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U.S. Citizenship
and Immigration
Services

PTIP 11/11/04

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[Redacted]

FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 22 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

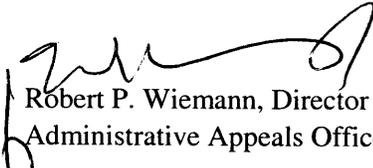
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[Redacted]

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

DISCUSSION: The director denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a corporation that seeks to employ the beneficiary as its president. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition because: (1) the petitioner does not have the ability to pay the proffered wage; (2) the foreign entity is not conducting business; and (3) the proffered position in the United States is not in an executive or managerial capacity.

On appeal, counsel submits a brief.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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 an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it is a subsidiary of Ki-A Commercial in Korea, and provides floor-covering services in the greater Columbus, Ohio area. The petitioner asserts that it currently employs the beneficiary in the proffered position as an intracompany transferee (L-1A), and that it also employs the beneficiary's wife as its vice president. The petitioner is offering to employ the beneficiary permanently at a weekly salary of \$1,100.

The first issue to be discussed in this proceeding is whether the petitioner has the ability to pay the proffered wage. Pursuant to 8 C.F.R. § 204.5(g)(2), an offer of permanent employment must be accompanied by

evidence that the petitioner has the ability to pay the proffered wage both at the time the priority date is established and until the beneficiary obtains lawful permanent resident status.

In a February 26, 2003 request for evidence (RFE), the director informed the petitioner that its tax returns failed to demonstrate that it had the ability to pay the beneficiary's annual salary of \$57,000. The director, therefore, asked the petitioner to "[p]lease submit evidence that you have the financial ability to pay that wage." In response, the beneficiary, acting as the company's president, stated that the petitioner paid him a salary of \$57,000. The petitioner did not, however, submit any documentary evidence requested by the director to show that it paid the claimed wages.

In denying the petition, the director noted the lack of documentary evidence to show that the petitioner had paid the beneficiary's salary in the past. The director further noted that the documentary evidence in the file, which consisted of the petitioner's tax returns, did not establish its ability to pay the proffered wage. The director, therefore, denied the petition, in part, on this issue.

On appeal, counsel states, "The financial stability can be clearly demonstrated by the statements from the company's financial institution, which may be provided upon the request of AAU. [The petitioner] has assets that are sufficient to pay the offered wage." Neither counsel nor the petitioner presents any documentary evidence on appeal to substantiate counsel's statements.

The statements of counsel on appeal regarding the petitioner's financial solvency are not evidence and thus 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). Without documentary evidence to show that the petitioner can pay the beneficiary's proposed salary, the petitioner cannot meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Accordingly, the AAO will not disturb the director's findings on this issue.

The second issue to be discussed in this proceeding is whether the foreign entity continues to do business. According to 8 C.F.R. § 204.5(j)(2), the term *multinational* "means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States."

In the February 2003 RFE, the director asked the petitioner to submit "documentation, with applicable English translations, which establishes that your parent company . . . continues to do business abroad." In response, counsel stated, "The Korean company is currently operated by [the beneficiary's] brother and is conducting business at a regular pace. The company is bringing in profits at an expected pace and its future earnings are projected to be exceeding the expected figures." Neither the petitioner nor counsel submitted any documentary evidence of the Korean company's ongoing business operations as requested by the director.

The director denied the petition, in part, because the petitioner failed to submit any documentary evidence of the Korean company's continued viability. The director noted that counsel's statements regarding the Korean company were not evidence. On appeal, counsel reiterates his statements from the RFE response, and adds, "At this time, we are unable to provide the necessary documents to substantiate our statements, but we will be

able to do that in the next couple of months. This situation is caused by the extremely slow mail turnaround which takes up to 4 weeks each way.”

As stated previously in this decision, the statements of counsel on appeal are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya, supra; Matter of Ramirez-Sanchez, supra.* Counsel’s statements regarding the Korean company’s operations are not enough to sustain the petitioner’s burden of proof. Again, going on record without supporting documentary evidence is insufficient. *Matter of Treasure Craft of California, supra.* Although counsel indicated in his September 2003 brief that he would be able to submit documentation “in the next couple of months,” such evidence has never been provided to the AAO. Accordingly, the AAO will not disturb the director’s comments on this issue.

The third and final reason for denying the petition was that the proffered position is not 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.

At the time of filing the petition, the petitioner indicated that the proffered position involves:

- Entering into contracts with U.S. Companies
- Instituting new sales and marketing strategies to grow the business
- Coordinating and directing the day[-]to[-]day operation of the corporation
- Prepar[ing] the corporate budget

In the February 2003 RFE, the director asked the petitioner to submit evidence of its employees, describe in detail the beneficiary's job duties, and provide an organizational chart. In response, counsel stated that the petitioner hires independent contractors to perform the service of floor installations. Counsel added further:

[The beneficiary] has the absolute power to hire or fire employees within the company at any level. He devotes most of his day at the office to implement[ing] the office policies and make sure that the business is running smoothly. [The beneficiary] devotes about an hour to two hours a day calling the contracted companies and checking up on the status of the projects. He also has to talk to current and prospective clients [The beneficiary] sets up appointments for estimates of jobs. He goes to the sites and performs the estimates, which are then presented to the clients. He is in charge of signing contracts for these jobs. After such a contract is signed he then assigns a subcontractor to that particular job and negotiates fees with them. He spends another couple of hours on the accounting of the company. At this time he checks the accounts payable and receivable. [The beneficiary] is also responsible for the ordering of the building materials. . . . Often [the beneficiary] joins his teams [and] gives them instructions on the techniques and methods of correct wood laying and minor carpentry. . . .

[The beneficiary] sometimes engages in [the] physical labor of installing floor covering. [The beneficiary] physically shows how to correctly install the various types of floors. . . . In terms of percent of time that this takes it probably varies between 5-10 hours per week, so about 10-15% of the total work hours.

Regarding its staffing level, the beneficiary, acting on behalf of the petitioner, stated that the petitioner did not pay any salaries or wages because it deals only with independent contractors. The beneficiary stated further that the petitioner did not employ a "formal vice-president," but that his wife was serving as the vice president. According to the beneficiary, his wife "keeps all records of the contracting and makes contact with all of the independent contractors. She makes sure all planning goes as planned."

In denying the petition, the director found that the proffered position was not in a managerial or executive capacity. The director noted that the beneficiary was responsible for all facets of the business including, soliciting business, providing estimates, accounting, and ordering materials. The director found that, because the beneficiary was not primarily engaged in managerial or executive tasks, the position did not qualify as a multinational managerial or executive position.

On appeal, counsel states that the director misconstrued the evidence. Counsel maintains that the beneficiary “runs and controls the entire company” and that any physical labor he performs takes only five percent of his monthly time. Counsel also refers to this physical labor as “hands-on training.” According to counsel, the beneficiary’s primary role with the petitioner is that of an executive.

The evidence in the record fails to establish that the proffered position is in a managerial or executive capacity. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in either definition. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). It is apparent from the evidence that the beneficiary performs all of the tasks that are necessary to operate the business. Although counsel indicates that the beneficiary spends only five percent of his time on “physical labor,” the other duties ascribed to the beneficiary all comprise the company’s day-to-day functions such as negotiating contracts and seeking clients. Nothing in the evidence establishes that the beneficiary primarily executes the duties that are listed in the definition of managerial or executive capacity. Because the beneficiary primarily performs the tasks necessary to provide the petitioner’s services, then the AAO will not consider the beneficiary to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Accordingly, the director’s decision will not be disturbed.

Beyond the decision of the director, the evidence in the record does not establish that the petitioner and the Korean company, Ki-A Commercial, share a common relationship pursuant to 8 C.F.R. § 204.5(j)(3)(i)(C). Although the petitioner claims to be a subsidiary of Ki-A Commercial, the record does not contain any documentary evidence of its ownership such as stock certificates, the corporate stock ledger, or its Articles of Incorporation. In addition, because the relationship between the Korean and U.S. companies has not been adequately documented, the beneficiary cannot meet the requirements of the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B), which states that the beneficiary must have been employed by a qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States in a nonimmigrant status. Although the director did not raise these issues in his denial letter, they are, nevertheless, additional reasons why 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 met that burden.

ORDER: The appeal is dismissed. The petition is denied.