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FILE: WAC 04 029 52053 Office: CALIFORNIA SERVICE CENTER Date: **SEP 15 2005**

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, California Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition seeking to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of California that is engaged in providing research services. The petitioner seeks to employ the beneficiary as its managing director.

The director denied the petition concluding that the petitioner had not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director determined that the beneficiary would be assisting the two lower-level employees with the non-qualifying functions of the business, and that the beneficiary's subordinate employees are not professionals. Consequently, the director denied the petition.

On appeal, counsel claims that the director considered only whether the beneficiary would be employed as an executive and did not considered the beneficiary's proposed employment as a manager. Counsel states that essentially all of the beneficiary's job duties "involve managing the overall operations of the organization and the essential functions thereof." Counsel states that, while functioning at a "senior level," the beneficiary will also supervise professional employees and exercise discretion over the company's employees and daily functions. Counsel submits a brief in support of the outlined claims.

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 or 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, which 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.

The issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner filed the instant petition on November 12, 2003 noting that the beneficiary would be employed in the position of managing director for an annual salary of \$120,000. In an attached letter dated September 5, 2003, the petitioner stated that the beneficiary's proposed responsibilities would include: (1) overseeing the

organization, including planning, developing and establishing the company's policies and objectives; (2) directing, managing and coordinating marketing and sales; and (3) making strategic business plans and overseeing implementation of the plans. The petitioner further explained:

[The beneficiary] will furthermore be responsible for locating and hiring staff as needed, and will have the authority to hire and fire as he deems necessary. [The beneficiary] will be responsible for overseeing and supervising the work of [the petitioner's] three U.S. executive research professionals. He will have full budget responsibility, including preparation and maintenance, and reviewing activities and financial reports on a regular basis to determine progress and revise objectives as needed. In performing his duties, [the beneficiary] will exercise discretion over the day-to-day operations of the company and he will function as the most senior employee of [the petitioning entity] reporting only to the Board of Directors.

The petitioner noted that as the current managing director of an affiliated United States company and the former managing director of the foreign entity, during which he performed essentially the same job duties, the beneficiary is "amply qualified" to perform in the proposed position.

In a request for evidence, dated October 28, 2004, the director asked that the petitioner submit the following evidence in support of the beneficiary's proposed employed in a primarily managerial or executive capacity: (1) an organizational chart identifying the petitioner's staffing and describing its managerial levels, including all employees subordinate to the beneficiary; (2) a brief job description, educational levels and the salaries of all employees subordinate to the beneficiary; (3) a detailed description of the job duties performed by the beneficiary on a "typical day"; and (4) a copy of the petitioner's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Report, for the third quarter of 2004.

Counsel responded in a letter dated January 19, 2005, stating that as the managing director, the beneficiary would possess the following responsibilities: (1) oversee the planning and development of the organization's goals and policies; (2) direct, manage and coordinate the company's marketing and sales activities; (3) make strategic business plans and oversee implementation of the plans; (4) locate new staff, and exercise the right to hire and fire personnel; and (5) maintain the company's budget. Counsel outlined the specific job duties associated with each of the beneficiary's responsibilities. As counsel's letter is part of the record, the descriptions will not be entirely repeated herein.

Counsel stated:

As the above duties illustrate, [the beneficiary's] primary duties are of a managerial nature. He will operate at a senior level and will exercise discretionary authority in performing the above duties on a day-to-day basis performing operations management functions. While [the beneficiary] will oversee the company's vision as Managing Director, the day-to-day work of executive search recruitment activities for clients will be performed by the professional Senior and Associate Researchers, who are under his supervision. He has the authority to hire and fire as needed. [The beneficiary] will devote the majority of his time to operations management, negotiating key client accounts contracts and finding new business opportunities.

Counsel explained that the beneficiary would supervise two professional employees, a senior researcher and an associate researcher, both of who are responsible for conducting "focused recruitment searches" for executives and managers. Counsel provided a description of the job duties performed by the lower-level employees. Again, as counsel's response is part of the record, it will not be entirely repeated herein. The petitioner's organizational chart identified the beneficiary as managing director and the senior researcher and associate researcher as its three employees.

In a decision dated February 3, 2005, the director determined that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director stated that the evidence submitted, including the beneficiary's job description and the organizational chart, "does not establish that the beneficiary primarily directs the management of the organization, establishes the company's policies and goals, exercises wide latitude in discretionary decision-making, and maintains autonomy over the petitioner's operations." The director further stated that with the employment of two subordinate workers, it is unreasonable to conclude that the beneficiary would not be performing the day-to-day non-supervisory tasks of the organization. The director concluded that the beneficiary would be a "first-line manager," as the beneficiary would not be supervising managerial or professional employees. Lastly, the director concluded that because the petitioner had not shown "that the beneficiary manages or directs the management of a department, subdivision, function, or component of the petitioning organization," the beneficiary would not be a functional manager. Consequently, the director denied the petition.

Counsel filed an appeal on March 7, 2005, claiming that, in his decision, the director considered only whether the beneficiary would be employed as an executive and did not consider the beneficiary's proposed employment as a manager. Counsel states that the information contained in both the immigrant petition and the petitioner's subsequent letter indicates that the beneficiary would occupy a managerial position, and likewise, would manage two professional employees. Counsel notes that contrary to the director's reference in his decision, the petitioner is not required to demonstrate that the beneficiary would qualify as both a manager and an executive. Counsel corrects the director's reference to the beneficiary as "president," and challenges the director's finding that the beneficiary would perform non-supervisory tasks of the business, stating:

First, the title of the position offered is Managing Director, not "President." Secondly, [the beneficiary] has and will be spending very little time in the day-to-day activities of Petitioner, as the detailed job description provided and which as part of the record clearly shows. Indeed, an estimated less than 10% of his time, will be spent on actually providing the service. The two U.S. based employees are highly experienced professionals, degreed and with extensive industry experience. They have both been trained in the unique and proprietary model used by [the petitioning entity] and developed by [the beneficiary] (see description from [the petitioner's] website, Exhibit D). The successful model developed by [the beneficiary] is also described in his best selling book in the U.S. "Secrets of the Executive Search Experts" (see description Exhibit E). The employees of [the petitioning entity] perform the research services [the petitioner] provides to the Fortune 1000 firms it serves (see list of clients, Exhibit F), not [the beneficiary].

Counsel also disputes the director's finding that the two lower-level workers are not professionals. Counsel states that the job duties performed by the senior and associate researchers "are essentially the same as those

performed by Marketing Research Analysts and Senior Market Analysts, which consistently have been upheld as 'professional.'" Counsel claims that the salaries paid to the subordinate employees, \$121,000 and \$72,000, "are commensurate with a professional level position." Counsel states that the petitioning entity requires the employment of professional employees, as its services are complex and require analyzing research and communicating professionally with client representatives. Counsel notes that both employees hold bachelor's degrees. Counsel further states that because the beneficiary would be supervising professional employees, the petitioner is not required to establish that the beneficiary would be a functional manager.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The AAO recognizes the comprehensive description of the beneficiary's proposed job duties offered by counsel in her January 19, 2005 response. However, portions of the responsibilities require the beneficiary to personally perform non-managerial and non-executive job duties that directly relate to the sale of the petitioner's services. Specifically, the beneficiary would be entirely responsible for the marketing and sales of the company. Based on counsel's description, the beneficiary would personally monitor industry competition, develop "creative marketing strategies," determine budgets for marketing and advertisements, contact clients, negotiate "key client contracts," review sales data, locate contractors to perform web designs and create advertisements, formulate plans to solicit new customers, and prepare and conduct sales presentations to potential clients. The beneficiary would also be personally responsible for many of the petitioner's financial functions, such as assessing its needs and expenses, ensuring compliance with state and federal payroll regulations, preparing financial reports, and maintaining the company's budget. Counsel did not assign a percentage of the amount of time the beneficiary would devote to these non-qualifying functions of the company. However, counsel stated in her January 19, 2005 letter that, in addition to managing operations and finding new business opportunities, the beneficiary would devote the majority of his time to negotiating key client accounts, which the AAO notes, is essentially the sale of the petitioner's services. The AAO notes that counsel failed to reconcile this statement with her claim on appeal that "an estimated less than 10% of [the beneficiary's] time, will be spent on actually providing the service." 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. 503 (BIA 1980). Based on the current record, the AAO is unable to determine whether the beneficiary primarily performs non-managerial sales, marketing and financial functions. Counsel's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Although counsel claims that the beneficiary is relieved from performing daily functions of the petitioner's business, the AAO notes that the "day-to-day activities" of the petitioning entity are not restricted solely to the recruitment searches performed by the lower-level employees. Rather, the daily activities may include such activities as the above-discussed marketing, sales and financial functions of the business, as well as administrative and operational tasks. Despite counsel's claim on appeal that the petitioner's two lower-level employees, a senior researcher and an associate researcher, would "perform the actual services" of the company, the employees' job descriptions indicate that they are responsible only for researching and recruiting executives and managers. The job descriptions do not indicate that the senior and associate researchers would relieve the beneficiary from performing the sales, marketing and financial functions of the

organization. As correctly noted by the director, 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 AAO notes that counsel has not demonstrated that the beneficiary would be employed as a functional manager. Counsel states on Form I-290B that "the beneficiary will serve as a functional manager so the staffing levels, on which the Service relied for the Decision, are not determinative." Counsel, however, subsequently states in her brief on appeal that because the beneficiary would be supervising professionals, the petitioner "is not per se required to show that [the beneficiary] will be a functional manager or that he functions at a senior level." Counsel does not offer any evidence that the petitioner would employ the beneficiary as a function manager. 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. As previously discussed, the petitioner has failed to comply with this requirement. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The petitioner stated in its September 5, 2003 letter that the beneficiary occupied the position of managing director in the overseas company, "generally perform[ing] the duties listed above for the offered position." The petitioner outlined essentially the same job responsibilities of the beneficiary. Based on the petitioner's representations, as in the beneficiary's employment in the United States, the beneficiary performed non-qualifying functions of the company, including its sales, marketing and finances. The petitioner did not provide a description of the foreign entity's staff, therefore, the AAO cannot determine whether the beneficiary would have been relieved from performing the business' functions by lower-level employees. 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. *Matter of Church Scientology International*, 19 I&N Dec. at 604. Accordingly, the petition will be denied for this additional reason.

An additional issue not addressed by the director is whether, at the time of filing the petition, the petitioner had the ability to pay the beneficiary's proffered annual salary of \$120,000.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner did not establish that it had previously employed the beneficiary.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

As the petition's priority date falls on November 12, 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 zero. The petitioner could not pay a proffered wage of \$120,000 per year.

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. The petitioner's current assets of approximately \$15,000 do not exceed its approximately \$45,000 in current liabilities. As a result, the petitioner does not have sufficient net current assets with which to pay the beneficiary his proffered annual salary. For this additional reason, the petition will be denied.

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.