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FILE: LIN 03 066 51275 Office: NEBRASKA SERVICE CENTER Date: JUN 13 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 corporation organized in the State of Michigan in October 1998. It owns and operates motels. 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 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; (2) that the beneficiary had been employed by the foreign entity for one of the three years prior to entering the United States as a nonimmigrant in a managerial or executive capacity; or (3) its ability to pay the beneficiary the proffered annual wage of \$40,000.

On appeal, the petitioner re-submits the description of the beneficiary's duties for the United States entity and asserts that the beneficiary has limited capability to involve herself in the petitioner's routine daily functions. The petitioner submits the beneficiary's Canadian personal tax returns for 1999, 2000, and 2001 to demonstrate that the beneficiary was employed abroad for the requisite time period. The petitioner also submits a letter from a Canadian accountant who states that the foreign entity in this matter has the ability to pay the beneficiary an annual wage of \$40,000.

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.

In a September 7, 2002 letter appended to the petition, the petitioner indicated that:

The Beneficiary's services in the capacity of President are permanently required for our Michigan motel operation. She will continue to hire, authorize training and fire all subordinate managerial motel personnel, as well as ensure that all employees are trained in accordance with company policies and strategies. She will continue to be involved in the daily direction of all motel functions and oversee proper following by all personnel of the motel operational procedures.

The Beneficiary will also be required to provide her guidance and direction with respect to the allocation of all funds to the proper departments of the motel, as well as direct any renovation projects and/or purchase of any additional equipment for any of the motel departments. She will delegate her authority through a subordinate General Manager and other managerial staff in each department with a view to assure conformance with company goals, approved budget and marketing strategies. She will continue to act as the highest authority in the organization and will have the discretionary power to exercise her decisions pertaining to all aspects of the motel operation, inclusive of personnel allocation, authorization of vacation leaves and wage raises, authorization of negotiation with particular suppliers for each motel department, as well as banking transactions and meeting with tax specialists.

The petitioner also provided a corporate flow chart showing that the Canadian foreign entity owned the petitioner and that the petitioner operated a motel in Michigan and a motel in West Virginia.

On September 18, 2003, the director requested additional evidence including: a detailed description of the beneficiary's day-to-day tasks and the percentage of weekly hours expended performing each of the identified tasks; specific examples of how the beneficiary exercised discretion in the operation of the business and how she directed the management of the business; and evidence that the beneficiary planned, organized, directed, and controlled the organization through other individuals who are on the company payroll or are paid as contract employees.

In a November 12, 2003 response, the petitioner indicated that the beneficiary spent: (1) 20 percent of her time negotiating contracts including contacting travel agencies to negotiate travel packages, securing long-term contracts with international companies, promoting the companies services to wedding planners, and organizing packages to meet specific client needs; (2) 20 percent of her time on human resources including

hiring, firing, and training all managerial staff, preparing training manuals identifying policies and standards, meeting with the general manager, conducting detailed interviews with potential staff members, and monitoring the job duties and responsibilities for each employee; (3) 20 percent of her time on fiscal operations including devising and implementing the budget, conferring with managerial staff on activity, operations, and sales reports, and meeting with the company accountant on a monthly basis; (4) 15 percent of her time on quality control including developing training manuals, inspecting rooms without notice, and inspections of overall hotel operations; (5) 15 percent of her time on inventory control including reviewing all inventory reports on a monthly basis, implementing changes as necessary, contacting suppliers for quality products at a low cost, researching product performance; and (6) 10 percent of her time reviewing and authorizing advertising layouts and developing marketing strategies. The petitioner stated: "The Beneficiary has unrestricted authority and answers to no one."

The petitioner also provided a list of its staff including the beneficiary as president, a general manager, a guest services manager, two front desk personnel, a lifeguard, a head housekeeper, five housekeepers, a groundskeeper, and two maintenance personnel.

On May 11, 2004, the director denied the petition. The director determined that a number of the beneficiary's described duties were not managerial or executive and that the duties indicated that the beneficiary would be performing a great majority of routine day-to-day functions necessary in the operation of the petitioner's motel. The director further determined that a motel operating 24 hours per day with the number of described staff would not sustain a position that would be primarily managerial or executive.

On appeal, the petitioner re-stated the previously submitted description of the beneficiary's duties. The petitioner asserts: "the growth of any business requires a great deal of time to be devoted to activities that do not encompass the day-to-day company operations." The petitioner claims that the president delegates duties and responsibilities to managerial staff and thus focuses her attention on the business rather than the operational aspects of the company. The petitioner notes that although the beneficiary may occasionally involve herself in the daily routine functions of the company her "presidential commitments" allow her only a limited capability to do so.

The petitioner's assertions 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 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.

The petitioner indicates that the beneficiary spends 30 percent of her time marketing and promoting the petitioner's services, 30 percent of her time on quality and inventory control, 20 percent of her time on human resources, and 20 percent of her on time on fiscal operations. Although some of the duties associated with these tasks could be considered managerial or executive tasks, many of the beneficiary's actual duties include

tasks associated with the operation of the petitioner. The actual duties themselves 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). 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 organizational chart depicts a general manager subordinate to the beneficiary who in turn has a guest services manager and a head housekeeper subordinate to his position. However, the petitioner's description of the general manager's duties seems to overlap with the beneficiary's duties. The record is insufficient to establish that the general manager is primarily responsible for supervising lower-level employees. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, the description of the beneficiary's duties includes the routine supervisory tasks of authorizing leave, conducting job interviews, and monitoring the job duties and responsibilities of each employee. Further, the petitioner has not sufficiently articulated the differences, if any, in the duties of its lower-level employees. Finally, the record does not contain substantiating evidence of the number of the petitioner's employees. The director specifically requested that the petitioner submit evidence that the beneficiary's subordinates are either on the company payroll or employed on a contractual basis. The petitioner did not submit the requested evidence to establish that it has actually paid wages to its claimed employees. 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).

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. At most, the petitioner has provided evidence that the beneficiary performs some operational tasks such as marketing and promoting the use of the petitioner's services, and some supervisory duties. The petitioner has not provided evidence of an organizational structure and the remuneration of subordinate employees sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

The second issue in this proceeding is whether the beneficiary was employed in a managerial or executive capacity by a qualifying entity in one of the three years prior to her entry to the United States as a nonimmigrant. The petitioner in this matter provided the same job description of the beneficiary's duties for the foreign entity as provided for the petitioner. For the same reasons noted above, the description of the beneficiary's duties is not sufficient to establish that the beneficiary's duties for the foreign entity were primarily managerial or executive.

In addition, the director observed that the petitioner had noted the beneficiary's official title had been president of the petitioner in charge of operating the petitioner's West Virginia motel operations during the 1999 through 2002 time period. The director determined that he could not conclude that the beneficiary was employed during the requisite time period with a qualifying organization abroad.

On appeal, the petitioner indicates that the beneficiary's position as president of the petitioner during the 1999 through 2002 time period was as a corporate officer and that her involvement with the petitioner began on a limited basis. The petitioner notes that the beneficiary did not draw a salary from the petitioner until January 2003. The petitioner also submits the beneficiary's Canadian personal income tax returns for 1999, 2000, and 2001 to substantiate that the beneficiary had been employed in Canada. The petitioner further submits documents showing the beneficiary had the authority to bind the foreign entity in business transactions in the year 2000 and had been appointed as the foreign entity's president in July 2000.

In this matter, the petitioner must establish that the beneficiary was employed by the foreign entity in one of the three years prior to the beneficiary's entry as a nonimmigrant in May 2002. The evidence submitted on appeal does not establish that the beneficiary was employed by the foreign entity in a managerial or executive capacity in 1999, 2000, 2001, or 2002. The beneficiary's Canadian personal income tax returns do not indicate the remitter of the beneficiary's salary.¹ The documentation submitted on behalf of the petitioner does not include evidence that the beneficiary was actually engaged in work for the foreign entity in one of the three years prior to her entry as a nonimmigrant. The fact that the beneficiary had been appointed president and had the authority to bind the foreign entity in business transactions in the year 2000 does not establish that the beneficiary was engaged in managerial or executive tasks for the foreign entity throughout the year. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N at 165.

The evidence in the record of proceeding is not sufficient to overcome the director's determination on this issue.

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

¹ The petitioner does attach the beneficiary's Canadian Form T4, Statement of Remuneration Paid, for the 1999 year that shows that the beneficiary received monies from the foreign entity. However, the Form T4 does not indicate when the beneficiary worked for the foreign entity in 1999 or whether her work began after May 1999. The petitioner does not attach the beneficiary's Canadian Forms T4 for the 2000, 2001, or 2002 years.

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 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, 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 has not offered evidence that it has paid the beneficiary the proffered wage.

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 March 6, 2003, the AAO must examine the petitioner's tax return for 2003. In this matter, the petitioner did not submit its 2003 IRS Form 1120.² When examining the petitioner's

² Although the petitioner's IRS Form 1120 for the 2003 year would not have been available for submission to the director in time for its response to the director's request for evidence, the 2003 IRS Form 1120 should have been available on appeal. The petitioner has not offered an explanation as to its unavailability and has not provided other documentation in the form of copies of annual reports or audited financial statements in support of its ability to pay the proffered wage.

IRS Form 1120 for calendar year 2002, the AAO observes that the petitioner did not pay any officer a salary and that the petitioner's net taxable income was \$9,328. The petitioner could not pay a proffered wage of \$40,000 per year out of this income.

The AAO acknowledges the letter submitted on appeal from the foreign entity's accountant advising that the foreign entity's operating budget could accommodate the beneficiary's \$40,000 year salary and that the beneficiary had sufficient funds to inject the foreign company with a shareholder loan sufficient to exceed the financial ability to pay the proffered wage. However, for this visa classification, it is necessary for the petitioner to establish its ability to pay the proffered wage without reliance on outside resources. See 8 C.F.R. § 204.5(g)(2).

The record does not contain sufficient evidence to overcome the director's decision on this issue.

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.