

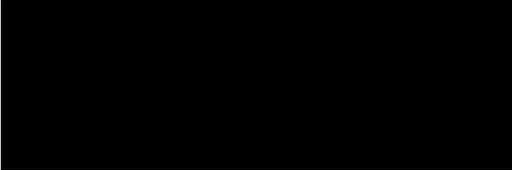
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U.S. Department of Homeland Security
Citizenship and Immigration Services

B4

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536



File: WAC 00 097 54575 Office: CALIFORNIA SERVICE CENTER

Date: **NOV 18 2003**

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:



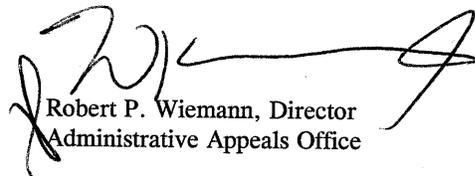
INSTRUCTIONS:

This is the decision 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 (CIS) 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, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Nevada in February 1999. It claimed to be engaged in the development and operation of shopping malls when the petition was filed. It seeks to employ the beneficiary as its president. 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 the ability to pay the beneficiary the proffered wage of \$30,000 per year.

On appeal, counsel for the petitioner asserts that the petitioner is a viable company and that large amounts of money have been invested in the company.

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 issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered wage of \$30,000 per year.

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 initially did not provide evidence of its ability to pay the beneficiary an annual salary of \$30,000. The director requested copies of the United States company's annual report, payroll summaries, including Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, evidencing payment to employees, and IRS Forms 1120, U.S. Corporation Income Tax Return.

In response to the director's request, the petitioner provided the payroll records of its claimed parent company covering January 1, 1998 up to February 28, 1999. The petitioner also included IRS Forms W-2 issued to the beneficiary in the amount of \$2,000 and to another individual in the amount of \$1,500 for the year 1999. The petitioner also submitted its IRS Form 1120 for 1999 listing salaries paid in the amount of \$3,500. The petitioner's IRS Form 1120 also showed negative taxable income of \$65,026.

On appeal, counsel asserts that the petitioner has expanded its operations by buying motor vehicles from auctions and doing business as Transamerican Motors to sell the vehicles. Counsel asserts Transamerican Motors started selling the vehicles in April 2000. Counsel also asserts that the claimed parent company of the petitioner will financially support the companies by infusing funds when needed. Counsel attaches a loan agreement between the petitioner and the claimed parent company wherein the petitioner borrows \$50,000 from the claimed parent company on November 15, 2000. Counsel attaches documentation of a transfer of funds on November 15, 2000 and a transfer of funds on March 21, 2001 from the claimed parent company to the petitioner pursuant to the loan agreement. Counsel concludes that the

petitioner is able to sustain a wage of \$30,000 to the beneficiary.

Counsel's assertions are not persuasive. 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). 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 demonstrated that it employed the beneficiary in intracompany L-1A status but the record shows that it had not paid the beneficiary a salary approaching the proffered wage.

Moreover, when determining the petitioner's ability to pay the proffered wage, CIS 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). In this matter, the petitioner has offered no evidence that it has or will have sufficient net income to pay the beneficiary the proffered wage. 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). The record does not contain sufficient evidence to overcome the director's decision on this issue.

Beyond the decision of the director, the record is clearly deficient in demonstrating that the beneficiary's assignment for the petitioner will be in a primarily managerial or executive capacity.

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 stated on the Form I-140, Immigrant Petition for Alien Worker that the beneficiary would be "responsible for all development & operation of malls." In response to the director's request for further evidence on this issue, the petitioner provided

the beneficiary's resume describing the beneficiary's duties for the claimed parent company. On appeal, counsel asserts that the beneficiary has proven himself to be a valuable executive of the claimed parent company. Counsel claims that the petitioner's expansion into another business evidences the beneficiary's capabilities as a multinational executive.

When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The director clearly overlooked the obvious lack of evidence on this issue when making his determination. The petitioner did not provide a comprehensive description of the beneficiary's duties for the petitioner. The record is completely deficient in this regard. The petitioner has not established the executive or managerial nature of the beneficiary's position. The possession of an executive title by the beneficiary is insufficient to deem the beneficiary to be an executive or a manager. In sum, the petitioner has not established that the beneficiary has been or will be employed in a primarily executive or managerial capacity or that the beneficiary's duties in the position will be primarily executive or managerial.

In addition, the petitioner has not 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.

The petitioner did not provide evidence that the claimed parent company purchased shares in the petitioner. The record is devoid of documentary evidence establishing the ownership and control of the petitioner. Again, 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*; *Republic of Transkei v. INS, supra*; *Matter of Treasure Craft of California, supra*. Ownership is a critical element of this visa classification; thus, CIS may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. *Matter of Church of Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); (in nonimmigrant proceedings). However, in this matter, the record does not provide even minimal evidence of the petitioner's stock certificates. Nor does the record contain evidence of payment for stock purportedly issued to the claimed parent company. The petitioner's IRS Form 1120 for 1999, Schedule L, Line 22 does not show that the petitioner has issued any stock. Again, the director overlooked this obvious deficiency of the record.

Further, the petitioner did not provide evidence to demonstrate that it had been doing business for one year prior to filing the petition as required by 8 C.F.R. § 204.5(j)(3)(i)(D).

The regulation at 8 C.F.R. § 204.5(j)(2) defines doing business as:

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.

The petitioner initially indicated that it would be in the business of developing and operating malls. The record contains no evidence that the petitioner began such operations. The director inexplicably does not comment on the lack of evidence on this issue. On appeal, counsel states that the petitioner began selling cars apparently using a fictitious name in April 2000, two months after the petition was filed. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The record is clearly deficient in establishing that the petitioner was engaged in the systematic, regular, and continuous business of providing goods or services when the petition was filed.

For these additional reasons, the petition will not be approved.

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.