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FILE: [Redacted]
SRC 04 146 50576

Office: TEXAS SERVICE CENTER Date: OCT 03 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, Texas 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 Florida in September 2001. It claims to operate a gift shop and service station. 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 in a primarily managerial or executive capacity for the foreign entity; (3) its ability to pay the beneficiary the proffered annual wage of \$30,000; or, (4) that the foreign entity continued to do business.

On appeal, counsel for the petitioner asserts that the beneficiary occupies a position that has both managerial and executive capacity, that the petitioner has the ability to pay the proffered wage, and that both the petitioner and the foreign entity currently are active businesses. Counsel submits a brief and 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 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 the AAO will consider in this matter is the director's determination that the petitioner had not established that the foreign entity continued to do business. The AAO observes that on December 15, 2004, the director issued a notice of intent to deny the petition and requested that the petitioner provide evidence that the foreign entity continued to conduct business from April 2003 to the date of the notice of intent to deny. The director stated that the petitioner must respond to the notice of intent to deny within 30 days or the petition could be denied. In a January 18, 2005 response, counsel for the petitioner noted that the petitioner had not been able to obtain more invoices from the foreign entity due to the time requirement listed in the notice of intent to deny. On February 1, 2005, the director denied the petition determining that the record did not contain evidence that the foreign entity was doing business when the petition was filed or was currently doing business. On appeal, counsel submits documentation establishing that the foreign entity has been and is currently conducting business.

Ordinarily, the AAO would not accept such documentation on appeal, as the petitioner failed to provide the evidence when requested to do so by the director. However in this matter, because counsel offered an explanation for the failure to timely comply with the director's request and has provided the requested documentation on appeal, the AAO will consider the evidence. The petitioner has provided sufficient evidence to establish that the foreign entity has been and is conducting business. The director's decision on this issue will be withdrawn.

The next issue in this proceeding is whether 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 an April 26, 2004 letter appended to the petition, counsel for the petitioner described the beneficiary's duties in the United States:

As President and Chief Executive Officer, the Beneficiary's duties are as follows: Directs, plans and implements policies and objectives of organization or business in accordance with charter and board of directors; Directs activities of organization to plan procedures, establish responsibilities, and coordinate functions among department and sites; Confers with board members, organization officials, and staff members to establish policies and formulate plans; Analyzes operations to evaluate performance of company and staff and to determine areas of cost reduction and program improvement; Reviews financial statements and sales and activity reports to ensure that organization's objectives are achieved; Directs and coordinates organization's financial and budget activities to fund operations, maximize investments, and increase efficiency; Assigns or delegates responsibilities to subordinates; Directs and coordinates activities of business or department concerned with production, pricing, sales, and/or distribution of products; Directs and coordinates activities of business involved with buying and selling investment products and financial services; Directs non-merchandising departments of business, such as advertising, purchasing, credit and accounting; Establishes internal control procedures; Prepares reports and budgets; Presides over or serves on board of directors, management committees, or other governing boards; Negotiates or approves contracts with suppliers and distributors, and with maintenance, janitorial, and security providers; Promotes objectives of institution or business before associations, public,

government agencies, or community groups; Screens, selects, hires, transfers, and discharges employees; Administers program for selection of sites, construction of buildings, and provision of equipment and supplies; Directs in-service training of staff.

The petitioner also provided the beneficiary's resume wherein the beneficiary described his duties for the United States petitioner as: "overseeing the wholesale and retail aspect of the business. Negotiating fresh orders from wholesale customers as well as procuring new retail space for further expansion."

The petitioner also included its organizational chart showing the positions of president [the beneficiary's position], a director, a manager, an assistant manager, and three cashiers.

On December 15, 2004, the director issued a notice of intent to deny and requested a more definitive statement describing the beneficiary's proposed duties including: position title, a list of all duties, the percentage of time spent on each duty, the number of subordinate managers/supervisors or other employees reporting directly to the beneficiary, and a brief description of their job titles, duties and educational levels, and, if the beneficiary did not supervise other employees, a specification of the essential function the beneficiary managed. The director also requested the petitioner's staffing level and copies of the petitioner's Internal Revenue Service (IRS) Forms 941, Employer's Quarterly Tax Report for each quarter in 2004.

In a January 18, 2005 response, the petitioner listed the beneficiary's duties as:

Overall Supervision of Corporation[.] He is [the] Top Officer in the Company, [r]eporting only to the Board of Director of owner the foreign company continue as President [sic] continue seeking new investment opportunities (Abbasi Inc.) in the United States, and continue making all decision [sic] relating to financial matters, answering only to the Board of Directors.

The petitioner also listed the duties of the petitioner's vice-president/financial manager as: "Assistant Manager Merchandise Export Sehar Corporation (the claimed foreign entity), continue managing as Assistant Mr. [REDACTED], Vice Preident/Financial Manager [sic]." The petitioner identified two individuals as cashiers who were responsible for "Supervision of Store." The petitioner provided its Florida Form UCT-6, Employer's Quarterly Report, for the second quarter in 2004, the quarter in which the petition was filed. The Florida Form UCT-6 listed the beneficiary, the employee in the vice-president/financial manager position, two individuals in the positions of part-time cashier, and an individual whose name did not correspond to the petitioner's organizational chart or its list of employees and who also appeared employed part-time or intermittently.

On February 1, 2005, the director denied the petition determining that: (1) the beneficiary's job description was vague and did not provide a clear depiction of his day-to-day duties; (2) with the nature of the petitioner's business and its staff the beneficiary would be performing operational duties; and (3) individuals who primarily perform the tasks necessary to produce products or provide services are not employed in an executive or managerial capacity.

On appeal, counsel for the petitioner recites the description of the beneficiary's job duties initially provided with the petition. Counsel asserts that the beneficiary occupies a position having executive and managerial capacity and that his managerial and executive duties occupy 90 percent of his time. Counsel contends that the beneficiary does not produce the goods or provide the petitioner's services. Counsel also references the petitioner's purchase of a convenience store/gasoline station and claims that the beneficiary's involvement in this purchase comprised managerial and executive duties.

Counsel 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). In this matter, the petitioner does not clarify whether the beneficiary is claiming to 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 beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

Counsel for the petitioner initially submitted a generic description for the beneficiary's position. The description did not contain any information tying the beneficiary's duties to the petitioner's actual business of operating a gift store and service station. Counsel's description paraphrased elements of the definitions of both managerial and executive capacity and did not convey an understanding of the beneficiary's daily duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Moreover, counsel indicated that the beneficiary would direct and coordinate the activities of the business but did not substantiate how the beneficiary would accomplish this with the petitioner's organizational structure when the petition was filed. 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 record contains evidence that the petitioner employs the beneficiary and one full-time employee and has employed three other individuals part-time or intermittently. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. As the director determined, the petitioner has not provided evidence that it employs sufficient personnel to relieve the beneficiary from primarily performing the petitioner's daily operational and administrative tasks.

The petitioner's response to the director's notice of intent to deny did not provide further enlightenment on how the beneficiary would perform primarily managerial or executive tasks. Owning a company, having the title of "president," or searching for investment opportunities does not establish an individual's managerial or executive duties. The regulations require a detailed description of the beneficiary's daily job duties. 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. at 1108.

Counsel's assertion on appeal that the beneficiary does not produce the petitioner's products or provide the petitioner's services is not substantiated in the record. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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). As observed above, the record does not contain evidence that the petitioner employs individuals to perform the necessary tasks associated with operating a gift shop and a service station, without the beneficiary's daily involvement in those tasks. As the director determined 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 record in this matter is deficient in establishing that the beneficiary's duties will comprise primarily managerial or executive duties. The petitioner has not established that the beneficiary will be employed in primarily a managerial or executive capacity. For this reason, the petition will not be approved.

The next issue in this proceeding is whether the petitioner has established that the beneficiary had been employed in a managerial or executive capacity for the foreign entity prior to entering the United States as a nonimmigrant.

In the April 26, 2004 letter submitted in support of the petition, counsel for the petitioner indicated that the beneficiary "had complete discretionary control over the export and merchandising (sales) function of [the foreign entity], including hiring and firing employees, establishing policy and procedures for the export and merchandising (sales) function, and exercising complete discretionary control over the day-to-day activities of the export and merchandising (sales) function." The beneficiary's resume, also submitted with the petition, showed the beneficiary's duties as including "extensive traveling around the world in securing fresh orders and following up with the orders already in place. Co-ordinate with the factory manager in timely execution of the placed orders." An undated letter, allegedly submitted by the foreign entity, indicated that the beneficiary had been supervising export business/letters of credit, documentation, negotiating with banks, and supervising the financial and accounting side of the corporation. The foreign entity's organizational chart showed the beneficiary had seven subordinates.

On December 15, 2004, the director issued a notice of intent to deny and requested a more definitive statement describing the beneficiary's proposed duties including: position title, a list of all duties, the percentage of time spent on each duty, the number of subordinate managers/supervisors or other employees reporting directly to the beneficiary, and a brief description of their job titles, duties and educational levels

and if the beneficiary did not supervise other employees a specification of the essential function the beneficiary managed.

In a January 18, 2005 response, the petitioner attached an undated letter purportedly from the foreign entity indicating that an assistant manager reported to the beneficiary and supervised the staff and that the staff consisted of individuals in the positions of "document incharge" who prepared the export documents, "rebat incharge" who worked with the bank and finance department, "custom clearance incharge" who worked with the customer clearance department, and three clerical staff who supported the department's work.

The director determined that the description of the beneficiary's duties for the foreign entity was vague and did not convey an understanding of the beneficiary's actual daily duties for the foreign entity.

Counsel does not address this issue on appeal. The AAO observes, in addition to the general description of the beneficiary's duties provided by the claimed foreign entity, the beneficiary's depiction of his duties for the foreign entity on his resume is quite different. 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).

Further, the foreign entity's organizational chart submitted shows the employment of seven individuals subordinate to the beneficiary's position. Although one of the iterations of the beneficiary's foreign duties suggests that the petitioner may be claiming that the beneficiary's foreign position is to supervise other personnel, the record does not contain sufficient evidence to establish that the beneficiary's subordinates performed primarily supervisory, managerial or professional duties. If the petitioner is claiming that the beneficiary's duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

The record in this matter is insufficient to overcome the director's determination on this issue. For this additional reason, the petition will not be approved.

The next issue in this matter is whether the petitioner established its ability to pay the beneficiary the proffered annual wage of \$30,000. 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 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, although the record suggests that the petitioner employed the beneficiary in 2004, the petitioner did not provide a copy of the beneficiary's 2004 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement. The record contains copies of the petitioner's Florida Form UCT-6 for the second and third quarters in 2004 that show the beneficiary was paid \$6,000 each quarter. The AAO cannot conclude from this evidence that the petitioner had the ability to pay the beneficiary the proffered wage.

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 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.

As the petition's priority date falls on April 28, 2004, the AAO must examine the petitioner's tax return for 2004. The petitioner's IRS Form 1120, U.S. Corporation Income Tax Return for calendar year 2004 presents a net taxable income of \$3,376. Contrary to counsel's assertion on appeal, the petitioner could not pay a proffered wage of \$30,000 per year from the petitioner's net income. Again, the unsupported 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. at 503.

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, the AAO determines that the petitioner's net current assets are insufficient to establish the petitioner's ability to pay the proffered wage.

The petitioner has not provided sufficient evidence to overcome the director's decision on this issue. For this additional reason, the petition will not be approved.

Beyond the decision of the director, the petitioner has presented confusing evidence regarding its ownership and control. 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.

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 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.

Counsel for the petitioner claims that the petitioner is a wholly owned subsidiary of the foreign entity. The petitioner's Articles of Incorporation show it is authorized to issue 500 shares at a par value of \$1.00. The record contains a stock certificate issued to the beneficiary's foreign employer for 500 shares on October 9, 2001. The petitioner's 2002, 2003, and 2004 IRS Forms 1120, show that a foreign entity owns 51 percent of the petitioner. As noted above, 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. at 591-92. Moreover, the record does not contain evidence that the foreign entity paid for its alleged interest in the petitioner. 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)). The petitioner has not established this essential element of eligibility for this visa classification. For this additional reason, the petition will not be approved.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.