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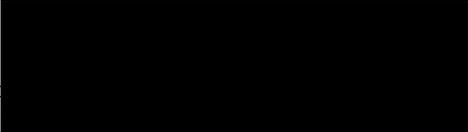
U.S. Citizenship
and Immigration
Services

B3



FILE: EAC 02 151 51234 Office: VERMONT SERVICE CENTER Date: **NOV 05 2004**

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

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DISCUSSION: The Director, Vermont Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner avers: (1) it is a corporation organized in the State of New York in March 1994; (2) it is involved in import and wholesale; and, (3) it seeks to employ the beneficiary as its "chairman." 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 determined that the petitioner had not established: (1) a qualifying relationship with the beneficiary's foreign employer; (2) that the beneficiary would be employed in a managerial or executive capacity for the United States entity; or (3) its ability to pay the beneficiary the proffered annual wage of \$60,000.

On appeal, counsel for the petitioner asserts that the Citizenship and Immigration Services (CIS) denial is not supported by the relevant facts of this matter.

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).

The first issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. See section 203(b)(1)(C) of the Act.

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

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) 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.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

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, 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 over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The record initially contained no documentation regarding the petitioner's qualifying relationship with the beneficiary's foreign employer. On July 16, 2002, the director provided the above definition of a qualifying relationship and requested evidence to establish that a qualifying relationship existed between the two entities.

In an October 8, 2002 response, the petitioner submitted: (1) copies of the foreign entity's minutes of seven meetings taking place from November 1999 to August 2001; (2) a copy of the Reserve Bank of India's approval notice dated April 24, 1996 that approved the foreign entity's investment in a wholly owned subsidiary that traded in textiles and leather subject to various conditions; (3) a license issued to the foreign entity dated May 25, 1995 authorizing the foreign entity to hold 100 shares in the petitioner with a face value of \$500 for each share and a total value \$50,000; (4) a handwritten letter dated October 8, 1997 from the Central Bank of India indicating it had been instructed by the foreign entity to remit \$50,000 to the petitioner; (5) a copy of the foreign entity's 2000-2001 annual report showing an investment in the petitioner with a face value of 10.00 rupees; (6) a subscriber statement dated December 20, 1979 showing that the beneficiary and one other individual each held 100 equity shares in the foreign entity; and, (7) the petitioner's New York City, New York State, and New Jersey State tax returns for its fiscal year ending March 31, 2001.

The director noted the petitioner's submission of the Reserve Bank of India's approval notice but determined that the petitioner had not submitted documentation establishing the qualifying relationship between the petitioner and the foreign entity.

On appeal, counsel for the petitioner asserts that the Reserve Bank of India's notice serves to establish that the bank permitted transfer of the foreign entity's funds for the sole purpose of buying stock in the petitioner. Counsel also notes that the foreign entity's annual report mentions the petitioner. Counsel submits the petitioner's stock certificate number 3 dated November 20, 1996 issuing five shares of the petitioner's authorized 200 shares to the foreign entity using its previous name. Counsel also submits the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return for the fiscal year ending March 31, 2003. The IRS Form 1120 at Schedule E, Line 1 identifies Gurdeep Sachdev as an officer and the owner of 100 percent of the petitioner.

On review, the petitioner has not submitted sufficient consistent documentation to establish a qualifying relationship between the petitioner and the beneficiary's foreign employer. The petitioner's IRS Form 1120 identifies an individual as the petitioner's 100 percent owner. Moreover, the petitioner has not provided its stock certificate numbers one and two, or its stock ledger describing the transfer of the petitioner's shares. Finally, the petitioner has submitted documentation showing that the foreign entity was to purchase 100 of its shares and has not explained why it purportedly issued only five of its 200 authorized shares to the foreign entity. 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). The record is not sufficient to overcome the director's decision on this issue.

The second issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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 January 9, 2002 letter appended to the petition, the petitioner stated that:

As a Chairman, [the beneficiary] will be responsible for directing and managing the business activities of the petitioning entity. He will be responsible for enhancing the resources of the company and for providing products and services to markets in New Jersey and all over the United States of America. He will recruit marketing and other staff for our office in the United States of America and will look after the overall management of the petitioner.

On July 16, 2002, the director requested a detailed description of the beneficiary's proposed duties, including an hourly breakdown of each of the proposed duties on a weekly basis.

In its October 8, 2002 response, counsel for the petitioner indicated: "the beneficiary is responsible for managing and directing the corporate affairs of the subsidiary. [The beneficiary] is not the only employee with the petitioner and the day[-]to[-]day non[-]managerial work is handled by other employees." Counsel indicated further that the beneficiary traveled back and forth between the United States and India and had also been responsible for upper level management for the Indian entity.

The director observed that the petitioner had not described the beneficiary's other duties and had not provided an hourly breakdown of the beneficiary's duties. The director determined that the petitioner had not established that the beneficiary's proposed position would be managerial or executive.

On appeal, counsel for the petitioner contends that the beneficiary's position as chairman is "to maximize the wealth of the shareholders and be responsible for the overall growth of the company." Counsel states that it is not possible to provide an hourly breakdown of the beneficiary's duties as chairman. Counsel also recites the beneficiary's experience with managing and promoting companies and implicitly relies on the beneficiary's past experience to demonstrate his managerial or executive capacity for the petitioner. Counsel also provides copies of Internet postings for managerial or executive positions of various companies and points out that the job descriptions are general. Counsel submits that the job position offered to the beneficiary, as described, falls within the definition of a management or executive level position.

Counsel's submission is 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 petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing that the beneficiary is both an executive and a manager. In this matter the petitioner does not clarify whether it seeks to employ the beneficiary as primarily a manager or primarily an executive or whether it claims his duties will encompass all elements for both managerial and executive capacity.

In addition, the description of the beneficiary's duties is vague and nonspecific. Despite the director's request for additional details regarding the beneficiary's proposed duties, the petitioner failed to provide such additional information. The petitioner stated that the beneficiary "will be responsible for directing and managing the business activities of the petitioning entity," and "enhancing the resources of the company and for providing products and services to markets in New Jersey and all over the United States of America." However, these statements do not convey an understanding of what the beneficiary will do on a day-to-day basis to achieve these goals. Although the beneficiary's past experience in starting up companies may be impressive, his past experience does not translate into an understanding of his actual duties for the petitioner. 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).

Counsel's reference to Internet postings for other "managerial" or "executive" positions is likewise not persuasive. In this matter, the AAO is unable to discern the primary daily duties and tasks of the beneficiary. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1103.

Moreover, counsel's reference to other employees who perform the petitioner's day-to-day non-managerial tasks is not apparent from the record. On review, the record does not identify the petitioner's employees. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The only documentary evidence of the petitioner's purported employees is its 2002 IRS Form 1120 which shows \$13,650 in compensation to an officer of the company, and \$24,000 paid in salaries. The record does not support counsel's indication that the beneficiary will be relieved from performing primarily non-qualifying duties.

The record does not support counsel's contention that the beneficiary's duties as described fall within the definition of a managerial or executive position. General statements without detail do not demonstrate managerial or executive capacity. Conclusory statements regarding the beneficiary's employment capacity are not sufficient. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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). In this matter, the petitioner has provided a non-specific description of the beneficiary's duties, has failed to provide the percentage of time the beneficiary spends on non-managerial and non-executive duties, and has failed to establish it has sufficient employees to carry out the day-to-day services of the business without the beneficiary's contribution to the day-to-day operational tasks. The petitioner has not established that the beneficiary's assignment would be primarily managerial or executive.

The last issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary 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.

The petitioner offered the beneficiary an annual wage of \$60,000. In response to a request from the director, the petitioner provided the beneficiary's IRS Form W-2, Wage and Tax Statement for the year 2001, showing the petitioner had paid the beneficiary \$12,000. Counsel for the petitioner also noted that the beneficiary had also been compensated by a foreign entity in 2001 because he had also performed duties for the foreign entity. The director determined that the petitioner had not provided sufficient evidence to demonstrate its ability to pay the beneficiary the proffered wage.

On appeal, counsel for the petitioner submits the petitioner's 2002 IRS Form 1120 for the petitioner's fiscal year ending March 31, 2003. Counsel also submits the beneficiary's IRS Form W-2 for the year 2002

showing that the petitioner had paid the beneficiary \$24,000. Counsel asserts that the petitioner's gross income for the year 2002 is sufficient to pay the beneficiary the proffered wage and, in addition, the law does not state that the beneficiary's wages can be paid only by the United States entity.

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. 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 the present matter, the petitioner has indicated, through counsel, that it is employing the beneficiary part-time. However, the record does not provide sufficient evidence to establish that the beneficiary was proportionately compensated for his "part-time" employment. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190.

As an alternate means of determining the petitioner's ability to pay, the AAO will next 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 court specifically rejected the argument that the CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

As the petition's priority date falls on April 2, 2002, the AAO must examine the petitioner's tax return for 2002. The petitioner's IRS Form 1120 for calendar year 2002 presents a net taxable income of \$49,535. In this matter, the petitioner paid the beneficiary \$24,000 in 2002. This wage, coupled with the petitioner's remaining net income, was sufficient to pay the beneficiary the proffered wage of \$60,000. On this issue alone, the petitioner has presented sufficient evidence to overcome the director's decision. The director's decision on the issue of the petitioner's ability to pay the proffered wage is withdrawn. The petitioner has not, however, provided sufficient evidence to overcome the director's decision on the issues of its qualifying relationship with the beneficiary's foreign employer and the beneficiary's managerial or executive capacity for the United States entity.

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.