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

**B4**

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ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass. Ave., 3rd Floor  
425 Eye Street N.W.  
Washington, D.C. 20536



NOV 21 2003

FILE: WAC 01 154 51264 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]  
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: SELF-REPRESENTED

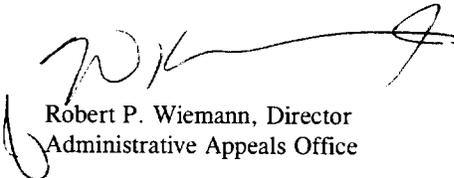
**INSTRUCTIONS:**

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 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 preference 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 California corporation and is claimed to be a subsidiary of [REDACTED] located in China. The petitioner is engaged in the business of manufacturing and exporting pesticides. It seeks to employ the beneficiary as its managing director. 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 that the beneficiary had been or would be employed in a managerial or executive capacity. He also concluded that the petitioner failed to establish the ability to pay the beneficiary's proffered wage.

On appeal, counsel submits a statement and additional evidence.

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 which 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 first issue in this proceeding is whether the beneficiary has been and will be employed in a 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.

On September 16, 2001, the director instructed the petitioner to submit, in part, a specific description of the beneficiary's day-to-day duties over the course of the last six months, indicating how the foreign entity will function in the beneficiary's absence.

The petitioner responded with the following list of the beneficiary's current and proposed duties in the United States:

1. Control and coordinate operations and activities, approve operating plans, and foster economy throughout the company.

2. Detect and prevent in advised application of allotted funds. Foster the best of use of facilities in the interest of the company.
3. Approve operating and administrative policies.
4. Approve maximum and minimum stock inventory levels.
5. Approve and sign master purchasing, shipping, and transportation contracts.
6. Approve type, form, and name of new products.
7. Acts as the principal public relations officer of the company.
8. Approve and enforce the organization plan of the company and any of its components, and changes therein.
9. Subject to the concurrence of the Board of Directors, approve the addition, elimination, or alteration of management positions.
10. Approve the addition, elimination, or alteration of positions other than in management.
11. Sponsor improvements in the organization plan of the company and any of its components.
12. Approve salary and wage structures.
13. Approve personnel policies.
14. Interview, pass upon the qualifications of, and, subject to the concurrence of the Board of Directors, hire personnel for or appoint employees to management positions.
15. Approve promotion, demotion, and release of personnel who are not members of management. Subject to the concurrence of the Board of Directors, approve promotion, demotion, and release of members of management.

16. Approve vacations and personal leaves for the Departments.
17. Ensure equitable administration of wage and salary policies and structures, employee benefit plans, and personnel rating programs.
18. Submit the annual budget and proposed capital and expenditure programs to the Board of Directors for approval, making appropriate recommendations thereon.

The petitioner also provided the names and the following position titles of the beneficiary's subordinates: production manager, finance manager, marketing manager, and administrative manager. Accompanying each name and position title, the petitioner included the phrase "[t]he beneficiary will spend the percentage of time" following each phrase with 30%, 30%, 25%, and 15% respectively. The petitioner did not explain what these percentages mean or how they relate to the beneficiary's daily activity.

The director denied the petition, noting that the beneficiary's subordinates all carry managerial titles, suggesting that there are no employees to actually perform the day-to-day duties of the petitioner. The director concluded that either the beneficiary himself has been performing the actual duties of the petitioning organization or that he has acted as a first-line supervisor over the four employees that have been performing duties that are at a non-professional level.

On appeal, the petitioner submits a statement, written by the beneficiary, describing the process the petitioner has gone through in filing its petition with the Environmental Protection Agency. The beneficiary discusses the benefits of the petitioner's product and asks that CIS approve its immigrant petition. Although the petitioner submitted additional evidence in regards to the product it manufactures, it did not address any of the objections discussed by the director in the denial.

In 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 job description provided by the petitioner in the instant case

suggests a great deal of the beneficiary's job involves approving a number of policies and actions that take place within the petitioning organization. However, there is no indication as to who would be performing the actions or making the policies that the beneficiary purportedly approves. The petitioner suggests in its organizational chart that each of the beneficiary's subordinates manages at least one other employee and that, cumulatively, the managers' subordinates actually perform the duties of the petitioning entity. However, the petitioner has not provided the names of any of the managers' subordinate employees. Nor has the petitioner submitted any tax documents that would support its claim to having employed the additional 28 employees listed in the chart. Simply 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 fact, the petitioner failed to explain why, if it employs a total of 33 employees, it claimed only five employees in the petition it originally filed. 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, 591-92 (BIA 1988). Furthermore, the summary of the beneficiary's duties does not indicate any subordinate positions that would perform the essential functions of the petitioner's business or the beneficiary's duties. Overall, the description of the beneficiary's job duties lead the AAO to conclude that the beneficiary is performing as a professional or "staff officer," but not as a manager or executive.

On review, the record contains insufficient evidence to demonstrate that the beneficiary has been and will be employed in a primarily managerial or executive capacity. The record does not sufficiently demonstrate that the staff the petitioner claims will be managed by the beneficiary is comprised of professional, managerial, or supervisory personnel. Nor does the record indicate that the beneficiary will be relieved from performing non-qualifying duties. CIS is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

The second issue in this proceeding is whether the petitioner has established that it has the ability to pay the beneficiary's proffered wage.

8 C.F.R. § 204.5(g)(2) states the following, in pertinent part:

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.

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. 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 Bureau 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 CIS should have considered income before expenses were paid rather than net income.

In the instant case, the petitioner previously submitted its wage statements for all four quarters in 2000, indicating that the beneficiary was paid \$2,400 per month for the first three quarters, and \$1,500 for the last quarter, totaling \$8,700 for the year. This salary is not commensurate with that of a full-time worker. The petitioner explained in a separate correspondence that the beneficiary is primarily paid by the foreign parent organization, indicating that the figures that appear on the

petitioner's wage statements do not represent the beneficiary's total salary. This further justifies the director's doubts regarding the petitioner's ability to pay the beneficiary's salary.

The petitioner also provided its year 2000 tax return, which indicates that the petitioner had a net loss of \$20,857. The director concluded in the denial that the petitioner's net loss, after a number of years of operating in the United States, suggests that the petitioner has not "matured as a viable business operation" to the point that it is able to support the beneficiary's full-time position. The petitioner has not provided a response to the director's objection on appeal. Therefore, it is concluded that the petitioner has failed to establish its ability to pay the beneficiary's proffered wage in the United States. For this additional reason the petition cannot 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.