

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B4



FILE:

[Redacted]
EAC 00 226 50752

Office: VERMONT SERVICE CENTER

Date: JUL 11 2005

IN RE:

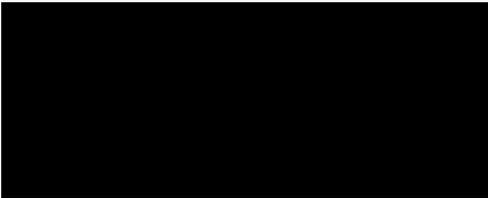
Petitioner:
Beneficiary:



PETITION:

Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, initially approved the employment-based petition. Upon subsequent review 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 is a liaison or branch office of [REDACTED]. The petitioner's branch office was established in 1988 in the State of New York. It serves as a liaison between [REDACTED] insurance companies, insurance brokers, claims settling agents, and other Chinese-owned entities doing business in the United States. It seeks to employ the beneficiary as its chief representative. 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 initially approved the petition on February 20, 2001. Upon subsequent review, including information received in response to a request for evidence regarding the beneficiary's Form I-485, Application to Register Permanent Resident or Adjust Status, the director issued a notice of intent to revoke approval on August 1, 2002. The petitioner submitted a rebuttal but the director ultimately determined that: (1) the United States office was not conducting business in its own right, but was acting merely as an agent for the foreign entity; and, (2) the United States entity could not and would not be paying the beneficiary's salary, thus, "the beneficiary is not acting in the position of a bona fide multinational manager or executive," and, (3) the beneficiary appeared to be the petitioner's lone representative, thus, "it is clear that he is not acting in the position of a bona fide multinational manager or executive."

On appeal, counsel for the petitioner asserts that the director's decision is in error.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. See 8 C.F.R. § 204.5(j)(5).

Section 205 of the Act, 8 U.S.C. 1155 (2005), 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 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition." 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).

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 Esteime*, . . . 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. at 590 (citing *Matter of Esteime*, 19 I&N Dec. 450 (BIA 1987)).

The first issue in this proceeding is whether the petitioner has established that it is doing business and is not merely an agent for the foreign entity.

The regulation at 8 C.F.R. § 204.5(j)(3) states in pertinent part:

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

* * *

- (D) The prospective United States employer has been doing business for at least one year.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Doing Business means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

Counsel asserts that the director's interpretation of the above regulation is incorrect. Counsel refers to the commentary and the Immigration and Naturalization Service's (now Citizenship and Immigration Service's (CIS)) response to the commentary noting that the commentary and response relate to the regulation for L-1A intracompany transferees. Counsel contends, however, that Congress legislated the first employment-based preference for managers or executives as a counterpart to the nonimmigrant L-1A provision. Counsel quotes the commentary to the L-1A definition of "doing business" as:

The Service recognizes that company representatives and liaison offices provide services in the United States even if the services are to a company outside the United States. Such services are within the doing business definition. 52 Federal Register 5738, 41 (February 26, 1987).

Counsel claims that the petitioner in this matter provides services to enhance understanding between the Chinese and United States insurance industries, to assist marine claims agents in the United States, to provide insurance consultation services to Chinese commercial offices, and to supervise and coordinate lawsuits involving the petitioner's interest.¹ Counsel references the extensive documentation provided to the record to demonstrate that the petitioner is active in providing these services.

Counsel's claim is persuasive in part. The critical focus in the definition of "doing business" is not whether the petitioner is an agent or representative office, but whether the entity constitutes the "mere presence of an agent or office" without conducting any business activities. The proper focus on this issue thus, is the nature and conduct of the petitioner's business activities, if any. In the matter at hand, the petitioner has presented evidence that it had been involved in providing consulting services and oversight services to the petitioner and to entities both inside and outside the United States. The petitioner has submitted evidence to establish that at one time it facilitated the regular, systematic, and continuous provision of services.

However, the petitioner has not submitted evidence that it continues to do business. The record does not contain evidence of the petitioner's active provision of services after the tragedy of September 11, 2001. The record does contain an April 5, 2002 letter to the vice-president [REDACTED] The People's Insurance Company of China from the New York Insurance Department. This letter advises that PICC has met the requirements for opening a liaison office in New York identifying the liaison office as "PICC Liaison Office. The New York Insurance Department also notes that China Reinsurance Company, also has a liaison office identified

¹ The petitioner's purpose is also outlined in a one-page excerpt from a 1996 annual report, presumably the petitioner's annual report.

as the CRC Liaison Office and inquires of the status of that liaison office. The record also contains the petitioner's 2001 New York Form CT-33, Insurance Corporation Franchise Tax Return, for the period beginning February 1, 2001 and ending January 31, 2002. These documents are not sufficient to establish that the petitioner continues to engage in providing services. It appears that the [REDACTED] Liaison Office is attempting to start up in New York in 2002, however whether the petitioner is re-starting its former business or these documents have some other purpose is unclear. The petitioner has not established that it continues to provide services on a continuous, regular, and systematic basis. 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). It is for this reason that the director's decision to revoke approval of the petition must be affirmed.

The next issue in this proceeding is whether the United States entity has the ability to pay the beneficiary's salary, and whether the inability to pay the proffered salary requires a conclusion that: "the beneficiary is not acting in the position of a bona fide multinational manager or executive."

The director inarticulately determined that the inability to pay the beneficiary the proffered wage required a conclusion that the beneficiary would not be employed in a multinational capacity as a manager or executive. However, the petitioner's ability to pay the proffered wage and the beneficiary's managerial or executive position with the petitioner are separate issues and should have been delineated and adjudicated accordingly.

Regarding the petitioner's ability to pay the proffered wage, 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.

Counsel claims that the beneficiary's wage is paid by its foreign office and that it is well established that a multinational executive may be paid from outside the United States. Counsel cites *Matter of Pozzoli*, 14 I&N Dec. 569 (BIA 1974), wherein the Regional Commissioner concluded that the use of the foreign qualifying entity's funds could also be used to support a beneficiary's wage in the context of the nonimmigrant petition. However, this matter concerns an immigrant petition and thus can be distinguished from the *Pozzoli* matter.

The AAO observes that the regulation cited above specifically requires that "an offer of employment must be accompanied by evidence that the prospective *United States employer* has the ability to pay the proffered wage." (Emphasis added.) In this matter the petitioner is a branch office of the foreign entity and has agreed to not transact insurance business. Counsel, in a December 12, 2000 response to the director's request for evidence states: "Petitioner was approved as a liaison office in the United States, but is not permitted to earn income." In the limited circumstances of this petition, the AAO acknowledges that the beneficiary may be paid by the petitioner's foreign office and that the evidence indicates that the foreign entity was sufficiently

viable to pay the beneficiary the proffered wage. In this matter, the AAO concludes that the petitioner's ability to pay the beneficiary the proffered wage has been sufficiently established, the director's reference to the contrary is withdrawn.

The last issue in this proceeding is whether the beneficiary's position is an executive or managerial position.

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 a June 14, 2000 letter appended to the petition, the petitioner listed the beneficiary's duties as chief representative:

- (1) Serve as a liason [sic] and promoting goodwill between the Petitioner and insurance companies, insurance brokers, claims settling agents and other entities in the United States;
- (2) Oversee and coordinating litigation and other legal matters affecting the Petitioner's business in the United States, including oversight of claims managed from Petitioner's California office;
- (3) Report to the Petitioner's head office in Beijing on any inquiries or complaints regarding the Petitioner Company;
- (4) Serve on the Board of Directors and as an elected representative of Petitioner to the [redacted] joint venture with American International Group Insurance Company (a major US based international insurance conglomerate);
- (5) Design and initiate implementation of the immediate and long term objectives and policies of the United States organization in coordination with the already existing long term objectives of its parent company in China;
- (6) Design business plan towards an effective marketing strategy;
- (7) Determine the investment direction and profit allotment in conjunction with the overall investment and profit structure of the parent company;
- (8) Oversee regional projects towards profitable financial results;
- (9) In charge of implementing management, investment and financial plans;
- (10) Supervise preparation of final report and profit allotment plan;
- (11) Set up long term objectives of the business; and
- (12) Elect and appoint officers on behalf of the corporation.

In a December 12, 2000 response to the director's request for evidence, counsel for the petitioner re-phrased elements of the position description previously provided and added that the beneficiary provided insurance management consultation services to the local Chinese commercial offices. Counsel also listed the number of hours the beneficiary devoted to his job duties as:

- (1) Act as member of Board of Directors of [redacted] entities in the United States[.] 15 hours per week
- (2) Supervise and coordinate lawsuits in the United States that involve the interests of the [redacted] 5 hours per week
- (3) Meet with top-level executives of United States insurance organizations to promote the interest of [redacted] and to enhance the mutual understanding between the Chinese and US insurance industries and their business cooperation. 10 hours per week

- (4) Provide insurance management consultation services to the local Chinese commercial offices. As needed depending on active projects

Counsel asserts that the beneficiary, as chief representative of the New York Liaison Office, directs the management, and establishes the goals and policies of the United States operations, a major function of the [REDACTED] organization. Counsel further indicates that the New York Liaison Office has been actively representing all of the petitioner's interests in the United States.

Based on this evidence, the director approved the petition. On August 1, 2002, the director issued a notice of intent to revoke approval. The petitioner, through counsel, provided a rebuttal on August 28, 2002, acknowledging that the New York office was a liaison office, that the New York office did not pay the beneficiary, and that the beneficiary was the only representative in the office. The director determined that the evidence submitted only confirmed that the beneficiary did not act as a multinational executive or manager but instead merely acted as an agent for the foreign entity.

On appeal, counsel for the petitioner contends that the beneficiary qualifies as an executive as he directs the management and establishes the goals and policies of the United States operations, a major function of the [REDACTED] organization. Counsel references the petitioner's L-1 intracompany transferee petition submitted on behalf of the beneficiary in December 2000. Counsel claims that a detailed description of how the beneficiary performs the United States operations through various [REDACTED] employees, both in the United States and China, is found in the L-1 intracompany petition, which was lost in the World Trade Center collapse.

Counsel's assertions and claims are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The initial description of the beneficiary's duties was general and did not convey an understanding of the beneficiary's day-to-day duties on behalf of the petitioner's liaison office. The second iteration of the beneficiary's duties, in response to the director's request for evidence indicated that the beneficiary spent 15 hours per week supervising and coordinating lawsuits that involved the petitioner's interest; 10 hours per week promoting the petitioner's interests; and an undefined amount of time providing consulting services. These duties are indicative of an individual performing promotional duties, providing consulting services, and acting as the petitioner's representative in order to protect its interests. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)).

The record does not support counsel's claim on appeal that the beneficiary performed the operations of the liaison office through various employees. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *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)). Counsel's references to information contained in previously submitted

L-1A intracompany petitions are insufficient to support the beneficiary's eligibility for this visa classification. When making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The AAO acknowledges the severity of the impact on the petitioner's liaison office due to the tragedy of September 11, 2001; however, the petitioner is obligated to substantiate that it employs sufficient personnel to relieve the beneficiary from performing primarily non-qualifying tasks. The petitioner has not provided such evidence in this matter.

Upon review, the record does not contain sufficient evidence that the beneficiary's daily activities encompassed primarily managerial or executive duties. The record demonstrates only that the beneficiary acted as a conduit and representative to filter information to the petitioner's headquarters, to promote the petitioner's insurance services, and to provide consulting services to those involved in or who desired to become involved in the petitioner's insurance business.

Of note, the beneficiary's new job and the portability considerations of AC21² are separate issues that must be addressed in the adjudication of the beneficiary's I-485 application, not in the I-140 revocation 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. The petition was filed on behalf of an alien who was not "entitled" to the classification and the petition's approval was ultimately revoked pursuant to the statutory authority of CIS. 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.

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.

² In 2000, Congress passed 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 or a similar occupational classification as the job for which the petition was filed." CIS has not issued regulations governing this provision.