

§ 204.7

alien entrepreneur classification under section 203(b)(5) of the Act.

[56 FR 60910, Nov. 29, 1991, as amended at 57 FR 1860, Jan. 16, 1992; 58 FR 44608, 44609, Aug. 24, 1993]

§ 204.7 Preservation of benefits contained in savings clause of Immigration and Nationality Act Amendments of 1976.

In order to be considered eligible for the benefits of the savings clause contained in section 9 of the Immigration and Nationality Act Amendments of 1976, an alien must show that the facts established prior to January 1, 1977 upon which the entitlement to such benefits was based continue to exist.

[41 FR 55849, Dec. 23, 1976]

§ 204.8 Petitions for employees of certain United States businesses operating in Hong Kong.

(a) *General.* A petition to accord an alien status as an employee of a United States business operating in Hong Kong pursuant to section 124 of the Immigration Act of 1990 shall be filed by the employer on Form I-140, Immigrant Petition for Alien Worker. Since section 124 provides for up to 12,000 additional visa numbers only in each of fiscal years 1991 through 1993, petitions for these employees will not be accepted after September 30, 1993.

(b) *Definitions.* As used in this section:

Affiliate means one of two subsidiaries both of which are owned and controlled by the same parent or individual or one of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. Effective October 1, 1991, in the case of a partnership that is organized in the United States to provide accounting services along with managerial and consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered

8 CFR Ch. I (1-1-07 Edition)

to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

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.

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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised, 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 direction over the day-to-day operations of the activity or function for which the employee has authority.

Officer means, with respect to a business entity, the chairman or vice-chairman of the board of directors of the entity, the chairman or vice-chairman of the executive committee of the board of directors, the president, any vice-president, any assistant vice-president, any senior trust officer, the secretary, any assistant secretary, the treasurer, any assistant treasurer, any

Department of Homeland Security

§ 204.8

trust officer or associate trust officer, the controller, any assistant controller, or any other officer of the entity customarily performing functions similar to those performed by any of the foregoing officers.

Parent means a firm, corporation, or other legal entity which has subsidiaries.

Specialized knowledge means, with respect to an organization, that an alien has a special knowledge of the organization's product and its application in international markets or has an advanced level of knowledge of processes and procedures of the organization.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power; or owns, directly or indirectly, less than half the entity, but in fact controls the entity.

Supervisor means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, award, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

United States business, as used in this section, means an entity or organization created under the laws of the United States which has a United States principal place of business and which is at least 50 percent owned by United States citizens or permanent residents.

(c) *Jurisdiction*. The petition must be filed at the Service Center having jurisdiction over the corporate headquarters of the business in the United States. There will be no concurrent filing of a petition with an application for status as a permanent resident (Form I-485).

(d) *Eligibility*. The alien beneficiary must:

(1) Be a resident of Hong Kong who:

(i) Is employed in Hong Kong and has been employed in Hong Kong during the 12 previous consecutive months; or

(ii) Is employed outside of Hong Kong during a temporary absence (i.e., of limited duration) from Hong Kong at the request of the employer and had been employed in Hong Kong for 12 consecutive months prior to such absence(s); and

(2) Be employed as an officer or supervisor or in a capacity that is managerial or executive or involves specialized knowledge, by a qualifying business entity. A qualifying business entity is one which:

(i) Is owned and organized in the United States (or is the subsidiary or affiliate of a business owned and organized in the United States);

(ii) Employs at least 100 employees in the United States and at least 50 employees outside the United States (not necessarily all in Hong Kong); and

(iii) Has a gross annual income of at least \$50,000,000.

(3) Have an offer of employment in the United States from the United States business entity as an officer or supervisor or in a capacity that is managerial or executive, or involves specialized knowledge. The offer of employment must:

(i) Be effective from the time of filing the petition through and including the time of entry into the United States, and

(ii) Provide for salary and benefits comparable to the salary and benefits provided to others with similar responsibilities and experience within the same company.

(e) *Determining managerial or executive capacities*—(1) *Supervisors as managers*. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties of the supervisor's supervisory duties unless the employees supervised are professional.

(2) *Staffing levels*. If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of

§ 204.9

8 CFR Ch. I (1–1–07 Edition)

the organization, component, or function shall be taken into account. An individual shall not be considered to be acting in a managerial or executive capacity merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

(f) *Evidence to accompany petition.* A petition filed on Form I-140 shall be accompanied by:

(1) Form ETA-750B, Statement of Qualifications of Alien; and

(2) A letter from the employer attesting to the information contained in paragraph (d) of this section. Since the alien's move to the United States from Hong Kong does not need to take place immediately, the employer's information on the job in the United States will be determined by the circumstances of the individual case. If immediate immigration is intended, a specific job description must be included with the employer's attestation. If immigration will be deferred, a simple commitment by the employer that a qualifying job will be available in the United States will be acceptable. Prior to seeking admission to the United States, a deferred visa applicant must present a specific job description letter for redetermination of eligibility. Such letter shall be presented to the visa-issuing consular post, or to the Service office where the alien is applying for adjustment of status in the United States.

(g) *Closing action—(1) Approval.* If the alien is residing in Hong Kong, an approved petition will be forwarded for visa processing to the United States Consulate at Hong Kong. Whether the alien is in Hong Kong or is adjusting in the United States, the legend "HONG KONG SEC. 124" will be clearly printed in the block used for indicating preference at the top of Form I-140.

(2) *Denial.* The denial of a petition filed under this provision shall be appealable to the Associate Commissioner, Examinations. Notification of denial and appeal rights, and the procedure for appeal shall be the same as those contained in 8 CFR 103.3.

(3) *Revocation.* A petition approved under this provision shall be automatically revoked for the same reasons provided in 8 CFR 205.1(c). The procedure

for revocation on notice shall be the procedure described in 8 CFR 205.2. Termination of employment shall be grounds for automatic revocation; however, a transfer within the same company to a different division, section, subsidiary, or affiliate (regardless of geographical location) will not be disqualifying.

[56 FR 23210, May 21, 1991, as amended at 57 FR 14792, 14793, Apr. 23, 1992]

§ 204.9 Special immigrant status for certain aliens who have served honorably (or are enlisted to serve) in the Armed Forces of the United States for at least 12 years.

(a) *Petition for Armed Forces special immigrant.* An alien may not be classified as an Armed Forces special immigrant unless the alien is the beneficiary of an approved petition to classify such an alien as a special immigrant under section 101(a)(27)(K) of the Act. The petition must be filed on Form I-360, Petition for Amerasian, Widow or Special Immigrant.

(1) *Who may file.* An alien Armed Forces enlistee or veteran may file the petition for Armed Forces special immigrant status in his or her own behalf. The person filing the petition is not required to be a citizen or lawful permanent resident of the United States.

(2) *Where to file.* The petition must be filed with the Service Center having jurisdiction over the place of the alien's current or intended place of residence in the United States, with the overseas Service office having jurisdiction over the alien's residence abroad, or in conjunction with 8 CFR 245.8.

(b) *Eligibility.* An alien is eligible for classification as a special immigrant under section 101(a)(27)(K) of the Act if:

(1) The alien has served honorably on active duty in the Armed Forces of the United States after October 15, 1978;

(2) The alien's original lawful enlistment was outside the United States (under a treaty or agreement in effect October 1, 1991) for a period or periods aggregating—

(i) Twelve years, and who, if separated from such service, was never separated except under honorable conditions; or