as manager, one assistant manager, two cashiers, and 5 working helpers. According to the organizational chart submitted, the 5 working helpers include two waiters, one driver, and two kitchen helpers.

The petitioner submitted a copy of its State of Texas quarterly wage report for the quarter preceding the date of filing, during which the petitioner reported 10 employees, including five employees who earned wages commensurate with part-time employment (\$205 to \$1,500 for the three-month period), and one employee who appeared to be no longer employed by the company. On the basis of this limited information, the director initially approved the petition.

In the notice of intent to revoke, the director instructed the petitioner to provide a detailed list describing the beneficiary's duties including the percentage of time spent on each duty, as well as detailed position descriptions for all employees in the organization. In response, the petitioner submitted a chart with brief position descriptions for the beneficiary and for the positions of assistant manager, cashier, waiter/waitress, driver and kitchen staff. The petitioner indicated that all employees work 40 hours per week.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant case the description of the beneficiary's job duties is too general to convey an understanding of what the beneficiary will be doing on a daily basis and how much of his time would be spent on qualifying versus non-qualifying duties. For instance, the description of duties indicates that the beneficiary will "monitor compliance with health and fire regulations (10 hours per week)"; "investigate and resolve complaints regarding food quality, service, or accommodations (15 hours)"; "perform company strategy to ensure ongoing company development and improvement (12 hours)"; and, "recruit all employees (3 hours)." However, the petitioner does not clarify with sufficient detail what the beneficiary would actually be doing in his effort to develop policies and strategies or why that effort would occupy a great deal of his time within the context of the petitioner's business. In the instant case, the record lacks sufficient information to indicate what specific duties the beneficiary would primarily perform. As such, the AAO cannot affirmatively conclude that the beneficiary would primarily perform managerial or executive duties.

In addition, the petitioner is a restaurant that is open daily for lunch and dinner and the only other employees are an assistant manager, two cashiers, two wait staff, one driver and two kitchen helpers. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). 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. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The evidence submitted does not support the petitioner's claim that its nine employees work full-time. For example, the employees responsible for the preparation and presentation of the petitioner's food are the two kitchen staff and the assistant manager. In the quarter preceding the filing of the petition, the assistant manager was paid \$205, and the two kitchen staff earned \$1,500 and \$400, respectively. The petitioner provided a menu of the restaurant that consisted of four pages of dishes, and photographs of the restaurant that showed at least 20 tables. It is not clear how a large restaurant that is open daily for lunch and dinner can function with only two waiters and two part-time kitchen staff. In addition, the position of the assistant manager mainly manages the food preparation and presentation and managing cooking personnel. Thus, the petitioner did not explain who would handle the financial and administrative operations of the restaurant, as well as operational tasks such as purchasing supplies and food. Since the petitioner must establish that the beneficiary would *primarily* perform qualifying duties, it must be determined that the beneficiary would not spend a majority of his time performing these non-qualifying duties. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The fact that an individual manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved and its approval was properly revoked.

III. Qualifying Relationship

The third issue in this matter is whether the petitioner submitted sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The director noted in his revocation decision, dated June 20, 2011, that the petitioner stated the foreign company purchased 6,000 shares of the petitioner and thus, owned a 60 percent interest in the company; however, the director noted that there was no evidence that 6,000 shares was the equivalent of 60 percent of the petitioner. In addition, the director noted that on the petitioner's 2009 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, the information did not corroborate the claim that the foreign company owned a 60 percent interest in the company. The director acknowledged the petitioner's claim that the accountant made a mistake when filing the tax returns, but found the explanation insufficient to overcome the evidentiary deficiencies and inconsistencies in the record.

As general evidence of a petitioner's claimed qualifying relationship, the articles of incorporation alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The stock certificates, corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986).

In the current petition, the petitioner did not provide any stock certificates or a stock ledger or registry to corroborate the claim that the foreign company owns 60 percent of the petitioner. The petitioner submitted only a share purchase agreement that indicates the foreign company purchased 6,000 shares of the petitioner for the purchase price of \$100,000.00. The share purchase agreement was accompanied by the petitioner's bank statement for the month of April 2009. The bank statement identifies four wire transfers received from China, totaling approximately \$100,000, on April 29 and April 30, 2009. The four wire transfers were sent by three individuals, [REDACTED], from two different Chinese banks. The petitioner provided no further evidence or explanation regarding the source of these funds and did not establish any connection between these individuals and the claimed foreign parent company. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

Further, the petitioner's corporate tax returns did not support its claim that it is majority-owned by the foreign entity. The petitioner's 2009 IRS Form 1120S identified the following shareholders on Schedule K-1: [REDACTED] and [REDACTED].

This information did reflect a change in ownership compared to the previous year's (2008) tax returns which indicated the ownership as follows: [REDACTED].

However, it did not support the petitioner's claims that the foreign entity purchased a majority interest in the company in 2009. Therefore, the petitioner's evidence did not establish that it had a qualifying relationship with the foreign entity and the petition was initially approved in error.

In response to the notice of intent to revoke, counsel for the petitioner stated that the petitioner's accountant filed the incorrect IRS corporate tax return form in 2009 and 2010 due to "miscommunication." The petitioner provided copies of completed IRS Forms 1120, U.S.

Corporation Income Tax Return, for 2009 and 2010, which both reflect that the foreign entity company owns 60 percent of the petitioner's stock. However, there is no evidence that these amended tax records were filed and accepted by the Internal Revenue Service. Furthermore, as noted above, tax records alone are not sufficient evidence to establish a qualifying relationship; the petitioner must provide additional documentation to support the claim that the beneficiary's foreign employer has a qualifying relationship with the petitioner. 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).

In addition, the director noted in the denial decision the inconsistent information regarding the foreign company's ownership of the petitioner but counsel failed to adequately address this issue on appeal. Counsel failed to submit any additional evidence to establish the qualifying relationship and overcome the director's concern regarding the inconsistency in the record regarding the percentage of ownership of the petitioner by the foreign entity. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). For this reason, the appeal will be dismissed.

IV. Conclusion

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