

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY



B4

FILE: [REDACTED]
SRC 03 216 51390

Office: TEXAS SERVICE CENTER Date: JUL 21 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

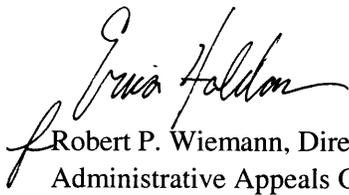
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



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, Texas Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant petition seeking to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Florida that is operating as an import and export company. The petitioner seeks to employ the beneficiary as its general manager.

The director denied the petition concluding that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel submits a brief claiming that as the general manager, the beneficiary manages the organization, supervises two employees, "has the authority to hire and fire," "exercises discretion over all day-to-day operations," and determines the company's short and long-term goals. Counsel contends that Citizenship and Immigration Services (CIS) erred in concluding that the beneficiary performed the daily operations of the business, and notes that the beneficiary's involvement in signing shipping documents and invoices does not preclude the beneficiary from functioning in a qualifying capacity.

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 or 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. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary would be employed by the United States entity 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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 filed the instant petition on August 1, 2003 requesting the employment of the beneficiary as its general manager. In an appended letter, dated May 29, 2003, the petitioner explained that as the general manager of the business, the beneficiary has directed its import, export and distribution operations in the southern Florida region, "negotiated contracts and managed the personnel." The petitioner stated that in this capacity, and "with the responsibilities of the company's Chief Executive Officer," the beneficiary would perform the following job duties:

- 1) She sets policy for all aspects of the administration of the company including:
 - a) Hiring standards, position job duties, personnel compensation and benefits;
 - b) Set marketing goals and strategies in consultation with the board of directors based upon projections of revenue and expenses under alternative marketing strategies and forecast general economic conditions;
 - c) She determines the company's credit needs and negotiates the terms of lines of credit obtained in consultation with professional advisors such as accountants and attorneys, as well as with the advice of the board of directors;
 - d) She determines policies for credit to be granted to purchasers of the company's products under various circumstances as well as policies for collections and shipment terms.

- 2) [The beneficiary] is responsible for [the] company's operations, including:
 - a) Assuring compliance with U.S. import and export trade restrictions and reporting requirements;
 - b) Compliance with Environmental Protection Agency (EPA) regulations on aerosol propellants in the United States;
 - c) Establishment of advertising based upon market survey information[.]

In a request for evidence dated January 20, 2004, the director asked that the petitioner submit a "definitive statement" describing the beneficiary's position in the United States entity and specifically addressing the following: (1) the beneficiary's position title; (2) a list of job duties performed by the beneficiary and the percentage of time spent on each; (3) the subordinate employees supervised by the beneficiary; (4) a brief description of the employees' job titles, job duties, and educational levels; (5) a description of the qualifications necessary for the beneficiary's position; (6) the beneficiary's position and level of authority within the organization; and (7) an explanation of who provides the sales and services of the company and produces the products sold by the petitioner. Counsel also requested that the petitioner submit Form W-2, Wage and Tax Statement, for each worker employed by the petitioning entity during the last two years.

Counsel responded in a letter dated April 9, 2004 and provided the following allocation of the job responsibilities held by the beneficiary as general manager:

- 20% - Directs, plans and implements policies and objectives of [the] business;
- 17% - Reviews financial statements and sales and activity reports to ensure attainment of corporate goals;
- 23% - Directs and coordinates corporate financial and budget activities for expanding business activities as well as traveled for prospecting new clients;
- 23% - Directs and coordinates activities of business involved with pricing, purchases, sales, rentals and/or distribution of products; and
- 17% - Directs non-business activities such as advertising, banking and credit negotiations, public relations and accounting.

Counsel also claimed that the beneficiary satisfied the requirements of general manager, as she "manages the organization," "supervises and controls the work of other supervisory, professional, or managerial employees," "has the authority to hire and fire or recommend personnel actions such as promotions, leave authorizations, etc.," and "exercises discretion over all day-to-day operations."

With regard to the petitioner's employees at the time of filing the petition, counsel noted that in addition to the beneficiary, the petitioner employed one worker, a sales and distribution assistant. The AAO notes that according to the employment dates provided by counsel, the company's "former" warehouse shipping and dispatch employee left the company one day before the instant petition was filed, while its current warehouse shipping and dispatch employee did not begin employment until two months after the filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) (concluding 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). Counsel outlined the job duties of the sales and distribution assistant as: telemarketing; "client follow-up"; preparation of quotes and sales material; and "report[ing] to [the] General Manager on accounts receivable, accounts payable, national sales and export sales." While counsel noted that an organizational chart would be attached, none was included in the record.

Counsel provided the petitioner's years 2002 and 2003 Forms W-2 for each employee and Forms 941, Quarterly Federal Tax Return, for the fourth quarter of 2003 and the first quarter of 2004.

In a decision dated May 11, 2004, the director concluded that the petitioner had not demonstrated that the beneficiary would be employed by the petitioning entity in a primarily managerial or executive capacity. The director stated that despite the beneficiary's supervision over two employees, there is "no evidence assert[ing] the exact duties, in such documents as a formally signed job contract, or authority over the hiring, firing and other personnel actions of the other two employees." The director also stated that only one employee is noted to have a college education, and explained that it was unknown from the record whether a college degree is required or merely preferred for the position performed by the employee.

The director also referenced the job duties to be performed by the beneficiary and concluded that the beneficiary would perform such day-to-day operations of the business as "bank fund transfers[] [and] completing shipping receipts[,] and [would function] as [the] contact for [a] request for the delay of an incoming product." The director identified documentation in the record reflecting instances in which the beneficiary signed orders and shipping documents, requested funds transfers, and was identified as the representative of the petitioning organization. The director stated that while the beneficiary exercises discretion over some of the daily operations of the company, she also performs a portion of its day-to-day functions. The director concluded that the beneficiary's primary assignment in the United States has not been and would not be directing the policy or management of the organization, or supervising a subordinate staff of supervisory, professional, or managerial employees. The director also concluded that the petitioning entity "does not need a full[-]time executive to manage two employees and to make decisions regarding the company."

The director further noted the existence of a letter from the foreign entity's accountant, in which the accountant identified additional compensation paid to the beneficiary from the foreign entity. The director stated that the material changes could not be made to a petition following its filing in an effort to conform to CIS requirements. The director also identified a discrepancy in the petitioner's purported business location, stating that counsel did not supply a lease signed by the beneficiary. Consequently, the director denied the employment-based petition.

Counsel filed an appeal on June 14, 2004. In a subsequently submitted brief, counsel claims that CIS "abused its discretion" in determining that the beneficiary would not be employed in a primarily managerial or executive capacity, and "erred" in its conclusion that the beneficiary would perform day-to-day operations of

the business. Counsel states that as the general manager, the beneficiary manages the petitioning organization, "has the authority to hire and fire," "exercises discretion over all day-to-day operations," and aids in achieving the short and long-term goals of the organization. Counsel notes that contrary to the director's claim, the beneficiary "has much more authority than a supervisor of two employees," claiming that the beneficiary also performs the following job duties:

[Directs] and plan[s] business goals, review[s] financial statements and sales reports, directs and coordinates business activities such as pricing, purchases, sales, rentals and/or distribution of products and non-business activities, such as advertising, public relations, banking, credit negotiations and accounting.

Counsel challenges the director's requirement that the petitioner provide employment contracts for its workers, stating that the workers are employed "at-will" without a written contract. Counsel submits a revised list of workers employed by the petitioner, which showed that a new employee had replaced the petitioner's former sales and distribution assistant.

Counsel also disputes the director's finding that the beneficiary would be involved in the daily operations of the business. Counsel states "[t]he mere fact of receiving and signing for a UPS shipping document or international airway bill is not probative that the Beneficiary as General Manager was involved in day-to-day operations." Counsel states:

As General Manager, if a task or duty cannot be performed by the employee because of an oversight or the absenteeism of the employee, the General Manager needs to step in and do it herself. Failing to perform an employee's duty or task could have adverse repercussions on the business entity. This by itself does not mean that the General Manager will be performing her employees' day-to-day tasks and duties.

In addition, counsel questions the director's finding that the petitioning organization would not need a manager or executive to manage its two workers and make decisions for the company. Counsel references a United States District Court case, and contends that CIS cannot "second [guess] the business judgment of a successful company" by determining whether an employee's qualifications are appropriate for a particular position. *Unico American v. Watson*, C.D.Cal. 1991 (1991 WL 11002594 (C.D.Cal.)). Counsel states "[CIS]' decision denying the Petitioner's specific business needs is tantamount to hampering the exercise to free enterprise and second guessing business judgment."

With regard to the petitioner's office lease, counsel states that the submitted evidence, including a letter from the lessor, a zoning verification from the Miami-Dade County Department of Planning and Zoning, zoning map, and photographs of the warehouse and office premises are sufficient to establish and confirm the petitioner's business location.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The record does not support counsel's claim on appeal that the beneficiary would not be involved in the daily operation of the business. The

beneficiary's job duties include the performance of non-qualifying operational tasks associated with the petitioner's finances, advertising, regulatory compliance, and import and export functions. Specifically, the beneficiary would be responsible for personally determining the petitioner's credit needs, negotiating financing, reviewing "market survey information," creating advertisements, and "assuring compliance with U.S. import and export trade restrictions and reporting requirements" and with EPA regulations. The record contains a personal solicitation from the beneficiary to a "prospective customer" explaining the petitioning organization and its products. The beneficiary has been and would clearly be involved in performing non-managerial and non-executive tasks promoting and maintaining the petitioner's business, and is not merely performing those tasks resulting from the "oversight or absenteeism of [an] employee." 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).

Additionally, even though counsel claims in his April 9, 2004 letter that the beneficiary "directs" the business' policies, objectives, finances, and "business" and "non-business" activities, including pricing, purchases, sales, advertising, banking, credit negotiations, public relations and accounting, it does not appear that the petitioner employs a staff sufficient to perform the operations of the company. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner employed the beneficiary and a sales and distribution assistant.¹ Based on the employment structure alone, the beneficiary would not qualify as a manager as the beneficiary is not supervising or controlling the work of other supervisory, professional, or managerial employees. *See* 8 C.F.R. § 204.5(j)(2). Notwithstanding this deficiency, according to counsel's description, the sales and distribution assistant would be mainly responsible for telemarketing, contacting clients and preparing sales material. As the petitioner does not employ any additional lower-level workers, it does not seem plausible that the reasonable needs of the organization are met by the employment of the beneficiary and a sales and distribution assistant. It is unclear how the that the beneficiary would actually be "directing" the business' policies, objectives, finances, and activities through the employment of a sales and distribution assistant who, according to counsel, is not responsible for such non-qualifying operations as determining the petitioner's pricing, nor handling its banking, credit negotiations, public relations and accounting. Based on the petitioner's allocation of the amount of time devoted to each responsibility, the beneficiary would spend approximately 63% of her time personally performing these business functions. As a result, the beneficiary would not be primarily performing the managerial or executive job duties outlined in the Act at sections 101(a)(44)(A) and (B). *See Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991)(concluding that the petitioner must prove that the beneficiary *primarily* performs the high-level responsibilities specified in the statutory definitions and does not spend a majority of his or her time on day-to-day functions).

¹ The petitioner noted on the petition that it employed three workers at the time of filing. The petitioner's appeal, however, incorporates a revised employee list, wherein the petitioner indicates that on August 1, 2003, it employed the beneficiary and a sales and distribution assistant.

The record indicates that the beneficiary is functioning as the chief operating officer, agent and legal representative of a second United States company, Souvenir Coffee Company. The petitioner submitted a partnership agreement for a separate United States entity, wherein the petitioning organization is named as a 50% partner and the beneficiary is identified as holding the above-noted positions. The petitioner does not explain the job duties to be performed by the beneficiary in association with her appointment as the chief operating officer, agent and legal representative. Regardless, the AAO is left to question how the beneficiary would be employed by the petitioning organization in a primarily managerial or executive capacity when the beneficiary is concurrently working for an additional organization. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

On appeal, counsel cites a United States District Court case and contends that CIS cannot "second [guess] the business judgment of a successful company." Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Unico American v. Watson*. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Although the appeal will be dismissed, the AAO notes that the director partially based her decision on two questionable factors. Specifically, the director points out a letter from the foreign entity identifying additional compensation paid to the beneficiary and the petitioner's failure to provide a lease signed by the beneficiary. It is unclear how these two factors have a direct bearing on the beneficiary's employment as a manager or executive. The director should either provide a more detailed explanation why this evidence is relevant to the immediate issue or focus on applying the statute and regulations to the facts presented by the record of proceeding.

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary's proffered wage of \$24,000 per year as required in the regulation at 8 C.F.R. § 204.5(g)(2). In 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, counsel submitted two letters from the foreign entity confirming that it supplemented the beneficiary's annual salary in the years 2002 and 2003. As a result, the petitioner has not demonstrated that it employed the beneficiary at an annual salary of \$24,000.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine 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 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 the Service 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 August 1, 2003, the AAO must examine the petitioner's tax return for 2003.² The petitioner's IRS Form 1120 for the tax year ending August 31, 2003 presents a zero balance for its net taxable income. The petitioner could not pay a proffered wage of \$24,000 per year.

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. According to Schedule L of the petitioner's tax return, its net current assets are less than the beneficiary's annual salary of \$24,000. The petitioner has not established its ability to pay the beneficiary's proffered wage. Consequently, the petition will be denied for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

² The petitioner submitted a 2002 tax return based on the tax year September 1, 2002 through August 31, 2003.