

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B4



FILE: [Redacted]
EAC 03 054 56476

Office: VERMONT 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 Acting Center Director, Vermont 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 New Jersey that is engaged in the import and export of freight. The petitioner seeks to employ the beneficiary as its marketing manager.

The director denied the petition concluding that the petitioner had not demonstrated that: (1) it has the ability to pay the beneficiary the proffered wage; or (2) the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

On appeal, the petitioner acknowledges that at the time the petition was filed, the beneficiary was the "key person" of the organization, and was responsible for performing high-level as well as non-qualifying job duties of the corporation. The petitioner claims that the United States organization now employs five lower-level employees who are managed by the beneficiary. The petitioner also explains that the United States company, an affiliate of the foreign company, receives financial support from the overseas corporation in order to pay the beneficiary's proffered salary. Counsel submits a letter from the petitioner and supporting documents in support of the appeal.

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.

The AAO will first address the issue of whether the petitioner had the ability to pay the beneficiary the proffered wage as required at 8 C.F.R. § 204.5(g)(2).

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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.

On the employment-based petition filed on November 15, 2002, the petitioner noted that as the marketing manager, the beneficiary would receive an annual salary of \$40,000.

In a request for evidence dated July 31, 2003, the director asked that the petitioner submit: (1) a copy of its 2002 federal tax return, including all schedules and attachments; (2) Forms W-2 and W-3 issued by the petitioner in 2001 and 2002; (3) quarterly tax returns for the years 2001 and 2002; and (4) a copy of its most recent payroll register.

In response, the petitioner provided the requested Form 1120, U.S. Corporation Income Tax Return, for years 2001 and 2002, as well as Forms W-2, Wage and Tax Statement and Forms 941, Employer's Quarterly Federal Tax Return, for the same years.

In a decision dated March 1, 2004, the director determined that the petitioner did not demonstrate its ability to pay the beneficiary's salary of \$40,000. The director noted that the petitioner's Form W-2 indicated that the beneficiary was paid \$28,900 during 2002, \$11,100 less than the proposed salary. The director further noted that the cumulative amount paid for employees' salaries in 2002 was \$40,100, only \$100 more than the beneficiary's salary. The director also determined that the petitioner's current liabilities were \$157,000 more than its assets. Consequently, the director determined that the petitioner did not have the ability to pay the beneficiary's annual salary.

In an appeal filed on March 25, 2004 and in a supplemental March 23, 2004 letter, the petitioner states that as an affiliate of the overseas company, the petitioning organization receives financial support from the foreign company, which will continue until the petitioner is self-sustaining. The petitioner explains that as a "new business . . . there will always be in [sic] an initial period of losses after which the company starts making profits." The petitioner indicates that a "major portion" of the petitioner's current liabilities is payments due to its foreign affiliate for shipping services.

The petitioner also submits a letter from its accountant dated March 18, 2004, in which the accountant identifies a mistake in the amount of gross wages reported by the petitioner on its 2002 Form W-2. The accountant notes that the beneficiary's annual rent allowance of \$11,400 was omitted from his annual salary.

The accountant submits Form 1040X, Amended U.S. Individual Income Tax Return, reflecting a \$10,097 increase in the beneficiary's annual salary, thereby reflecting a salary of \$40,839.

On review, the petitioner has not demonstrated its ability to pay the beneficiary's proffered salary. In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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, although the petitioner employed the beneficiary at the time the priority date was established, the beneficiary's salary was lower than the proffered amount of \$40,000. Although the petitioner's accountant provided an explanation for the discrepancy in the beneficiary's 2002 salary, the record is not persuasive in establishing the petitioner's financial ability. The immigrant petition, as well as the appended Application for Alien Employment Certification, indicates that the beneficiary would receive a rate of pay of \$40,000 annually. There is no indication that the beneficiary would actually earn a lesser annual salary plus a rent allowance, resulting in a cumulative "salary" of \$40,000, as suggested by the accountant. If anything, it would seem that the beneficiary would receive an allowance for rent in addition to his \$40,000 salary. The petitioner would be required to establish that it had sufficient income to pay the cumulative amount of the beneficiary's salary and rent. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not provided evidence sufficient to resolve the inconsistencies in the beneficiary's actual salary.

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 November 15, 2002, the AAO must examine the petitioner's tax return for 2002. The petitioner's IRS Form 1120 for calendar year 2002 presents a net taxable income of negative \$83,648. The petitioner could not pay a proffered wage of \$40,000 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.

Specifically, Schedule L of the petitioner's year 2002 corporate income tax return reflects an amount of \$178,202 in liabilities, including accounts payable, whereas the petitioner's cash notes and accounts receivable amount to \$20,746. The negative balance of \$157,456 creates a compelling assumption that the petitioner does not have sufficient assets to pay the beneficiary's salary. As a result, the petitioner cannot be deemed to have the ability to pay the proffered wage.

The petitioner's claim on appeal that the petitioner receives financial support from the overseas corporation is not sufficient to demonstrate the petitioner's ability to pay the beneficiary's salary. The regulations specifically state that "the prospective United States employer" must demonstrate through annual reports, federal tax returns or audited financial statements that it can afford the suggested salary. 8 C.F.R. § 204.5(g)(2). The petitioner cannot rely on the financial resources of the foreign organization to establish its ability to pay. Consequently, the appeal will be dismissed.

The AAO will next address the issue of 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 stated on the immigrant petition that the beneficiary would be employed as its marketing manager to promote the company's services in the United States and Middle East. The petitioner noted that it employed four workers at the time of filing the petition. In an appended Application for Alien Employment Certification, the petitioner provided the following description of the job duties to be performed by the beneficiary:

Promote company service such as USA/Middle East and sub-continent trade (vice-a-versa) and other areas. Look after overall marketing performance. Coordinate and liaison with customers and [the petitioner's] overseas partners. Responsible for correspondence with customers, principals and agents. Maintain monthly targets and sales performance reports. Book and follow-up all locally secured orders. Handle all freight inquiries. Prepare marketing statistics. Assist Vice President of the company in preparation of annual budgets.

In her July 31, 2003 request for evidence, the director asked that the petitioner submit the following documentation regarding the beneficiary's employment as a manager or an executive: (1) a comprehensive description of the job duties performed by the beneficiary as the petitioner's marketing manager; (2) an explanation that the beneficiary has been and will be managing a subordinate staff of managerial, professional or supervisory personnel who would relieve him from performing non-qualifying job duties of the petitioning organization; (3) an allocation of the amount of time the beneficiary would spend performing executive and non-executive job duties; and (4) a list of workers presently employed in the United States company and the position held by each. The director also requested documentation, such as monthly sales targets and performance reports, demonstrating the beneficiary's current employment in the position of marketing manager.

The petitioner responded in a letter dated "0th October, 2003," providing a list of the requested job duties of the beneficiary in the United States entity.¹ The petitioner provided a comprehensive list of the job duties performed by the beneficiary in the capacity of marketing manager. As the letter is part of the record, it will not be entirely repeated herein. The petitioner also provided a list of its four employees, including a general

¹ The record contains documentation from the petitioner and the foreign entity that is undated or fails to reference the purpose for which it is being submitted. As a result, it is unclear when the document dated "0th October, 2003" was actually submitted. Based on the supplementary documentation in the record, it appears that it was likely submitted in response to the director's request for evidence.

business manager, a senior supervisor of operations and finance, and two operations and documentation executives responsible for imports and exports. The petitioner also submitted the requested sales targets and performance reports documenting the beneficiary's performance as marketing manager.

In her decision, the director determined that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director noted that the salaries paid by the petitioner in 2002 indicate that the beneficiary was the petitioner's sole full-time employee. The director stated that while the petitioner identified in its October 2003 response that it employed four lower-level workers, these employees were not employed at the time the petition was filed. The director noted that at the time of filing the petition, the beneficiary did not manage any subordinate employees that would relieve him from performing the non-qualifying sales function of the organization. The director further indicated that the record failed to identify workers employed in the positions of "president" and "vice president" as referenced by the petitioner. Consequently, the director denied the petition.

On appeal, the petitioner concedes that the beneficiary was the sole employee of the United States organization at the time of filing the petition. The petitioner explains that the unexpected resignation of its president and chief executive officer caused a lapse in its business activities, thereby requiring the corporation to lay off its imports operations supervisor. The petitioner states:

Since that time [the beneficiary] was the only, as well as the key person to take complete care of the company in 2002, and running the show, thus performing all types of jobs right from the lowest clerical duties till the level of Vice President in order to minimize the loses, and try to achieve his goal in developing business and keeping the company going with independent efforts and with the financial/business generation support from the holding/parent company in Dubai.

* * *

[The beneficiary] was still the only person running the entire show taking care of the day to day activities like operations, documentation, sales and marketing, settling dues of various vendors, maintaining accounts, arrange payment of taxes, coordinate with overseas agents, business development, and reporting directly to the President until such time that the company was in a position to afford employing more staff.

The petitioner notes that beginning in March 2003, after the petitioning entity gained the financial capability to hire more employees, it hired a shipping operations supervisor, an import operations/documentation supervisor, a finance manager/bookkeeper, a business development manager, and a sales and operations supervisor. The petitioner provides a brief description of each employee and their respective position. As the appeal is part of the record, it will not be repeated herein.

On review, the petitioner has failed to demonstrate 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). Counsel concedes on appeal that at the time of filing the petition, the beneficiary was responsible for performing all lower-level clerical tasks of the organization, as well as performing the company's non-qualifying functions, such as sales, marketing, and account maintenance, paying taxes, collecting on outstanding accounts, and communicating with overseas agents. Based on counsel's

representations, the beneficiary, as the sole employee of the organization at the time of filing the petition, performed all non-managerial and non-executive functions of the company. As a result, the beneficiary cannot be deemed to be employed in a primarily managerial or executive capacity. 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's current personnel and the job duties presently performed by the beneficiary will not be considered in determining the beneficiary's employment capacity. Counsel admits on appeal that the petitioner began hiring its five lower-level employees in March 2003, approximately four months after the instant petition was filed. As discussed above, prior to this time the beneficiary was personally responsible for the non-qualifying functions of the organization. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Based on the foregoing discussion, the petitioner has failed to establish 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, an additional issue is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity as required in the Act at section 203(b)(1)(C). In an October 7, 2003 letter, the foreign entity's managing director noted that while employed abroad as U.S./Gulf Trade Manager, the beneficiary performed such non-qualifying job duties as preparing sales reports, communicating with customers and agents, making sales calls and visiting agents. As the beneficiary was responsible for personally performing functions related to generating sales for the overseas business, the beneficiary cannot be considered to have been a manager or an executive. 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. at 604. Additionally, as the petitioner does not provide a comprehensive description of the beneficiary's overseas position, the AAO cannot conclude whether the remainder of the beneficiary's time was spent performing in a primarily managerial or executive capacity. 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). Consequently, the petition may not be approved for this additional reason.

Another issue not addressed by the director is whether the petitioner demonstrated the existence of a qualifying relationship between the foreign and United States entities. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical*

Systems, Inc., 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

At the time the petition was filed, counsel referred to the overseas organization as the parent company of the petitioner. Alternatively, in its March 23, 2004 letter on appeal, the petitioner states that the United States company is an affiliate of the foreign entity as it is 100 percent owned by [REDACTED] who is claimed to also own 49 percent of the foreign company. The record does not contain evidence of this claimed change in ownership. The petitioner's two stock certificates identify the overseas company, West Star Shipping Services, LLC, and "Milton Vincent D'Souza" as the owners of 700 shares and 300 shares of stock, respectively. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Regardless, the claimed current ownership does not meet the definition of an affiliate relationship. The foreign entity's December 31, 2002 "Managing Director's Report" identifies "Bader Mir Ahmen Amirir" as a majority shareholder of the foreign entity with 51 percent of the shares. Consequently, the petitioner has not established the existence of a qualifying relationship. For this additional reason, the petition is denied.

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).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.