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U.S. Citizenship
and Immigration
Services



FILE: WAC 01 175 52134 Office: CALIFORNIA SERVICE CENTER Date: **OCT 28 2004**

IN RE: Petitioner:
Beneficiary:



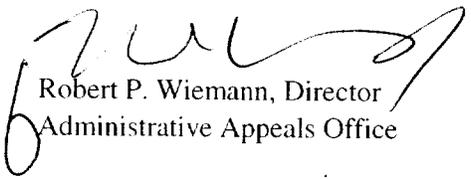
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


Robert P. Wiemann, Director
Administrative Appeals Office

identifying data referred to
prevent disclosure of information
in violation of the Privacy Act

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DISCUSSION: The Director, California Service Center, denied the employment-based visa petition. The Administrative Appeals Office (AAO) dismissed the appeal on May 28, 2003. The matter is now before the AAO on a motion to reopen. The motion will be granted and the matter will be reopened for entry of a new decision. The decision denying the petition will be affirmed.

The petitioner is a corporation organized in the State of California in 1993. The record contains evidence that the California Secretary of State suspended its powers, rights, and privileges but that it was subsequently revived in December 2000. It claims to be engaged in the import and export business. It seeks to employ the beneficiary as its executive director/general manager. 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: (1) that the beneficiary would be employed in a managerial or executive capacity for the United States entity; (2) that the beneficiary had been employed in a managerial or executive capacity for the overseas entity for one year prior to entering the United States as a nonimmigrant; or (3) its ability to pay the beneficiary the proffered annual wage of \$36,000. The AAO affirmed the director's decision and also determined that the petitioner had failed to establish that it had been doing business for one year prior to filing the petition.

On motion, counsel for the petitioner submits a brief and exhibits. The exhibits include: (1) intermittent California Forms DE-6, Quarterly Wage Report, from 1994 to March 31, 2003; (2) intermittent Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax, from 1994 to 2002; (3) the petitioner's revival registration; (4) a June 17, 2003 letter from the president of the foreign entity; (5) copies of invoices from 2001 and 2002; (6) copies of sales order forms from 2001 to 2003; and, (7) bank statements from 2001 to April 2003.

The first issue in this proceeding is whether the petitioner established that the beneficiary's position for the United States entity is primarily managerial or executive.

On motion, counsel for the petitioner asserts that a beneficiary may be a manager or executive even if he is the petitioner's sole employee. Counsel observes that a beneficiary may be a "functional manager" and cites an unpublished decision in support of this assertion. Counsel also submits "All DE-6 Forms from 1994 to present" to show that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

On review of the evidence submitted on motion, the AAO observes that the petitioner did not submit a California Form DE-6, Employer's Quarterly Report, for the second quarter of 2001. The petition was filed in May 2001 making the 2001-second quarter California Form DE-6, the pertinent report. The petitioner's 2001-third quarter California Form DE-6 shows that the petitioner employed two individuals, however as the AAO stated in its previous decision, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel's assertion that the beneficiary may be a manager or executive even if he is the petitioner's sole employee is also not persuasive in this matter. The record does not support counsel's observation that the beneficiary may be a "functional manager."

First, as stated in the AAO's prior decision, the petitioner did not provide a comprehensive description of the beneficiary's duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Second, the petitioner has provided no evidence that the petitioner employed individuals who would relieve the beneficiary from performing primarily operational duties when the petition was filed. 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).

Third, the petitioner has not established that the beneficiary manages an essential function. To establish that a beneficiary manages an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function.

Finally, counsel's citation to an unpublished decision is not persuasive. Counsel has not explained how the facts of the instant petition are analogous to those in the unpublished matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all Citizenship and Immigration Services (CIS) employees in the administration of the Act, unpublished decisions are not similarly binding.

The record on motion does not establish that the beneficiary had been or would be performing primarily managerial or executive functions when the petition was filed.

The second issue in this proceeding is whether the petitioner has established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity prior to entering the United States as a nonimmigrant.

Counsel submits a June 17, 2003 letter from the president of the foreign entity further describing the beneficiary's duties for the foreign entity. However, the letter provided on motion is not an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to

administer oaths or affirmations, does it contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a motion are not evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The record contains no other evidence on motion to support counsel's assertion that the beneficiary was employed in a managerial or executive capacity for the foreign entity.

The final issue in this proceeding is whether the petitioner established its ability to pay the beneficiary the proffered annual wage of \$36,000.

On motion counsel submits invoices and sales orders from 2001 to 2003 to substantiate the petitioner's ability to pay the beneficiary the proffered wage. Although the invoices and sales orders may show that the petitioner had been doing some business in 2001 through 2003, they do not establish the petitioner's ability to pay the proffered wage.

As the AAO previously observed and petitioner's counsel seemed to acknowledge on motion, the petitioner did not provide evidence that it had paid the beneficiary the proffered wage in the past.

As such, the AAO next examines the petitioner's net income figure as reflected on the 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 that the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on 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. 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.

As the petition's priority date falls on May 4, 2001, the AAO must examine the petitioner's tax return for 2001. The petitioner's IRS Form 1120 for calendar year 2001 presents a net taxable income of \$21,008. The petitioner could not pay a proffered wage of \$36,000 per year out of this income.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets

are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage. In this matter, the petitioner's 2001 IRS Form 1120 shows sufficient net current assets to pay the beneficiary's proffered wage. On this issue alone, the petitioner has provided sufficient evidence on motion to overcome the director and AAO's previous decisions. The director and AAO's decision will be withdrawn on this issue.

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, the petitioner has not provided sufficient evidence on the issues of the beneficiary's managerial or executive capacity for the foreign entity or the petitioner to overcome the director and AAO's prior decisions.

ORDER: The decisions of the director and the AAO are withdrawn on the issue of the petitioner's ability to pay the beneficiary the proffered wage. The decisions of the director and the AAO are affirmed on the issue of the beneficiary's managerial and executive capacity for the foreign entity and the United States petitioner.