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U.S. Department of Justice  
Immigration and Naturalization Service

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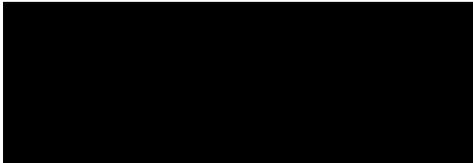
Date: NOV 13 2002

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)

IN BEHALF OF PETITIONER:



**PUBLIC COPY**

INSTRUCTIONS:

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

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation engaged in the business of international trade. It seeks to employ the beneficiary as its general manager. Accordingly, it seeks 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 that the beneficiary had worked in a primarily managerial or executive capacity for the foreign company and would not be acting in a primarily executive or managerial capacity for the United States company. The director also determined that the petitioner had not established its ability to pay the beneficiary the proffered wage.

On appeal, counsel for the petitioner disputes the Service's conclusions and submits additional evidence for review.

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.

The petitioner was incorporated in the State of California in February of 1991. The petitioner claims it is the parent company of a Chinese company that was established in 1995.

The first issue in this proceeding is whether the petitioner has established that the beneficiary has been employed in a primarily managerial or executive capacity for the foreign entity in one of the three years preceding her application for classification as a Section 203(b)(1)(C) multinational executive or manager.

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 through its counsel initially described the beneficiary as the finance manager for the foreign entity who had authority over the company's 7 financial departments and who supervised three professional staff. The petitioner also provided translated copies of salary statements for the foreign entity from February 1997 through September 1997, each monthly statement listing the beneficiary as an employee.

In May of 2000 the director requested detailed information regarding the status of the beneficiary's residence and employment in the home country.

On July 26, 2000 the petitioner through counsel stated that the beneficiary resided in China and worked for the foreign entity from April 1996 to October 1997 as the foreign entity's finance manager. The petitioner through counsel further noted that in October of 1997 the beneficiary entered the United States with a B-1 visa. Counsel explained that the beneficiary had been "assigned by [the foreign entity] under the B-1 visa." The beneficiary's duties for the foreign entity were described as "responsible for the company's financial affairs, including income and expenditure, such as loans, and all kinds of monthly expenses; prepare financial statements of assets and liabilities and income statement, audit all incomes and expenses; supervise, hire and fire employees of Finance Dept."

The director determined that the petitioner had not provided evidence that the beneficiary had been employed by the foreign entity for one year prior to its application for the beneficiary's classification as a multinational manager or executive.

On appeal, counsel for the petitioner asserts that the beneficiary continued her employment with the foreign entity while in the United States until May of 1998. Counsel also submitted a statement from the foreign entity stating that the beneficiary had assumed the post of finance manager from April 1996 to the present. The letter is dated January 15, 1998. The letter also contained the foreign entity's description of the beneficiary's

duties from April 1996 to present as:

All of our company's financial affairs are under the authority of Finance Manager, including income and expenditure, such as loans, and all kinds of monthly expenses. On the tenth day of each month, calculate and pay staff's salary of that month; make statistic statement on inventory; prepare financial statements of assets and liabilities and income statement, audit all incomes and expenses, including: product sales, interest income, statements of cost, expense, tax, sales, profit; compare them with the same term of last year, and assist other department [sic] in making business policies; supervise, hire and fire employees of Finance Department.

Counsel also explains that the beneficiary was assigned by the foreign entity to conduct market research while in the United States. Counsel states that the payroll records submitted with the original petition were only part of the payroll records of the foreign entity but does not submit additional records.

Counsel's assertions are not persuasive. The petitioner has not provided supporting evidence that the beneficiary was employed by the foreign entity for the requisite one year time period in one of the three years prior to the petitioner's application for the beneficiary's classification as a multinational manager or executive. The foreign entity's pay records indicate the beneficiary was employed for eight months. Counsel's statement that other payroll records are available is not sufficient to overcome the director's determination on this issue. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

In addition, the foreign entity states that the beneficiary began her employment as a finance manager and is continuing to act as its finance manager while in the United States. Counsel on the other hand, states that the beneficiary was dispatched to the United States to conduct market research. The foreign entity appears unaware of this additional duty. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

Further, the description of the beneficiary's duties for the foreign entity even absent the unreliability of the time period of the beneficiary's employment is not sufficient to establish that the beneficiary was employed in a managerial or executive capacity. The description provided is indicative of an individual performing basic operational tasks of the foreign entity rather than performing in a managerial or executive capacity. The evidence submitted must demonstrate that the majority of the beneficiary's actual daily activities were managerial or executive in nature. 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. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has not established that the beneficiary was employed by the foreign entity in a managerial or executive capacity for one year in the three years preceding the filing of this petition.

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

At the time the petition was filed in August of 1998, the petitioner stated the beneficiary's duties as follows:

As General Manager of the parent company, [the beneficiary] will have ultimate decision [sic] over day-to-day operations, supervise and control the work of other supervisory and managerial employees; hire and fire employees with authority over other personnel decisions; negotiate business transactions; establish goals and policies of the Sales and Finance Department; analyze financial reports and submit monthly and annual financial reports to company leadership. This job description clearly demonstrates that [the beneficiary] will be a functional manager of the highest order within the Petitioner's company hierarchy, and that the majority of her duties relate to either supervising other management, or to operational and policy management. Given the nature of the Petitioner's business, International Trade, and Manufacturer of residential/commercial/industrial water purification system, the Beneficiary will be involved in very specialized business functions that requires a high degree of sophistication.

The petitioner also provided an organizational chart depicting a chairman, "director of Board," a general manager (the beneficiary's position), and a finance manager reporting to the general manager. The chart also depicted a sales manager and accountant reporting to the finance manager and a sales person and

technician reporting to the sales manager.

The director requested additional information regarding the petitioner's employees.

In response, the petitioner provided its 1998 Internal Revenue Service (IRS) Form W-2s, Wage and Tax Statements. The W-2 Forms for 1998 reflected salary paid to five employees. The named employees corresponded to the following positions on the petitioner's organizational chart, the president, the sales manager, the accountant, the sales person, and the technician. The president was paid \$48,000 and the salary for the remaining four employees totaled \$54,848. The petitioner also included its IRS Form 1120, U.S. Corporation Income Tax Return for 1998. The tax return revealed gross receipts in the amount of \$1,628,249, compensation to officers in the amount of \$20,000, and salaries paid in the amount of \$78,348.

The director determined that the petitioner had not established that the beneficiary would be a functional manager and that the petitioner's business structure would require five managers and/or executives.

On appeal, counsel for the petitioner asserts that in addition to the beneficiary supervising five employees in the United States that the beneficiary would also supervise the seven departments in China. Counsel also asserts that the beneficiary was needed to continue to establish policies and oversee the petitioner's operations in the current rapidly changing business environment.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). In the initial petition, the petitioner provided a broad description that vaguely refers, in part, to duties such as "negotiate[ing] business transactions," and "analyze[ing] financial reports and submit[ting] monthly and annual financial reports to company leadership." These job duties are vague and general in nature and at most indicate the beneficiary will be performing some basic operational tasks for the petitioner. 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. Matter of Church Scientology International, supra. The petitioner also borrowed liberally from portions of the statutory definition of "managerial capacity" including duties such as "have[ing] ultimate decision [sic] over day-to-day operations," and "supervise[ing] and control[ing] the work of other supervisory and managerial employees," and "hire[ing] and fire[ing] employees with authority over other personnel decisions." The petitioner also focussed on the petitioner's need of the beneficiary to establish goals and policies, an element contained in the statutory definition of "executive

capacity." Merely paraphrasing the statutory definition of managerial or executive capacity is not sufficient to convey an understanding of what the beneficiary will be doing on a daily basis.

In addition, the petitioner's organizational chart reflects that the beneficiary will supervise a financial manager who will then supervise other employees, however, the 1998 IRS W-2 Forms do not reflect the individual named in the position as financial manager. The record does not provide evidence to support the petitioner's organizational structure as set out in the organizational chart, specifically that of the petitioner's employment of a finance manager. The organizational chart and the IRS 1998 W-2 Forms provide an inconsistent view of the petitioner's structure. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, supra.

Counsel's contention that the supervision of employees of the foreign entity from the beneficiary's post in the United States contributes to a finding that the beneficiary is acting in a managerial or executive capacity for the petitioner is without merit. First, the record provides insufficient evidence to establish that the beneficiary continues to supervise foreign employees. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, supra. Second, counsel does not provide any reasoning as to why it is necessary for the beneficiary to supervise employees of the foreign entity while residing in the United States. Furthermore, the statutory definitions of executive and managerial capacity refer to an assignment within an organization in which the employee either manages the organization or directs the management of the organization. Section 101(a)(28) of the Act defines "organization" as follows: "The term 'organization' means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects." The statutory definition of an organization would not reasonably include a foreign corporation that is an entity separate and distinct from the petitioning organization. Accordingly, the beneficiary's claimed managerial or executive duties that relate to the employees of the foreign corporation may not be considered for purposes of this immigrant visa petition.

Counsel's assertion that the beneficiary is needed to establish policies of the petitioner is also not supported in the record. The petitioner has not provided evidence to demonstrate that the

beneficiary will primarily serve the petitioner in the capacity of a manager or an executive as defined by the statute.

Upon review, the petitioner has not provided sufficient evidence to conclude that the beneficiary will be employed in a primarily managerial or executive capacity. The descriptions of the beneficiary's job duties are vague and fail to describe her the actual day-to-day duties. In addition, a portion of the position description serves to merely paraphrase the statutory definitions of managerial and executive capacity. The description of the duties to be performed by the beneficiary does not sufficiently demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision, or component of the company. Further, the record does not adequately demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

The third issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered salary of \$60,000 per year. The director determined that the petitioner had not provided evidence that it had sufficient net income to pay the petitioner. Counsel asserts that the petitioner's ability to pay is not based solely on the taxable income of the petitioner because it has good credit and profitable subsidiary in China that transfers funds to cover expenses as necessary and has a history of doing so.

Again, counsel's assertion is not persuasive. The regulation clearly requires that the petitioner establish its ability to pay the beneficiary the proffered wage. See 8 C.F.R. 204.5(g)(2). The Service cannot rely on the petitioner's "good credit" and transfers of funds from a foreign entity to support payment of the proffered wage to the beneficiary. We also note that the petitioner had only paid \$78,348 in total salaries in 1998 excluding any payment made to the beneficiary.

Further, in determining the petitioner's ability to pay the proffered wage, the Service will examine the net income figure reflected on the petitioner's 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 Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. The court specifically rejected the argument that the Service 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. According to the petitioner's 1998 IRS Form 1120, the company had a net income of \$15,206. As noted by the director, the petitioner has not established that it has sufficient net income to pay the beneficiary the proffered wage.

Beyond the decision of the director, the petitioner has not established a qualifying relationship between itself and the claimed foreign entity. The petitioner's IRS Form 1120s all state on Schedule K, Line 7 that the corporation was not the U.S. shareholder of any controlled foreign corporation. This is in direct contradiction to the various translated documents alleging that the petitioner is the sole shareholder of the claimed foreign subsidiary. Of further note, it is questionable whether the United States petitioner, the avowed parent company of the foreign entity qualifies as the same employer or a subsidiary or affiliate of the foreign entity. As the appeal is dismissed for the reasons stated above, this issue is not examined further.

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, the petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.