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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
WAC 02 175 51584

Office: CALIFORNIA SERVICE CENTER

Date: JUN 27 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

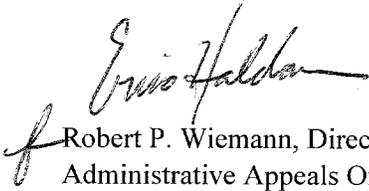
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, California Service Center, initially approved the employment-based visa petition. Upon review of the record, the director properly issued a notice of intent to revoke and ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a partnership organized in the State of California in July 1998. It imports jewelry and operates a retail jewelry shop. It seeks to employ the beneficiary as its executive. 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 initially approved the petition on November 15, 2002. Upon review of the record, the director determined that the petitioner had not established: (1) that the beneficiary would be employed in a managerial or executive capacity for the United States entity; (2) a qualifying relationship with the beneficiary's foreign employer; or (3) its ability to pay the beneficiary the proffered annual wage of \$40,000. After properly issuing a notice of intent to revoke, and reviewing the rebuttal provided in response, the director revoked the approval of the petition on January 14, 2004.

On appeal, counsel for the petitioner asserts the beneficiary qualifies as an executive under this visa classification and that the petitioner has established its qualifying relationship with the beneficiary's foreign employer and its 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).

Section 205 of the Act, 8 U.S.C. § 1155 (2005), states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In Matter of Estime, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

The first issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act.

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.

The director acknowledged that two partners owned the petitioning partnership:

[REDACTED] (the beneficiary)	55 percent
[REDACTED]	45 percent

And two partners owned the foreign entity:

[REDACTED]	60 percent
[REDACTED]	40 percent

The director concluded that the two entities were not owned and controlled by the same parent or individual, or the same group of individuals, each owning approximately the same share or proportion.

On appeal, counsel for the petitioner asserts that the director's conclusion makes no sense and that Rahat Hussain is the common majority owner in both partnerships.

Upon review, counsel's assertion is persuasive. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In 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 petitioner provided copies of the partnership agreements for itself and the foreign entity, as well as Internal Revenue Service (IRS) Forms 1065, U.S. Return of Partnership Income, with Schedule K-1, Partner's Share of Income, Credits, Deductions, etc., attached. If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners.

The record does not contain evidence that undermines the beneficiary's ownership or control of either entity. The director's decision will be withdrawn on this issue.

The next issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered wage.

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. The priority date is May 2, 2002. 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. The IRS Form 1065 U.S. Return of Partnership Income, Schedule K-1, showed the beneficiary's 55 percent share of the ordinary income as \$26,716. Counsel also provides the beneficiary's 2002 1040 that shows the beneficiary received \$39,000 from partnership income; however, it appears that \$13,242 of the partnership income came from a separate and distinct partnership in which the beneficiary is a 50 percent owner. The record does not establish that the petitioner 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.

In the present matter, the petitioner provided a copy of its 2002 IRS Form 1065, U.S. Return of Partnership Income, with Schedule K-1, Partner's Share of Income, Credits, Deductions, etc. The 2002 IRS Form 1065 U.S. Return of Partnership Income, showed net income of \$66,790 for the year. Counsel indicates that the beneficiary did not take out all the net earnings because he wanted to re-invest in the business. The petitioner

has established its ability to pay the proffered wage of \$40,000 per year out of this income. The director's decision will be withdrawn on this issue.

The last issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in an executive capacity for the United States entity. The petitioner and counsel clarify that the petitioner is requesting consideration of the beneficiary only in an executive capacity.

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 an April 30, 2002 letter appended to the petition, the beneficiary stated that his day-to-day duties consisted of: general supervision of employees, including scheduling, resolving disputes, hiring and firing, deciding manpower requirements and interviewing prospective employees; overseeing financial aspects of running the business, including reviewing financial results, conferring with the accountant, paying bills, depositing receipts, etc.; negotiating with sales representatives about purchasing supplies and services; and, planning for future expansion of the business.

The petitioner's organizational chart showed the beneficiary as executive with an assistant manager/partner reporting directly to him. The chart also showed that two salespersons and a goldsmith reported to the assistant manager/partner.

The director approved the petition on this limited information regarding the beneficiary's actual duties. On November 6, 2003, the director determined that the job description provided did not establish that the beneficiary was employed primarily in an executive capacity. The director observed that the petitioner had not provided job descriptions for the beneficiary's subordinates; thus the director could not determine whether the beneficiary's subordinates engaged in managerial or professional duties. The director requested that the petitioner provide a more detailed description of the beneficiary's duties and a copy of its organizational chart including a brief description of job duties for all employees under the beneficiary's supervision.

In rebuttal, counsel for the petitioner stated that the petitioner was seeking to classify the beneficiary in an executive capacity and referenced the previous approvals of the beneficiary as an L-1A intracompany

transferee in an executive capacity. Counsel asserted that the beneficiary "directs the management of the organization by providing executive oversight of the functional areas of management, customer service, claims, quality management, and vendor relations." Counsel also stated that the petitioner was in the early stages of development and acknowledged that the beneficiary "is often left to handle some of the day-to-day management functions." Counsel indicated further that: "In the near future once the economy improves, [the beneficiary] does intend to hire more individuals to manage the various stores where he will be providing far more executive oversight and far less guidance in the day to day operations." Finally counsel stated: "while there are some functions that [the beneficiary] performs that may be considered non-executive in nature, the vast majority of his time and energies is devoted primarily to executive duties. And, as the business grows to expected levels and cash flow improves with the businesses, more employees will be hired and the non-executive duties will be phased out entirely."

The director observed that the petitioner had not specified the beneficiary's activities associated with the broadly described duties submitted in rebuttal to the notice of intent to revoke. The director noted that when the petition was filed, the petitioner employed one full-time employee and two part-time employees. The director determined that the petitioner had not provided evidence that individuals, other than the beneficiary, performed the petitioner's operational and administrative tasks. The director also determined that the record did not include evidence that the beneficiary supervised professional positions.

On appeal, counsel for the petitioner asserts that the job duties listed for the beneficiary clearly shows that the beneficiary primarily: (1) directs the management of the organization; (2) establishes the company's policies and goals; (3) exercises wide latitude in discretionary decision-making; and, (4) maintains autonomy over the petitioner's operations. Counsel again acknowledges that the beneficiary sometimes has to handle day-to-day functions, but asserts that does not mean "most of his duties are not executive-related." Counsel explains that the details regarding the beneficiary's subordinates' job duties were not provided because the petitioner is requesting the beneficiary's classification as an executive.

Counsel's assertions are not persuasive. First, 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). It must be noted that many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1 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). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 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. Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than 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).

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).

Second, by itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*, 19 I&N Dec. at 590.

Third, counsel's assertion that the description of the beneficiary's job duties clearly shows that the beneficiary performs in primarily an executive capacity is not persuasive. As the director observed, the petitioner paraphrased portions of the definitions of executive and managerial capacity in its initial description of the beneficiary's duties. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). In addition, the petitioner indicated that the beneficiary would be involved in general supervision of employees including scheduling and resolving disputes, paying bills and depositing receipts, and negotiating for the purchase of supplies and services. These duties are more indicative of an individual performing the petitioner's 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 rebuttal, counsel for the petitioner provided a nonspecific description of the beneficiary's duties. For example, counsel stated that the beneficiary provides "executive oversight of the functional areas of management, customer service, claims, quality management, and vendor relations." This general statement, however, does not convey an understanding of the beneficiary's actual daily duties. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The petitioner also failed to explain how these general duties comprise executive duties rather than an owner's oversight of his business. Moreover, the petitioner failed to expand upon the nature of the petitioner's organizational structure and failed to describe who provides the petitioner's daily operational and administrative duties. Instead, counsel for the petitioner acknowledged that the beneficiary performs some non-executive duties.

Counsel's indication that the beneficiary planned to hire more individuals to lessen his involvement in the petitioner's day-to-day operations is not relevant to the matter at hand. 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). Further, counsel's indication that the beneficiary plans to phase out his involvement in daily operations undermines the assertion that most of the beneficiary's duties are currently executive-related.

Whether the beneficiary is an executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" executive. See sections 101(a)(44)(B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties are executive functions and what proportion are non-executive functions. Counsel acknowledges that the beneficiary participates in the petitioner's daily operational and administrative tasks and the record supports the same conclusion. When, as in this matter, a beneficiary's duties purportedly include executive as well as administrative and operational tasks, the petitioner must quantify the time the beneficiary spends on each of the tasks. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In sum, the petitioner has provided a general and non-specific description of the beneficiary's duties. The initial description paraphrases portions of the definitions of both managerial and executive capacity. Subsequent descriptions paraphrase the definition of executive capacity. The petitioner, through its counsel acknowledges that the beneficiary performs some non-executive tasks without quantifying the time the beneficiary spends on non-executive tasks. Finally, the petitioner does not provide evidence that the beneficiary's subordinates relieve the beneficiary from performing primarily non-qualifying duties. The record does not support the beneficiary's eligibility for this visa classification as an executive. The petitioner has not provided 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.