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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUN 07 2005
WAC 03 076 50417

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 preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a Las Vegas corporation engaged in the business of importing rice from the Philippines and exporting leather goods to the Philippines. It seeks to employ the beneficiary as its president. 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 denied the petition based on the following grounds: 1) the petitioner failed to establish that it has a qualifying relationship with a foreign entity; 2) the beneficiary was not employed abroad in a managerial or executive capacity and would not be employed in the United States in a managerial or executive capacity; 3) the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage; and 4) the foreign entity is not doing business abroad.

On appeal, counsel disputes the director's conclusions, pointing out that the petitioner's L-1A nonimmigrant petition had been previously approved and that the issues in this case are similar to those already considered in the adjudication of the L-1A petition filed on behalf of the beneficiary. The petitioner submits additional documentation 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 and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 first issue in this proceeding is whether the petitioner has a qualifying relationship with a foreign entity.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In support of the petition, the petitioner submitted a letter dated January 2, 2003 stating that it is a subsidiary of EDB Marketing/EDB Transport Services (EDB), located in the Philippines. Specifically, the petitioner stated that EDB is the owner of all of the petitioner's outstanding stock. In support of its claim, the petitioner submitted a stock certificate, a stock transfer ledger, as well as fund transfer receipts and copies of two checks to establish that the foreign entity paid for its ownership of the petitioner's stock.

On March 6, 2003, the director issued a request for evidence indicating that the initial evidence submitted in support of the petition was not sufficient. The petitioner was instructed to submit proof of the foreign entity's purchase of the petitioner's stock, including the original wire transfers from the parent company showing where the funds originated.

The petitioner responded by submitting the same documents it previously submitted in support of the petition.

On February 10, 2004, the director denied the petition concluding that the evidence submitted does not establish that the foreign entity paid for its ownership of the petitioner's stock. Specifically, the director stated that the wire transfer receipts did not show that the foreign entity was the originator of the transferred funds. Rather, based on the documents submitted, the originator of the fund transfer is unknown and in both cases the funds went to individuals, not to the petitioner. The director also pointed out that neither of the checks that were previously submitted is shown as having been cashed, and both checks were written out by private individuals. Taken together, none of the documents submitted establish that the funds originated from the foreign entity and that they were for the purpose of purchasing the petitioner's stock.

Counsel refutes the director's finding on this issue stating that the petitioner's previously filed L-1 non-immigrant petition had been approved and that this issue had already been decided. However, the director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The

AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, 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 had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be 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). As such, evidence of prior approval of the petitioner's nonimmigrant petition does not overcome the director's objection.

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 the United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *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.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. In the instant matter, the director discussed the evidence submitted and provided an explanation of why such evidence does not establish that the foreign entity paid for the petitioner's stock. However, neither counsel nor the petitioner provides any additional evidence to support counsel's statements. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Based on the evidence submitted, the AAO cannot conclude that the foreign entity paid for ownership of the petitioner's stock as claimed. As such, the petitioner has failed to establish that it has a qualifying relationship with a foreign entity.

The second issue in this proceeding is whether the beneficiary was employed abroad and would be employed in the United States in a capacity that is managerial or executive.

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 the petitioner's support letter of January 2, 2003, the petitioner provided descriptions of the beneficiary's past and proposed job duties. As the director has incorporated both descriptions in the denial, the AAO need not repeat them in this decision. The petitioner also submitted its organizational chart listing the beneficiary's position of president and three proposed positions.

In the request for additional evidence, the director instructed the petitioner to submit further information regarding the beneficiary's respective job duties abroad and in the United States as well as additional information about the respective organizational structures of the beneficiary's two employers. Specifically, the director requested organizational charts of both entities identifying each company's employees by name and job title. The petitioner was also asked to provide detailed descriptions of the beneficiary's foreign and U.S. job duties, including lists of all employees the beneficiary has and would supervise. Additionally, the petitioner was instructed to submit several of its quarterly wage reports stating the job titles and job duties of all employees listed in the DE-6 forms.

Although the petitioner responded to the director's request, he provided the same general job descriptions provided earlier in support of the petition. The petitioner failed to provide the requested percentage

breakdowns indicating the amount of time the beneficiary has spent and would spend performing each of his past and proposed duties. The petitioner also provided its quarterly tax returns, indicating that it employed a single employee during the third quarter of 2002 and the fourth quarter of 2001. It is noted that the date of the 2001 report appears to have been altered. The original date has been manually crossed out and in its place appear the words "SIB March 2002." The wages paid are indicated as \$2,400 and \$1,600, respectively, and neither of the quarterly returns is accompanied by the name(s) of the employee(s) working for the petitioner during each respective time period.

Additionally, the petitioner submitted an organizational chart for the foreign entity. However, the chart provided only position titles and did not name any of the employees that were employed by that company. The petitioner also failed to specify where in the foreign entity's structure the beneficiary's position was located. The petitioner failed to submit its own, more detailed organizational chart as requested.

In the denial, the director stated that the petitioner's descriptions of the beneficiary's job duties are mere paraphrases of the statutory definitions of managerial and executive capacity. The director concluded that the petitioner's evidence fails to establish that the beneficiary was employed abroad and would be employed in the United States in qualifying capacities.

The petitioner also failed to submit more detailed job descriptions for the beneficiary on appeal. Counsel's sole response to the director's comments in regard to the beneficiary's job duties is a single statement expressing his disagreement with the director's conclusion. However, 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). It is noted that the statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

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). Reciting the beneficiary's vague job responsibilities or broadly cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. *Id.* The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the instant matter, the petitioner has failed to answer this crucial question either in regard to the beneficiary's duties abroad or in regard to his proposed position in the United States. The petitioner has not demonstrated that the beneficiary was or would be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel or that he would otherwise be relieved from performing non-qualifying duties. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Based on the evidence furnished, it cannot be found that the beneficiary has been or would be employed primarily in a qualifying managerial or executive capacity.

The third issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary's proffered wage of \$36,000 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) states the following in pertinent part:

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.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's 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 that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

In support of the petition, the petitioner submitted the following, which address the issue of the petitioner's ability to pay:

1. Several bank statements from 2001 indicating that the petitioner maintained an average monthly balance of approximately \$5,000.
2. The petitioner's unaudited balance sheet reflecting the petitioner's claimed financial status as of September 2001.
3. Various graphs projecting the petitioner's future earnings.
4. Several of the petitioner's quarterly tax returns from 2002 showing that the petitioner paid \$2,400 in wages and one quarterly tax return showing \$1,600 in paid wages. The date of the latter tax return cannot be determined, as it has been manually altered.
5. The petitioner's federal tax return for 2001 showing that the petitioner did not pay any wages or officer compensation.

In the director's request for additional evidence, the petitioner was instructed to submit its two latest quarterly tax returns, its payroll summary, the W-2 wage and tax statements it issued, its own W-3 statement, and evidence of any other income paid during 2001 and 2002. The petitioner was also asked to submit either a certified Form 1120 with all of its schedules and attachments or an audited financial statement.

Although the petitioner's response included additional bank statements from 2002, the petitioner primarily ignored the director's request for specific documents and instead submitted the same unaudited balance sheet, quarterly tax returns, and the same federal tax return as initially submitted in support of the petition.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal in regard to the issue of the petitioner's ability to pay.

In the instant matter, the petitioner has indicated that the beneficiary's yearly salary would be \$36,000. However, the documents the petitioner has submitted do not corroborate this claim. Rather, the petitioner's quarterly tax returns indicate that \$2,400 is the most the petitioner has paid for salaries during any given quarter. This is equivalent to \$9,600 per year, which falls far short of the beneficiary's proffered wage. Based on this information as well as the insufficient evidence of the petitioner's net current assets, the petitioner has failed to establish its ability to pay the beneficiary's salary.

The fourth and final issue in this proceeding is whether the foreign entity has been doing business since the instant petition was filed. *See* the definition of *multinational* at 8 C.F.R. § 204.5(j)(2).

The regulation at 8 C.F.R. 204.5(j)(2) defines doing business as "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 support of the initial petition, the petitioner submitted the foreign entity's annual tax returns for 1998 and 1999, as well as an income tax withholding statement for 1998. The petitioner also submitted the foreign entity's independent auditor's report for the year ending December 1997 and a Revenue Official Receipt indicating taxes paid on April 17, 2000.

In the request for additional evidence, the director instructed the petitioner to submit photographs of the foreign entity showing the inside and outside of the company's premises while making sure that the company's employees are visible in the photographs. The petitioner was also instructed to submit lists of the foreign entity's major clients including the business names, addresses, and phone numbers. Finally, the director asked the petitioner to show the foreign company's listing in the telephone directory.

In the petitioner's response letter dated May 27, 2003, the petitioner stated that the foreign entity's current assets are valued at \$64,190. The petitioner also submitted a number of exhibits, including photographs of the vehicle used in the foreign entity's business and the vehicle's insurance policy effective May 21, 1999 to June

1, 2000. The petitioner resubmitted several of the documents initially submitted in support of the petition, but did not submit any of the documents requested in the director's request for additional information.

As previously stated, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In the instant matter, the petitioner essentially ignored the director's attempt to elicit relevant information and opted instead to resubmit irrelevant documents that do not indicate whether the foreign entity has been and continues to engage in the regular, systematic, and continuous provision of its services. It is noted that 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). In the instant matter, the petition was filed in January of 2003. However, the most recent indication of the foreign entity's viability is a document dating back to 2000. There is no indication that the foreign entity continued to exist and actually do business beyond that date. As such, the AAO cannot conclude that at the time the petition was filed the petitioner was a multinational entity doing business in the United States and at least one other country. *See* 8 C.F.R. § 204.5(j)(2).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.