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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[Redacted]

APP 00 2003

File:

Office: TEXAS SERVICE CENTER

Date:

APR 08 2003

IN RE: Petitioner:
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:

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SELF-REPRESENTED

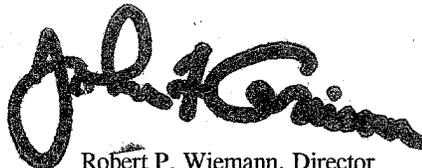
INSTRUCTIONS:

This is the decision 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.

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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.



Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further consideration.

The petitioner must appeal the director's decision within 30 days after service of the decision. See 8 C.F.R. § 103.3(a)(2). The record indicates that the decision was mailed March 29, 2002. The appeal was filed May 16, 2002. Thus, the appeal was not timely filed.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. § 103.5(a)(2), the appeal must be treated as a motion, and a decision must be made on the merits of the case.

The regulation at 8 C.F.R. § 103.5(a)(2) requires that motions to reopen state the new facts to be provided in the reopened proceeding, and that the new facts are supported by affidavits or other documentary evidence. Review of the record indicates that the appeal meets this requirement. The petition will be remanded to the director for consideration as a motion to reopen.

Although the petition will be remanded to the director for consideration as a motion to reopen, examination of the record reveals a number of issues that must be addressed at this time.

Regarding the immigrant classification of an alien worker as a multinational executive or manager, section 203(b)(1)(C) of the Act states:

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 the alien 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.

The first issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's overseas 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; specifically, the petitioning company must be the same employer or an affiliate or subsidiary of the foreign entity.

The petitioner asserts that the beneficiary's husband owns 50 percent of the overseas entity and owns 50 percent of the petitioner. The petitioner submits an untranslated document in support of this statement. The petitioner asserts that it has provided documentation that the overseas entity "had a turnover of hundreds of thousands of dollars/year." The petitioner submits several untranslated documents apparently in support of this statement. The petitioner also re-submits a copy of a letter from an overseas bank that states the overseas entity has been a client since May 1996.

The majority of the documents submitted in support of the qualifying relationship are not translated. As required by 8 C.F.R. § 103.2(b)(3) any document containing foreign language submitted to the Bureau must be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

In addition, the petitioner's assertion that the beneficiary's husband owns and controls 50 percent of both the petitioner and the overseas entity is not supported by independent evidence. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Other than its stock certificate issued to the beneficiary's husband, the petitioner has not provided documentation to establish ownership and control of both entities. This limited information is not sufficient to establish that the beneficiary's husband controls both entities.

Further, a statement from an overseas bank indicating that the overseas entity has been a client does not substantiate that the overseas entity is actually doing business as defined by the regulations. See 8 C.F.R. § 204.5(j)(2).

The second issue in this proceeding is whether the petitioner established that the beneficiary had been working for one year in a managerial or executive capacity for the claimed foreign entity. In examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The petitioner initially stated that the beneficiary was "responsible

of the marketing department being responsible of the distribution on the Romanian Market of the products imported by [redacted] [the claimed foreign entity] and [redacted]. In response to the director's request for evidence, the petitioner stated that [redacted] employed the beneficiary as a marketing manager during 1995 through 1997 and that the beneficiary managed 10 employees during that time period.

The petitioner's description of the beneficiary's job duties for the claimed affiliated company does not convey an understanding of the beneficiary's day-to-day duties for the foreign entity. The petitioner again does not provide documentary evidence of the beneficiary's actual employment or an explanation of her purported managerial or executive capacity.

The third issue in this proceeding is whether the beneficiary's employment by the petitioner has been or will be in a managerial or executive capacity. The petitioner initially indicated that the beneficiary's tasks for the petitioner would involve marketing, training, market research, and human resources. The petitioner indicates, in the untimely appeal, that the beneficiary negotiates contracts, opens accounts, introduces new services, makes cold calls, and develops marketing mail campaigns. The petitioner also states that the beneficiary creates service programs, prepares monthly accounting reports, and supervises, coordinates and trains sub-contractors.

The description of the beneficiary's duties for the petitioner describes an individual performing the necessary operational tasks to sell the petitioner's services to the public. 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 provided independent evidence that the petitioner employs individuals who perform the marketing tasks of the petitioner. The petitioner has not provided independent evidence that it employs sub-contractors. As noted above, going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra*.

The fourth issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered wage. See 8 C.F.R § 204.5(g)(2). The petitioner states that it has several contracts and provides evidence of these contracts. The petitioner also states that the company operations are supported by the personal credit lines of its owners. However, the petitioner has not provided evidence that the petitioner's owners have legally assumed the responsibility of the company's operations. The petitioner also provides its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the year 2000. The IRS Form 1120 revealed that no salaries had

been paid and no compensation had been provided to officers and that the petitioner had a total net income of \$59. In determining the petitioner's ability to pay the proffered wage, the Bureau 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. Tex. 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). The record does not support a conclusion that the petitioner has the ability to pay the proffered wage.

The last issue in this proceeding is whether the petitioner has established that it had been doing business for one year prior to filing the petition. The petitioner provides copies of contracts entered into by the petitioner under the name ServiceMaster. It appears that the petitioner may have been doing business pursuant to a franchise agreement for one year prior to filing the petition.

ORDER: The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.