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U.S. Citizenship
and Immigration
Services

134



FILE:



Office: CALIFORNIA SERVICE CENTER

Date: JUN 01 2005

IN RE:

Petitioner:



Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California 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 is a limited liability company organized in the State of Arizona in July 2001. It owns and operates a motel. It seeks to employ the beneficiary as its chief executive officer. 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 primarily a managerial or executive capacity for the United States entity; or, (2) its ability to pay the beneficiary the proffered annual wage of \$40,000.

On appeal, counsel for the petitioner asserts that the beneficiary is an executive and that the company has the ability to pay the proffered wage.

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 matter is whether the petitioner has established that the beneficiary will be employed in primarily 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.

In a February 11, 2003 letter appended to the petition, the petitioner stated that:

[The beneficiary] as Chief Executive Officer, will direct and manage all corporate and business operations of [the petitioner] to include hiring and firing personnel and establishing corporate goals and policies with discretionary decision-making powers. He will continue to report to the Board of Directors of 590135 [redacted] Hotel, [the affiliate company] in Canada.

The petitioner added that the beneficiary "was responsible for negotiating and reviewing franchise selection for our company's hotel in Toltec, Arizona," and "is currently responsible for the executive function of the transformation of this hotel property into a 'Red Roof Inn and Suites' franchise." The petitioner continued, stating that the beneficiary:

[O]versees the purchasing and procurement with financial control of transactions. He signs and negotiates contracts for the materials and supplies necessary for the renovation and conversion. He hires outside contractors and construction workers for various projects of the upgrading and conversion. He is responsible for seeing that the business has all the necessary permits required for renovation and that work is carried out according to specifications. He is responsible for maintaining and following the very strict requirements of the Red Roof Inn for the hotel's conversion.

In addition to the outside contractors hired temporarily for renovation work, there are 10 current employees who handle the day-to-day operation of the hotel. Once the hotel has finished conversion, the beneficiary will supervise the major reorganization of staff to fulfill the needs of the 75 rooms and executive suites. He expects to hire ten additional employees, including supervisors with degrees in hotel management.

The petitioner noted that once the beneficiary saw that the hotel was ready for inspection and formal reopening, the beneficiary would continue to work to fulfill the franchise requirements and responsibilities and would oversee any expansion and future development of the property and any other property owned by the company in the United States.

The petitioner also provided its organizational chart showing the beneficiary as general manager supervising an accountant, an administrative assistant, a guest services and sales manager and clerks, a housekeeping supervisor and maids, hotel security, maintenance personnel, and a groundskeeper. Several of the individuals identified on the chart occupied more than one position.

On a separate list, the petitioner also identified six individuals as staff supervised by the beneficiary. The six individuals held the positions of administrative assistant, guest services and sales manager, guest safety, housekeeping supervisor, weekend housekeeping supervisor, hotel security and guest safety, maintenance, and front desk supervisor.

On November 20, 2003, the director requested: (1) a copy of the petitioner's organizational chart describing its managerial hierarchy and staffing levels as of the date of filing the petition, February 18, 2003 which should include the names of all executives, managers, supervisors, and number of employees within each department or subdivision; (2) a brief description of job duties, educational levels, salaries/wages for all employees under the beneficiary's supervision; (3) a more detailed description of the beneficiary's duties in the United States and the percentage of time he spent in each of the listed duties; (4) evidence that the beneficiary managed or directed the management of a department, subdivision, function, or component of the petitioner and that the function managed would not be directly performed by the beneficiary; and (5) the petitioner's state wage report for the first quarter of 2003.

In a January 21, 2004 response, the petitioner stated that the beneficiary spent the majority of his time (70 percent) on hotel operations. The petitioner stated that:

[T]he beneficiary is responsible for setting operations, their specification and finally implementation through training. In the area (SW Arizona), limited trained personnel is available to work in the hospitality industry. This industry demands commitment, discipline and repeatability of quality. The local High School has coordinated with us to provide job training through which students can earn ½ credits. However, it is anticipated that it will take a year or two to develop stable and educated staff through discipline of training. This will reduce turn-over which plagues the industry. Thus, the beneficiary has to prepare manuals and maintain hands-on operation during the initial period of building a team up.

The petitioner also indicated that the beneficiary spent 15 percent of his time on construction management and coordination and 15 percent of his time on commercial property management and operation. In a separate description of the beneficiary's duties, to demonstrate that the beneficiary functioned as a manager, the petitioner indicated that the beneficiary spent approximately 40 percent of his time overseeing the renovation and development project, signing and negotiating contracts, hiring outside contractors, and seeing that the business had all proper permits and followed the strict requirements of the Red Roof Inn franchise. The petitioner stated that the beneficiary spent 60 percent of his time converting the staff to specific hotel procedures demanded by Red Roof Inn. The petitioner noted that once the hotel had been renovated the beneficiary would supervise the reorganization of staff and would hire ten additional employees.

The petitioner also provided an organizational chart showing the beneficiary as the petitioner's general manager, as well as general manager of several separate limited liability companies in the United States. The petitioner indicated that the petitioner employed a front desk supervisor, four clerks, a housekeeping supervisor, and six housekeepers. The chart indicated that an outside contractor handled construction and general maintenance, but post construction general maintenance would be handled in-house.

The petitioner's Arizona Report of Wages Paid showed that for the first quarter of 2003, the petitioner paid six individuals sufficient wages to establish that the individuals were employed full-time. The report showed that nine individuals had been employed temporarily or part-time.

On March 4, 2004, the director determined that the beneficiary's job description did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director compared the petitioner's organizational chart with its employee report of wages for the first and second quarter of 2003. The director determined that the record did not establish which employees worked full-time or part-time. The director concluded that it was reasonable to believe that with the petitioner's organizational structure, the beneficiary would be assisting with the day-to-day non-supervisory duties. The director also concluded that the record did not establish that the beneficiary would be supervising professionals or would be managing a function.

On appeal, the petitioner states that its asset, the hotel property, was redeveloped into a Red Roof Inn after 18 months of construction and was reopened in February 2004. The petitioner observes that in October 2003, eight months after the petition was filed, it has hired an operations director and assistant general manager and that it plans to add other managerial/supervisory employees. The petitioner notes that the beneficiary has been involved in all aspects of the hotel's operation out of necessity until the hotel staff was trained. The petitioner claims that the beneficiary is now able to focus on his executive capacity to direct the staff through his directors. The petitioner submits the resumes of the recently hired employees and a job task analysis of its employees.

The petitioner's statements and evidence are not persuasive. First, 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). The petition was filed February 18, 2003. At that time the petitioner employed the beneficiary and several individuals to operate the hotel while it underwent construction. The petitioner indicated that the beneficiary spent 70 percent of his time on hotel operations.¹ In addition, the petitioner on appeal acknowledges that the beneficiary was involved in all the operational tasks of the hotel while training permanent employees. 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). Thus, the petitioner has not established that the beneficiary's job duties when the petition was filed were primarily managerial or executive.

Second, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the beneficiary's job duties. See 8 C.F.R. § 204.5(j)(5). However, the petitioner's description of the beneficiary's duties submitted at the time the petition was filed, prior to the reopening of the hotel, does not establish the managerial or executive capacity of the beneficiary's position. Further, the petitioner does not clarify whether the beneficiary will 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.

¹ The AAO notes that the petitioner also stated that the beneficiary spent 60 percent of his time converting the staff to specific hotel procedures demanded by Red Roof Inn. 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).

A petitioner may not claim 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.

Third, the petitioner's organizational charts and descriptions of duties for those individuals under his supervision do not demonstrate that the beneficiary is primarily supervising other managerial, supervisory, or professional employees. The petitioner does not establish that the duties of the front desk supervisor or the housekeeping supervisor are primarily supervisory duties. 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). The AAO notes that these two individuals receive comparable salaries to those individuals holding the clerical and housekeeper positions. Likewise the record does not contain evidence that either of these positions are professional or managerial positions.

Finally, the AAO observes that 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 the definitions. 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). In this matter, the beneficiary appears to perform the responsibilities of the principal interest owner of various businesses in the United States, including spending the majority of his time on day-to-day operations when necessary. The petitioner in this matter was not fully established when the petition was filed, requiring the beneficiary to perform non-qualifying administrative and operational tasks daily. Again, although the petitioner claims that this is no longer the case, 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 at 49.

The petitioner has not established that the beneficiary performed primarily managerial or executive duties for the United States petitioner when the petition was filed.

The second issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered annual wage of \$40,000.

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.

When 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, the petitioner's Arizona wage reports do not show that the petitioner paid the beneficiary a salary on the priority date.

As an alternate means of determining the petitioner's ability to pay, the AAO next examines the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's 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 February 18, 2003, the applicable tax return is the petitioner's 2003 tax return. The petitioner's Internal Revenue Service (IRS) Form 1065, U.S. Return of Partnership Income for calendar year 2003 shows ordinary income (loss) from trade or business activities as negative \$75,619 and the beneficiary's share of this loss as \$19,660. The petitioner could not pay a proffered wage of \$40,000 per year out of this income and the beneficiary did not earn his proffered wage from the petitioner's business.

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

In this matter, Schedule L of the petitioner's Form 1065 for the year 2003 shows the petitioner's cash on hand as \$19,076 and liabilities in the amount of \$851,838 and \$435,070 in partner's capital accounts. Given that the petitioner's liabilities exceeded its assets in the year covered by the tax return, the petitioner has not established that it could pay the beneficiary the proffered wage.

On appeal, the petitioner submits an accountant's letter showing the petitioner's projected income for 2004 and the current market value of properties owned by the beneficiary and the limited liability companies controlled by him.

However, projections of future income are not sufficient to demonstrate the petitioner's ability to pay the proffered wage on the date of priority, February 18, 2003. Further, real estate properties are not sufficiently liquid to be considered when assessing the petitioner's ability to pay the proffered wage.

Beyond the decision of the director, the record does not contain sufficient evidence to establish that the petitioner had been doing business for one year when the petition was filed as required by 8 C.F.R. § 204.5(j)(3)(i)(D). The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

In this matter, the petitioner stated that the hotel property was redeveloped into a Red Roof Inn after 18 months of construction and was reopened in February 2004. It appears that the petitioner did not purchase an asset or otherwise engage in business until August 2002, six months prior to filing the petition. The record does not contain evidence that the petitioner was providing goods or services prior to its purchase of the hotel property. The record does not contain documentation establishing the actual date the petitioner purchased the hotel asset. 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 at 190.

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). For this additional reason the petition may not 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.