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U.S. Citizenship  
and Immigration  
Services

BH



FILE: [REDACTED]  
WAC 04 025 50292

Office: CALIFORNIA SERVICE CENTER

Date: OCT 03 2008

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, 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 California in August 2002. It imports and wholesales specialty garments. 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 that: (1) the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity; or (2) the beneficiary had been employed in a primarily managerial or executive capacity for the foreign entity.

On appeal, counsel for the petitioner submits a brief and documentation.

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 primarily an executive capacity for the United States entity. Counsel emphasizes that the petitioner does not claim that the beneficiary will be employed in a primarily managerial 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 a November 4, 2003 letter appended to the petition, the petitioner described the beneficiary's duties in the United States:

As the sole owner of the entire multinational corporation, the beneficiary is the only person who can attend to the continued establishment and development of the U.S. affiliate. No one else is in a position to run the company and to make all the major expansion and development decisions. In addition, the beneficiary needs to train and supervise lower level management in this critical corporate development stage. Since [the beneficiary] is the sole and unsupervised major decision maker of the corporation, he is clearly working in an executive capacity as defined by the regulations.

The petitioner also provided the beneficiary's resume wherein the beneficiary described his duties as:

[Having] overall responsibility for the management of the US entity. I had set the operating policies and goals for the business and I am following those goals.

I started as a single person and now I have three employees working for me. A large portion of my time [is] spent on negotiating and finalizing the parameters of contracts between [the petitioner] and the buyers of my product line as well as developing new business contacts that are the potential buyers.

Last year I visited Texas to get the distributionship [sic] of one of the manufacturer[s] of high end bedding items and comforters [sic] sets for the State of California on commission basis.

Moreover, since I have the expertise in designing the fashionwear [sic] garments so I spend lot [sic] of my time designing the clothes as per the prevailing fashion trends keeping in mind the target customers.

I also spend a significant portion of my time planning, organizing, directing and controlling the activities of the independent contractors who perform certain essential function necessary for the successful operation of the corporation [sic] business, including accounts, sales and income tax returns, payrolls, custom brokers, advertisements and promotion, fairs and exhibitions, [sic] fashion shows, interviews to the community media and finally the warehouseing [sic] service providers

The petitioner also included its organizational chart showing that a president [the beneficiary's position], a wholesale manager, a retail manager, and a "sales girl" were employed. The chart did not identify the individuals holding the various positions by name. The petitioner indicated the wholesale manager handled the purchase orders that the beneficiary received from buyers, arranged deliveries, managed the inventory, made packing lists and invoices, and stayed in touch with the buyers. The petitioner indicated that the retail manager placed purchase orders to vendors for merchandise for the retail store, forwarded the fashion designs created by the beneficiary, placed orders for samples and prices from the vendors, and would be responsible for the cash register and the inventory related to the retail business. The petitioner indicated that the "salesgirl" interacted with retail customers and provided other customer related services.

On November 2, 2004, the director requested: (1) a more detailed description of the beneficiary's duties in the United States, explaining what the beneficiary would do in the day-to-day execution of his position, and including the percentage of time the beneficiary spent in each of the listed duties; (2) a copy of the petitioner's organizational chart describing its managerial hierarchy and staffing levels, which should include the names of all executives, managers, supervisors, and number of employees within each department or subdivision, and a brief description of job duties, educational levels, salaries/wages for all employees under the beneficiary's supervision; and, (3) the petitioner's California Forms DE-6 for the last eight quarters that were accepted by the State of California.

In a January 20, 2005 response, counsel for the petitioner provided a revised and more generic description of the beneficiary's duties. The revised description indicated that the beneficiary spent:

35 percent of his time executing plans, such as promoting the claimed parent company's Pakistani textile and apparel business, directing marketing plans through personnel and distributors, promoting the company's products, training and directing personnel, budget management, preparing monthly trade offers, and analyzing sales feedback;

20 percent of his time on planning, such as devising marketing plans, reviewing and advising on variances reports, recommending distributor sales strategy, obtaining and controlling inventory, and obtaining funding;

10 percent of his time on control, such as credit terms, check and balance methodology, delegating authority, controlling expenses, reviewing markets, checking on shipments and stock arrivals, reviewing cash control, maintaining working capital, ensuring proper inventory as well as retaining authority to hire, fire, promote, negotiate, and procure products from suppliers and manufacturers, appointing distributors, extending credit to distributors, negotiating with buyers, executing promotional campaigns, registering trademarks, appointing legal counsel and accountants, and importing and trading from different vendors and countries;

20 percent of his time on relationships including maintaining personal contact with suppliers, manufacturers, bankers, lenders, distributors, wholesalers, legal counsel, tax consultants, wholesalers, and retailers, participating in industry associations and international trade fairs, and promoting trade links with textile and apparel exporting countries;

10 percent of his time on internal relationships including coordinating staff and management, and distributors, as well as the accountant, legal counsel, and corporate advisors;

5 percent of his time on other functions such as reviewing the company's website and recommending promotion of on-line sales, compliance with corporate laws and laws related to business operations, and reviewing daily operations.

The petitioner provides its California Form DE-6, for the last quarter of 2003, the quarter in which the petition was filed. The fourth quarter California Form DE-6 confirmed the employment of four individuals including the beneficiary.

On February 16, 2005, the director denied the petition determining that: (1) the petitioner's business does not require or have a reasonable need for an executive because all they do is buy and sell products; (2) because the company only has three other employees, the beneficiary will have to be assisting in the performance of the numerous menial tasks involved in importing/exporting because the petitioner does not have enough employees to perform all of these duties; (3) the performance of menial tasks, such as negotiating, designing clothes and preparing monthly trade offers precludes the beneficiary from being considered an "executive;" and, (4) labeling a position "president" did not necessarily reflect that the position would be truly executive in nature by virtue of the duties to be performed. The director also determined that the petitioner had not established that the beneficiary would be a manager because the record did not reflect that the beneficiary would be more than a first-line supervisor of non-professional employees.

On appeal, counsel for the petitioner asserts that the director's basis for denying the petition is legally incorrect because the director draws conclusions regarding the beneficiary's managerial capacity. Counsel contends that the director's conclusion that the petitioner does not require or have a reasonable need for an executive because it just buys and sells products is also not a legal basis for a denial. Counsel claims that the director's interpretation of the description of the beneficiary's duties has no validity when the beneficiary is the sole owner of the company. Counsel asserts that the supporting documentation submitted with the petition shows that the beneficiary more than satisfies every component of the definition of executive

capacity. Counsel contends that the director has improperly concluded that the beneficiary must be involved in non-executive functions. Counsel notes that as long as an executive is primarily engaged in executive functions, it is permissible for the executive to engage in non-executive activities. Finally, counsel asserts that the petitioner's growth is solely the result of the beneficiary's executive decisions.

Counsel assertions are not persuasive. The AAO notes preliminary, that although the appeal will be dismissed, the director's conclusory statement that the petitioner's business does not require or have a reasonable need for an executive because all they do is buy and sell products is improper. Although Citizenship and Immigration Services (CIS) must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some rational basis for finding a petitioner's staff or structure to be unreasonable. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in a particular industry will not preclude the beneficiary from qualifying for classification under section 203(b)(1)(C) of the Act. For this reason, the director's conclusory statement will be withdrawn. In this matter, however, for the reasons discussed below, the record is not sufficient to establish that the beneficiary performs primarily executive duties.

Also preliminarily, the AAO observes that the director's recitation and interpretation of the evidence as it relates to the beneficiary's managerial capacity, does not adversely impact the petitioner. The director also considered the beneficiary's executive capacity for the United States entity and ultimately found the record deficient in establishing this element of eligibility.

The petitioner has not submitted sufficient evidence to establish that the beneficiary's duties will be primarily executive. First, when examining the executive or managerial capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In this matter the petitioner's initial iteration of the beneficiary's duties portrayed the beneficiary as a hands on owner making all the decisions necessary to establish his business in the United States. However, contrary to counsel's assertion that an owner of a company is clearly an executive, the AAO has long required a petitioner to establish that the beneficiary primarily performs executive functions rather than performs the tasks associated with providing the petitioner's goods or services. 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 beneficiary's own description of his duties lists his direct involvement in "negotiating and finalizing the parameters of contracts between [the petitioner] and the buyers of my product line as well as developing new business contacts that are the potential buyers," "designing the clothes as per the prevailing fashion trends," and "planning, organizing, directing and controlling the activities of the independent contractors who perform certain essential function necessary for the successful operation of the corporation [sic] business." These duties comprise the basic daily operational and supervisory tasks of the company and are not incidental to the beneficiary's daily duties.

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). 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.

The second iteration of the beneficiary's duties provided in response to the director's request for further evidence does not aid in establishing the beneficiary's eligibility for this visa classification. For example, counsel for the petitioner indicates that the beneficiary spends a majority of his time executing plans including promoting the claimed parent company's business and directing marketing plans through personnel and distributors. However, the petitioner does not list any employees, other than the beneficiary, who are involved in promoting and marketing the parent company and the petitioner's products. The petitioner does not identify independent contractors used by the petitioner and does not clarify how the petitioner utilizes "distributors." 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 provided evidence that it employs sufficient personnel to relieve the beneficiary from performing primarily operational, administrative, and first-line supervisory tasks.

Although the AAO acknowledges the petitioner's plans to add additional positions, a petitioner must be sufficiently established to support a managerial or executive position when it files the petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel's assertion that the beneficiary satisfies every element of the definition of executive is not persuasive. As observed above, the beneficiary cannot primarily direct the management of the organization when he is primarily performing the operational, administrative, supervisory, and design functions of the organization. Moreover, 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).

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the United States petitioner comprise primarily executive or managerial duties. 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 November 4, 2003 letter submitted in support of the petition, the petitioner indicated that the beneficiary was the sole owner of the foreign entity. The petitioner noted that in this capacity the beneficiary had been responsible for the direction and development of the company, the overall supervision, and major decision-making. The petitioner claimed that the beneficiary had made all decisions affecting the company autonomously and without supervision. The petitioner claimed that as the beneficiary was responsible for the entire operation, he clearly controlled a major function of the company and this control established the beneficiary's employment with the foreign company in an executive capacity.

On November 2, 2004, the director requested: (1) a more detailed description of the beneficiary's duties with the foreign company, an explanation of what the beneficiary would do in the day-to-day execution of his position, and the percentage of time the beneficiary spent in each of the listed duties; and (2) a copy of the foreign entity's organizational chart describing its managerial hierarchy and staffing levels, which should include the names of all executives, managers, supervisors, and number of employees within each department or subdivision, and a brief description of job duties, educational levels, salaries/wages for all employees under the beneficiary's supervision.

In a January 20, 2005 response, counsel for the petitioner noted that information about educational and employment experience is not relevant when the multinational executive is the owner of both operations. The petitioner also noted in an attachment that the beneficiary's main objective as chief executive of the foreign entity was to explore new markets other than the traditional market for its textile and other related products. The petitioner provided the foreign entity's organizational chart showing the beneficiary as owner and chief executive. The chart also showed a [REDACTED] operations subdivision and a Lahore operations subdivision. Each of the operational subdivisions employed a manager and two assistant managers. The chart also reflected a third component consisting of a deputy chief executive, a chief accountant, and an assistant accountant.

The director denied the petition on February 16, 2005, determining that the petitioner had not provided a description of the beneficiary's job duties for the foreign entity sufficient to establish the beneficiary's eligibility for this visa classification. The director also observed that the petitioner had indicated that the beneficiary as owner of the company was not listed in the company's payroll documents. The director determined that the petitioner had not submitted evidence that the foreign entity had profits available to pay the beneficiary. The director further determined, based on the evidence submitted, that the beneficiary did not actually participate in the day-to-day management of the foreign entity. The director also incorrectly stated that the petitioner had failed to provide the foreign entity's organizational chart.

On appeal, counsel for the petitioner points out that the petitioner had submitted the foreign entity's organizational chart and incorrectly notes that the chart showed that the foreign entity employed at least 11 persons in two separate locations. Counsel also contends that the beneficiary as the sole owner of the foreign company was responsible for the development and direction of the company, and functioned in an executive capacity.

Counsel's contention is not persuasive. Again as observed above, 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. The record does not contain a comprehensive description of the beneficiary's duties for the foreign entity. 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). The AAO observes that the record does not demonstrate whether the beneficiary performed primarily in an executive capacity or whether the beneficiary performed operational and supervisory tasks for the foreign entity. Moreover, owning a business does not establish eligibility for this visa classification. As the director observed, the record is inconclusive regarding whether the beneficiary participated in managing or directing the management of the foreign entity or simply was an investor in the foreign concern.

Further, the organizational chart submitted shows the employment of nine individuals. It appears six of the individuals perform operational tasks at two factories and three individuals perform administrative and financial tasks. Despite the director's request, the record does not set forth these individuals' specific duties. 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). Counsel does not adequately address the deficiencies in the record on appeal, instead relying on the misguided belief that ownership connotes executive capacity. 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.

Beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered annual wage of \$39,000. The AAO acknowledges counsel's belief that the petitioner need not establish its ability to pay the proffered wage in the context of this visa classification. However, the AAO directs counsel's attention to the regulation at 8 C.F.R. § 204.5(g)(2) which 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, although the petitioner employed the beneficiary in 2003, the petitioner paid the beneficiary either \$27,000 as reflected on the beneficiary's 2003 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, or \$14,500 as reflected on the petitioner's 2003 IRS Form 1120, U.S. Corporation

Income Tax Return.<sup>1</sup> Neither amount is sufficient to establish that the petitioner has paid 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 November 25, 2003, the AAO must examine the petitioner's tax return for 2003. The petitioner's IRS Form 1120 for calendar year 2003 presents a net taxable income of \$8,143. The petitioner could not pay a proffered wage of \$39,000 per year out of this income even when coupled with the \$14,500 allegedly paid to the beneficiary as an officer of the company.

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 petitioner's 2003 IRS Form 1120, Schedule L is blank. The AAO cannot determine the petitioner's net current assets.

The petitioner has not provided sufficient evidence to establish its ability to pay the beneficiary the proffered wage.

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

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<sup>1</sup> The petitioner's 2003 IRS Form 1120 shows that the petitioner compensated officers in the amount of \$14,500. As the beneficiary appears to be the only officer of the company, the AAO presumes that the \$14,500 noted on the IRS Form 1120 was paid to the beneficiary. The AAO observes however, that this inconsistency casts doubt on the petitioner's proof not only on the ability to pay component of eligibility but also on the entire record. *Matter of Ho*, 19 I&N Dec. at 591.

*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.