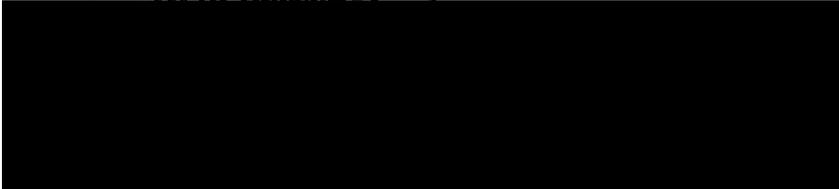


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U.S. Department of Homeland Security
Citizenship and Immigration Services

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invasion of personal

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



File: [redacted] Office: NEBRASKA SERVICE CENTER

Date: OCT 23 2003

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)

IN BEHALF OF PETITIONER:



PUBLIC COPY

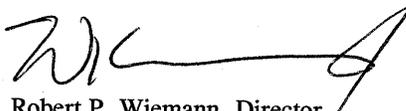
INSTRUCTIONS:

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 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, Nebraska Service Center. The matter is now before the Associate Commissioner for Examinations (AAO) on appeal. The appeal will be dismissed.

The petitioner is a limited liability partnership organized in the state of Washington that is engaged in the operation of a Chinese buffet restaurant. 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 it had the ability to pay the proffered wage of \$30,000 per year. The director also determined that the petitioner had not established that the beneficiary would be employed in either a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director erred in reaching his determinations.

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.

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 first 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 regulations 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 submitted its Internal Revenue Service (IRS) Form 1065, U.S. Partnership Return of Income for 1999. The Form 1065 revealed gross receipts in the amount of \$688,552 and ordinary income as negative \$41,306.

The director noted that the petitioner had indicated it had suffered a business loss and that the IRS Form 1065 confirmed the business loss of 1999. The director determined that the IRS Form was credible evidence in defining the profitability of the filer. The director determined based on this evidence that the petitioner had not established the petitioner's ability to pay the proffered wage.

On appeal, counsel for the petitioner asserts that CIS must consider the totality of the petitioner's circumstances. Counsel asserts that the business loss suffered by the petitioner in the year 1999 was as a result of initial advertisement expenses, amortization and bank charges and that without these expenses the petitioner would have made a profit.

Counsel's assertion is not persuasive. In 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. 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 CIS 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. *K.C.P. Food Co., Inc. v. Sava* 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. The director properly relied upon the petitioner's net loss in this instance when concluding that the petitioner had not established its ability to pay the beneficiary the proffered wage. Counsel's assertions to the contrary are 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 primarily 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.

The petitioner initially stated the beneficiary's job duties for the petitioner were as follows:

Recruit, hire, train, and discharge employees. Evaluate employee performance for promotion purpose. Call and coordinate meetings of managers, and supervisors to discuss how to improve quality of service and efficiency of operations. Prepare budget and financial objectives of the company and monitor spending to ensure that it is within budget limit. Conduct market research and feasibility studies to determine timing and location for the opening of additional stores. Serve as liaison between the US company and its Korean affiliate.

The petitioner also provided its payroll register for the period beginning June 19, 2000 and ending July 2, 2000 for six employees. The salaries paid to the six employees for the two-week time period totaled \$2,494.50. An unidentified individual representing him or herself to be the petitioner's manager in a letter to support the petition confirmed that the petitioner currently had six employees. However, in the same letter the petitioner represented that it would increase its current nine full-time employees to fifteen.

The director determined that the petitioner had provided evidence of only a small staff and the evidence in the record failed to demonstrate that the small restaurant required the services of an executive or a manger or that the beneficiary would be performing the duties of an executive or manager.

On appeal, counsel for the petitioner states that CIS must take into account the reasonable needs of the organization in light of the overall purpose and stage of development of the organization and that the number of employees is not determinative. Counsel asserts that the beneficiary is the majority owner of the business operation and is responsible for directing the organization's operations.

Counsel's statement regarding CIS's requirement to take into account the reasonable needs of the petitioner is correct. Although the director based his decision on the size of the enterprise and the number of staff, the director did not clearly

state that he had considered the reasonable needs of the petitioner in light of its overall purpose and stage of development.

At the time of filing, the petitioner was a two and a half-year-old company operating a Chinese restaurant. The enterprise proposed to employ the beneficiary as its general manager. Although the petitioner stated it planned to hire additional employees the petitioner only provided evidence of six individuals employed at the time of filing the petition. The wages paid to these employees is not indicative of individuals employed on a full-time basis in a managerial, supervisory, or professional capacity. The petitioner also represented in the same letter that it employed nine full-time employees. 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). Based on the petitioner's inconsistent statements regarding its number of staff, it is not possible to determine if the reasonable needs of the company could plausibly be met by the services of the staff on hand at the time the petition was filed. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial capacity. As discussed below, the petitioner has not established this essential element of eligibility.

Counsel's assertion that the beneficiary directs the organization is 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). The petitioner has submitted a broad position description that refers to duties that are more indicative of an individual providing basic services to the company. 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 stated that the beneficiary would "prepare budget and financial objectives of the company," and "call and coordinate meetings of managers, and supervisors," and "conduct market research." The beneficiary also appears not only to have the authority to recruit, hire, train, and discharge employees but will actually be performing the service of hiring, firing, and evaluating the employees. This service is more indicative of an individual who may be performing first-line supervisory duties.

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are general in nature

and are more indicative of an individual providing services to the enterprise rather than managing the enterprise. The record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. CIS 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.

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed by the foreign entity in an executive or managerial capacity. The petitioner's description of the beneficiary's duties for the overseas entity is vague and general and does not convey an understanding of the duties of the beneficiary on a daily basis.

Also beyond the decision of the director, the petitioner has provided incomplete information regarding the transfer of the limited liability partnership to the beneficiary. Ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and a foreign entity for purposes of this immigrant visa classification. *Matter of Church of Scientology International*, 19 I&N Dec. 593 (BIA 1988); *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986) (in non-immigrant proceedings); see also *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in non-immigrant proceedings). The record is deficient in this regard.

As the petition will be dismissed for the reason stated above, these issues are 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.