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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[Redacted]

FILE:

[Redacted]

Office: VERMONT SERVICE CENTER

Date: JUN 01 2005

IN RE:

Petitioner:

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

The petitioner claims it is a limited liability company organized in the Commonwealth of Pennsylvania in June 2000. It imports furniture and accessories. It seeks to employ the beneficiary as its 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 primarily managerial or executive capacity for the United States entity; or, (2) its ability to pay the beneficiary the proffered annual wage of \$75,000.

On appeal, counsel for the petitioner asserts that the director's decision is in error.

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 and 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 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. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the beneficiary will be employed in a 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.

On the Form I-140, Immigrant Petition for Alien Worker, the petitioner referenced an attached letter for the non-technical description of the beneficiary's duties. However, the petitioner's letter of support was not appended to the petition. The record contained the foreign entity's organizational chart, evidence of the foreign entity's general stockholders' meetings, the petitioner's certificate of organization as a domestic limited liability company in compliance with the laws of Pennsylvania, the petitioner's lease agreement, the petitioner's financial statement ending June 30, 2002, evidence of insurance, the petitioner's 2001 Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation, the foreign entity's 2001 IRS Form 1120-F, U.S. Income Tax Return of a Foreign Corporation, the petitioner's third quarter Pennsylvania Form UC-2A, Employer's Quarterly Report of Wages Paid to Each Employee, showing three employees were paid, and the approval notice of the beneficiary's classification as an L-1A nonimmigrant intracompany transferee.

On June 4, 2003, the director observed that the evidence submitted did not establish, among other things, that the beneficiary would be employed in a managerial or executive capacity for the petitioner. The director requested the number and job titles of the petitioner's employees, a brief description of the formal education credentials of the petitioner's employees, copies of the two most recently filed federal quarterly income tax returns with attachments showing each employee's name and quarterly gross wages, copies of all 2002 IRS Forms W-2, Wage and Tax Statement issued by the petitioner, and any other evidence the petitioner believed should be considered.

In a September 8, 2003 response, counsel for the petitioner provided the petitioner's September 11, 2003 statement describing the beneficiary's job duties as:

1. Directing the day[-]to[-]day operations of the United States company. [The beneficiary] directs and has [f]ull discretion of the company's medium and long term strategies.
2. Directing the United States company's joint ventures with artists and artisans for the development of new products.
3. Purchase Administration – Directly contacts suppliers and manufacturers to place purchase orders, negotiate prices and control payable accounts. Directly supervises the Marketing Manager and is involved in major decisions about marketing of products.
4. Sales Administration – Determines fundamental sales policies (i.e. discounts, prices, credit lines, etc). Effects periodical audits in the receivable accounts.
5. Accounting Administration – Supervises and controls the accounting process. Plans the company's budget. Supervises the audit process.
6. Human Resources – Has full discretion to hire, fire and/or promote personnel.

The petitioner also indicated that the company currently employed six individuals, including the beneficiary, sub-contracted with two individuals to load and unload merchandise, and also sub-contracted with an associated interior designer. Counsel again referenced the approval notice of the beneficiary's classification as an L-1A nonimmigrant intracompany transferee and noted that a complete photocopy of the Form I-129 petition was included in the response to the director's request for evidence. Counsel also listed the petitioner's claimed employees and their positions as: the beneficiary in the position of director and general manager, a

marketing manager, a manager of the main street store, a warehouse manager, a loader, an associate designer, and a salesperson employed on commission. The petitioner submitted three 2002 IRS Forms W-2 issued to: (1) the beneficiary in the general manager's position; (2) the manager of the main street store; and (3) the individual who had been employed in retail sales at some point in 2002.

The director observed that the petitioner had provided evidence that it only employed three individuals. The director determined that given the nature and size of the company when the petition was filed, she was not persuaded that the beneficiary would be engaged primarily in managerial or executive duties.

On appeal, counsel for the petitioner claims that when the petition was filed, the petitioner employed three individuals and five to twelve subcontractors at any given time. Counsel again references the evidence submitted in support of the petitioner's L-1A petitions for the beneficiary to establish a new office and for the extension of the beneficiary's employment. Counsel asserts that the sub-contractors over time have become full and part-time employees. Counsel repeats the previous general description of the beneficiary's duties and concludes that when the petition was filed the beneficiary was engaged in primarily managerial and executive duties.

Counsel's assertions and claims are not persuasive. 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 petitioner does not clarify whether the beneficiary would be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim that a beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

Moreover, the petitioner's description of the beneficiary's duties is generally vague and when the petitioner provides more detail, the petitioner describes an individual performing operational and administrative tasks for the petitioner. For example, "Directing the day[-]to[-]day operations of the United States company," and "direct[ing] and [having [f]ull discretion of the company's medium and long term strategies," paraphrase elements contained in the definition of managerial and executive capacity. See sections 101(a)(44)(A)(iv) and 101(a)(44)(B)(ii) of the Act. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *[REDACTED] Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Further, the beneficiary's duties associated with developing new products, contacting suppliers and manufacturers, determining sales prices, and conducting audits of receivable accounts, are operational and administrative tasks. 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).

In addition, although the petitioner claims that the beneficiary directly supervises a marketing manager and supervises the accounting process, the petitioner has not provided substantive evidence that it employed individuals subordinate to the beneficiary in these roles when the petition was filed. 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). When the petition was filed in October of 2002, the petitioner employed three individuals. The petitioner has not provided descriptions of job duties for the individual in the position of manager of the main street store and only identifies the third employee as a salesperson. This information is not sufficient to substantiate that the beneficiary would be relieved of performing all the operational, marketing, and administrative tasks associated with establishing and running its retail furniture and accessory business. At most, the beneficiary appears to perform some first-line supervisory duties of non-professional employees, in addition to performing operational and administrative tasks. 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. See section 101(a)(44)(A)(iv) of the Act.

Further, counsel's claim on appeal that the petitioner used sub-contractors is not substantiated in the record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Counsel states that the documentation submitted in support of the petitioner's L-1A petitions on behalf of this beneficiary included evidence that the petitioner employed sub-contractors. However, a review of the record does not reveal evidence that the petitioner issued IRS Forms 1099, Miscellaneous Income, in 2002. The record contains checks issued in minimum amounts in 2001 to individuals who performed remodeling tasks, assisted in the graphic design of stationery, and provided interior design services. This evidence is not sufficient to establish that the petitioner employed sufficient sub-contractors in positions that would relieve the beneficiary from performing primarily non-qualifying duties when the petition was filed.

Finally, counsel's reliance on past approvals of the beneficiary in an L-1A classification is misguided. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. See §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. Cf. §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427.

It must be noted that many I-140 immigrant petitions are denied after Citizenship and Immigration Services (CIS) approves prior nonimmigrant I-129 L-1A petitions. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Each petition is a separate record of proceeding and receives an independent review. *See* 8 C.F.R. § 103.8(d). The petitioner's initial Form I-129 petition was for a new office, a petition that has special criteria and acknowledges that a new office may not have fully established the necessity for a manager or executive. The petitioner's second Form I-129 petition for an extension of the new office petition, while articulating the petitioner's future business plans, did not contain sufficient evidence to establish that the beneficiary would be engaged in a managerial or executive position. Nevertheless, CIS approved the nonimmigrant extension petition. It appears the petitioner's Form I-129 extension request was approved in error. However, the AAO is not bound or estopped by the previous decisions of the service center director. The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director has approved the nonimmigrant petitions on behalf of the beneficiary, the AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner include primarily executive or managerial duties. The petitioner has not submitted sufficient evidence on appeal to overcome the director's decision on this issue.

The second issue in this proceeding is whether the petitioner established its ability to pay the beneficiary the proffered annual wage of \$75,000.

The regulation 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. (Emphasis added.)

When 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, the petitioner had previously employed the beneficiary. However, the record contains discrepancies as to the entity that actually paid the beneficiary. 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 beneficiary's 2002 IRS Form W-2 shows that the petitioner paid the beneficiary \$45,400, a little more than half of the proffered

salary. The foreign entity's 2002 IRS Form 1120-F shows that it paid the beneficiary \$45,400.¹ The beneficiary's 2002 IRS Form 1040, U.S. Individual Income Tax Return, shows the beneficiary received \$45,500 in salary.² The record does not contain evidence that the petitioner paid the beneficiary the proffered annual salary of \$75,000 in 2002.

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 October 7, 2002, the AAO must examine the petitioner's tax return for 2002. However, the petitioner has submitted the foreign entity's 2002 IRS Form 1120-F, U.S. Income Tax Return of a Foreign Corporation to establish its (the petitioner's) ability to pay the beneficiary the proffered wage.³ The IRS Form 1120-F specifically notes that the foreign entity is filing a return to report the income and expenses of the petitioner, as the foreign entity is the single member of the petitioning limited liability company. However, this information conflicts with other information in the record presents regarding the nature of the petitioner. The petitioner submits evidence to show that it is organized in the United States, as a limited liability company. As such, the petitioner does not qualify as a branch office of the same organization housed in a different location, since the incorporated entity is a distinct legal entity separate and apart from the foreign organization. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite*

¹ Counsel asserts that the foreign entity had contributed to the beneficiary's salary during the year 2002, sufficient to meet the proffered wage. Counsel cites *Matter of Pozzoli*, Int. Dec. 2260 (R.C. 1974) wherein the Regional Commissioner concluded that the use of the foreign qualifying entity's funds could also be used to support a beneficiary's wage in the context of the nonimmigrant petition before the Regional Commission. However, this matter concerns an immigrant petition and thus can be distinguished from the *Pozzoli* matter.

² The beneficiary's IRS Form 1040 also shows that the beneficiary received \$124,852 in taxable interest. However, this sum is not relevant when determining whether the *petitioner* has the ability to pay the beneficiary the proffered wage.

³ The record also contains the petitioner's 2000 and 2001 IRS Forms 1120-S. However, to qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any non-resident alien shareholders. See Internal Revenue Code, § 1361(b)(1999). This conflicting information has not been resolved.

Investments Limited, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). The petitioner, as a separate legal entity must file its own IRS Forms. Nevertheless, even if considering the foreign entity's IRS Form 1120-F, as evidence that the petitioner has the ability to pay the proffered wage, the petitioner does not establish its ability to pay the proffered wage. The foreign entity's IRS Form 1120-F shows a negative net income of \$87,087 and negative net current assets.⁴

The petitioner has not provided sufficient evidence to overcome the director's decision on the issue of the petitioner's ability to pay the beneficiary the proffered annual wage of \$75,000

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.

⁴ 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.