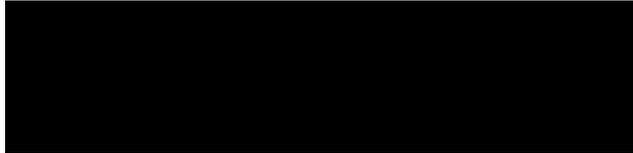




U.S. Citizenship
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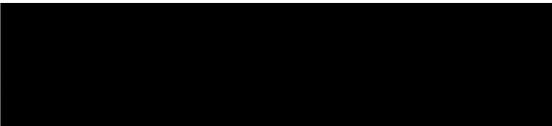
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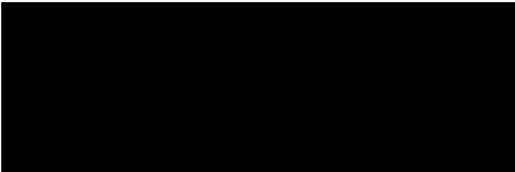
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IN RE: Petitioner:
Beneficiary:



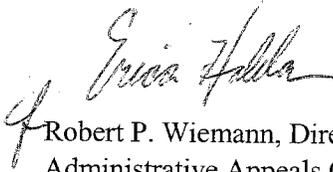
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 Texas in November 2000. It operates a restaurant. It seeks to employ the beneficiary as its food services manager/chef. 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 the beneficiary would be employed in a primarily managerial or executive capacity for the United States petitioner. The director also determined that the petitioner had not established its ability to pay the beneficiary the proffered annual wage of \$18,000.

On appeal, counsel for the petitioner asserts Citizenship and Immigration Services (CIS) improperly focused on the petitioner's number of employees. Counsel observes that the petitioner's size alone is not determinative, but that a beneficiary's duties must also be examined when considering a beneficiary's executive capacity. Counsel also alleges that the beneficiary satisfies all three criteria for a functional manager and that the director did not consider that an executive may manage a function. Counsel cites an unpublished decision as well as a district court decision and precedent decisions to support his assertions on the issue of the beneficiary's managerial or executive capacity for the petitioner. Counsel also contends that the petitioner has established its ability to pay the proffered wage and references a memorandum issued by William R. Yates, Associate Director for Operations, USCIS, HQOPRD 90/16.45 (May 4, 2004) in support of his contention.

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 December 23, 2003 letter appended to the petition, the petitioner stated that the beneficiary's duties in the position of food services manager/executive chef would include:

Direct the preparation and presentation of ethnic Thai dishes;
Coordinate food service activities of the restaurant on a daily basis and during social functions;
Estimate food and beverage costs and requisitions or purchase of supplies;
Confer with food preparation and other personnel to plan menus and related activities, such as dining room, bar, and banquet operations;
Direct the hiring and assignment of personnel in the food preparation area;
Investigate and resolve food quality and service complaints;
Review financial transactions and monitor budgets to ensure efficient operation, and to ensure food expenditures stay within budget limitations.

The petitioner also provided copies of federal and state employer's quarterly wage reports for one quarter in 2001, three quarters in 2002, and three quarters in 2003. Each return indicated that the petitioner employed two individuals.

On January 11, 2005, the director requested, among other things, additional evidence detailing the beneficiary's proposed position with the petitioner including: the position title; a list of all duties; the percentage of time spent on each duty; the names of subordinate managers/supervisors or other employees reporting directly to the beneficiary; a brief description of their job titles, and educational levels, or if the beneficiary would not supervise other employees, the essential function the beneficiary would manage; an organizational chart specifying the beneficiary's position within the organizational hierarchy; and, who provides the product sales/services or produces the petitioner's products.

In an April 4, 2005 response, the petitioner provided the beneficiary's job duties as:

- Oversee the preparation and presentation of ethnic Thai dishes for the purpose of developing, implementing, and to ensuring proper food quality and budgetary goals (30%);
- Directs overall food service operations (15%);

- Coordinates food service activities of the restaurant on a daily basis and during social functions (10%);
- Estimates food and beverage costs and requisitions or purchase of supplies (5%);
- Confer with food preparation and other personnel to plan menus and related activities, such as dining room, bar, and banquet operations (10%);
- Directs the hiring and assignment of personnel in the food preparation area; Investigates and resolve[s] food quality and service complaints (20%);
- Reviews financial transactions and monitor[s] budgets to ensure efficient operation, and to ensure food expenditures stay within budget limitations (10%).

The petitioner also provided its organizational chart showing the beneficiary in the position of food services manager reporting to the president and directly supervising an "operations supervisor," and a certified public accountant "on contract." The organizational chart showed the "operations supervisor" over three electrical technicians, two cleaners, a dishwasher technician and helper, and a pest control technician all also "on contract." The petitioner provided brief job descriptions for all the personnel "on contract" and indicated that the "operations supervisor" managed the restaurant. The petitioner also provided a portion of its Texas Employer's Quarterly Report, for the quarter in which the petition was filed. The Texas Form confirmed the employment of the petitioner's president and "operations supervisor." The petitioner also included checks made out to various individuals for services such as cleaning, repairing signs, "electrical," fixing the ice machine, dishwashing service, "A-C," and pest control. The checks were dated in the years 2004 and 2005.

Counsel claimed that the employees below the beneficiary on the organizational chart will carry out the day-to-day low-level operations of the organization with respect to the food services function. Counsel also observed that the cleaners, helpers, and technicians will produce quality food services for the market. Counsel concluded that the beneficiary qualifies as a manager because she manages a function of the organization, controls the work of other supervisors or professionals, is authorized to hire and fire subordinates, and exercises direction over the day-to-day operations of her functions.

The director determined that the proffered position was not managerial or executive. The director noted that the beneficiary "evidently exercises discretion over the day-to-day operations of the activity," but also performs some of the day-to-day duties of the business. The director concluded that it is reasonable to assume that the petitioner's business does not need a full-time executive to manage one employee and several contract workers.

On appeal, as observed above, counsel asserts that the director: improperly focused on the petitioner's number of employees; based her decision on the size of the petitioner without examining the beneficiary's duties; and, did not consider whether an executive may manage a function. Counsel contends that the beneficiary satisfies all three criteria for a functional manager. Also as observed above, counsel cites unpublished decisions, district court decisions, and precedent decisions to persuade that the petitioner has established the beneficiary's eligibility for this visa classification.

Counsel's assertions and references to other decisions are not persuasive. Counsel's citation to unpublished matters carries little probative value. When examining the managerial or executive capacity of a beneficiary, 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. Upon review of the record in this matter and as discussed further below, the petitioner has not established that the beneficiary's duties and those of her claimed subordinates elevate the beneficiary's position to a primarily managerial or executive position. Further, counsel should take note that unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c).

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). Counsel seems to suggest that the beneficiary qualifies as both a manager under section 101(a)(44)(A) of the Act, and an executive under section 101(a)(44)(B) of the Act. Counsel suggests as well that the beneficiary may be a "function manager." However, 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.

On review, the petitioner has indicated that the beneficiary is responsible for overseeing the preparation and presentation of ethnic Thai dishes. However, the organizational chart provided does not include positions subordinate to the beneficiary that would commonly be engaged in preparing food. Rather the beneficiary's purported subordinates are service people who repair machinery, provide a pest control service, and provide a bookkeeping service. 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).

Moreover, the beneficiary's duties of estimating costs, purchasing supplies, planning menus, resolving customer complaints, and reviewing financial transactions are more indicative of duties that include routine 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).

Further, the petitioner in this matter has failed to provide sufficient documentation to establish that it employed anyone other than the president of the company (the beneficiary's brother) and one other individual in the position of "operations supervisor" when the petition was filed. 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). The petitioner's checks made out to various service people in 2004 and 2005, not only fail to demonstrate that the beneficiary "supervises" full-time subordinates that relieve her from performing non-qualifying duties, the checks do not establish that the beneficiary's position would have included supervision of "service personnel" when the petition was filed.

The record in this matter shows that the petitioner operates a Thai restaurant, yet the record does not include evidence that the petitioner employed waiters, chefs,¹ or other individuals to provide the petitioner's services, other than the president and the "operations supervisor." 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)).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In addition, the AAO acknowledges that the director should have more articulately discussed the beneficiary's duties and how the description failed to establish that the beneficiary's duties would be primarily managerial or executive. However, the totality of the record in this matter raises questions regarding the legitimacy of the beneficiary's position. Upon review, the discrepancies between the description of the beneficiary's duties, the petitioner's type of business, the petitioner's organizational chart, and the absence of evidence confirming the employment of individuals other than a president and an "operations supervisor," cast doubt on the legitimacy of the petitioner's offer of employment.

Further, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* In this matter, If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel's assertion that the beneficiary's position satisfies all three criteria of a functional manager is not persuasive. First, the AAO notes that it is not clear if counsel or the petitioner is claiming that the beneficiary's position comprises: (1) the duties of an executive directing the management of a function, establishing the goals and policies of a function, exercising wide latitude in discretionary decision-making (as it relates to the function), and receiving only general supervision from higher level executives; or (2) the duties of a functional manager managing a function, which is an essential function, functions at a senior level with respect to the function, and exercises discretion over the day-to-day operations of the function. Again, a

¹ The AAO acknowledges that the petitioner has sometimes referred to the beneficiary's position as chef or executive chef; however the position of chef is traditionally an operational position and does not include managerial or executive duties. As noted above, 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).

petitioner cannot combine portions of one definition with portions of the second definition and conclude that the beneficiary is eligible as a hybrid manager/executive.

Second, counsel has indicated that the beneficiary manages the function of "food services" and that this is an essential function. However, the petitioner's position on the organizational chart does not comport with an individual managing food services, whether that function is essential or otherwise. Third, the term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. Again, 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. at 604. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Counsel's citation to district court decisions and precedent decisions do not support counsel's claim that the beneficiary will perform primarily managerial or executive duties for the petitioner. The facts provided in this matter, including the description of the beneficiary's duties, the lack of evidence substantiating the employment of sufficient personnel to relieve the beneficiary from performing operational and administrative tasks, and the description of the beneficiary's subordinates' duties do not establish the beneficiary's eligibility for this visa classification.

In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's pragmatic duties of overseeing service personnel or overseeing the preparation of food. Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner will comprise primarily executive or managerial duties. For this reason, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered annual wage of \$18,000. In analyzing a petitioner's ability to pay the proffered wage, the fundamental focus is whether the employer is making a "realistic" or credible job offer and has the financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977).

The petitioner has not provided evidence that it employed the beneficiary in the past. As such, the AAO must examine the petitioner's 2003 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, the year in which the priority date was established.

First, the AAO will 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 this matter, the petitioner's 2003 IRS Form 1120 shows the petitioner's net income is \$6,322, after paying the president of the petitioner \$9,200, the second employee \$9,200, and other expenses. The petitioner has not established its net income is sufficient to pay the beneficiary the proffered wage.

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. According to the petitioner's 2003 IRS Form 1120, the petitioner has \$25,338 in net current assets. The petitioner has the ability to pay the beneficiary the proffered wage from its net current assets. The AAO considers this sufficient information to overcome the director's decision on this issue.

Beyond the decision of the director, the petitioner has presented inconsistent evidence regarding the petitioner's 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 petitioner has provided its stock certificate issued to the foreign entity, Thapthan Restaurant on September 2, 2002 in the amount of 1,000 shares. The record shows that Thapthan Restaurant is a restaurant owned by the beneficiary's father as a sole proprietorship. The petitioner's 2002 and 2003 IRS Forms 1120, each show that the beneficiary's brother owns 100 percent of the petitioner. The petitioner's inconsistent evidence casts doubt upon the purported subsidiary relationship between the petitioner and the foreign entity.

Likewise, the petitioner has not provided evidence that it is affiliated with the beneficiary's foreign employer as defined in the regulations. *See* 8 C.F.R. § 204.5(j)(2). Counsel should note that familial relationships do not establish a qualifying relationship under the regulations. Again, 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. For this additional reason, the petition will not be approved.

Further, the petitioner has not established that the beneficiary's duties for the foreign employer constitute managerial or executive duties. The petitioner submits a similar description for the beneficiary's duties for the foreign entity as submitted for the petitioner. For the reasons discussed above, the description of the beneficiary's duties is insufficient to establish that her duties for the foreign entity were primarily managerial or executive. 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.