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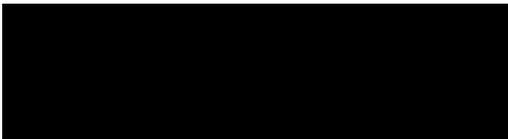
FILE: SRC 02 225 53511 Office: TEXAS SERVICE CENTER Date: SEP 30 2005

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 preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation that claims to be doing business as a general trading company. It seeks to employ the beneficiary as its chief executive officer (CEO). 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 failed to submit sufficient evidence to establish that the beneficiary would be employed in a managerial or executive capacity or that the petitioner had the ability to pay the beneficiary's proffered wage at the time the petition was filed.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 first issue in this proceeding is whether the petitioner established that the beneficiary would be employed in a 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) 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 support of the petition, the petitioner submitted the following description of the duties to be performed by the beneficiary under an approved petition:

As the company plans [to] develop and [as] various business enterprises are acquired and developed, [REDACTED] [p]resident of the company, will oversee the day[-]to[-]day operations of the company while [the beneficiary] concentrates on the long range goals of the company and directs the company to the successful attainment of those goals. [The beneficiary] has studied the best possible options available for [the petitioner] and the task has taken him to several different arenas. [He] has also hired several independent consulting companies to assist him in his evaluation process. Through market surveys and thorough studies, the direction in which [the beneficiary] will take [the petitioner] will prove very profitable and provide tremendous growth.

The petitioner also submitted a letter dated September 21, 2001 from its accountant, who discussed the petitioner's progress with the purchase of a specialty grocery store. The accountant also indicated that the beneficiary himself performs the essential operational tasks that are necessary in running a grocery store, including providing customer service and buying inventory for the store. Although the beneficiary's wife apparently works at the store as well, her assistance is required only when the beneficiary is buying inventory and is away from the store.

On January 27, 2004, the director issued a request for additional evidence (RFE) instructing the petitioner to submit a more detailed description of the beneficiary's proposed job duties, including information about any possible subordinates that would be under the beneficiary's supervision. The petitioner was also instructed to provide its organizational chart illustrating the beneficiary's position with respect to other employees within the petitioning organization.

In response, the petitioner provided the following percentage breakdown of the beneficiary's responsibilities with the U.S. petitioner:

**General Role Description**

**Percentage of time Spent on these duties: 50%**

[The beneficiary] is currently the [c]hief [e]xecutive [o]fficer of [the petitioner]. He oversees planning and implementation, operations, resource development, and management of strategic plans for the business. He is responsible for directing all day-to-day operations and directing the management of operations. Along with these duties he helps establish the goals and policies of the business and direct the company to the successful attainment of those goals. [The beneficiary] reports directly to the [p]resident of the organization.

**Primary Areas of Responsibility**

**Percentage of time spent on these duties: 30%**

- Direct and manage overall legal and financial decision[s] for the business;
- Control all areas of day-to-day operations and management for the business;
- Facilitate the growth of the sales and marketing in order to promote the growth of the business;
- Provide leadership and direction to the administrative and managerial staff;
- Provide financial and administrative reports[,] including current budget status of financial plans, updates on new initiatives: revenue growth, and capital improvements;
- Manage and outsource bookkeeping duties as appropriate: AP/AR, payroll, reimbursement processing, banking and cash reconciliation, monthly, quarterly, and yearly tax filing, and computer record keeping;

**Personnel**

**Percentage of time spent on these duties: 10%**

- Provide leadership and direction to the administrative and management staff;
- Responsible for hiring, firing, and training of all employees;
- Maintain and update [the] job description[s] of the responsibilities and scope of the staff positions;
- Secure confidential information including personnel files and salary information;
- Optimize [the] management staff time to maximize income for the company, including appropriate delegation of non-essential tasks.

**Long-range planning**

**Percentage of time spent on these duties: 10%**

- Assure all administrative activities have an outcome that supports [the petitioner]'s sales;
- Regularly assess the long-range goals of the organization;
- Set and monitor income growth targets as a part of our strategic planning and annual resources budgeting;
- Establish and communicate appropriately solid business justifications for financial decisions, new policies, and policy changes; [sic]

The petitioner stated that the beneficiary would supervise the company's president, who is responsible for overseeing five information technology (IT) consultants, and the store manager, who is responsible for the daily operations and employees of the petitioner's grocery store business.

The petitioner provided an organizational chart identifying the beneficiary at the top of the company's hierarchy. The chart indicates that the petitioning organization is divided into two types of business ventures: one venture dealing with information technology and the other venture dealing with the grocery store. The petitioner identified the beneficiary as the director of operations and manager of the grocery store, thereby making the beneficiary as his own immediate subordinate. The chart does not indicate that the store has any employees aside from the beneficiary and his wife. The company president, [REDACTED] is identified as the director of operations of the IT portion of the petitioner's business operation. His immediate subordinate is identified as an IT manager with five IT consultants as his subordinates.

On August 17, 2004, the director denied the petition noting that the petitioner's organizational chart shows the beneficiary as both CEO of the entire organization and the director of operations with respect to the petitioner's grocery store. The director also points out the petitioner's failure to submit evidence documenting the employment of any of the claimed IT consultants and points out that the petitioner's corporate tax return identifies the petitioner as a grocery retailer.

On appeal, counsel explains that one of the petitioner's business goals is to provide internet and IT services within the fast food and restaurant industry. Counsel claims that the petitioner acquired a grocery store while working to meet this goal and indicates that the petitioner had 10 employees as of 2003. However, 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). Thus, for the purpose of determining the petitioner's eligibility to classify the beneficiary as a multinational manager or executive, the only events that are relevant are those that had taken place as of the date the petition was filed. As the petition was filed on July 18, 2002, any additional hires or developments that took place in 2003 and 2004 are irrelevant.

Counsel also provides an additional list of the beneficiary's job responsibilities indicating that since the beneficiary's entry to the United States, he has been responsible for formulating goals and policies; networking with professionals and investors; hiring and training a professional staff; managing the corporation's essential functions; supervising the marketing efforts; and reviewing and approving venture capital decisions. While counsel's broad overview of the beneficiary's job responsibilities suggests that the beneficiary has been employed in a primarily qualifying capacity, 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). Much like the petitioner's own claims, counsel's claims must be supported by the evidence of record. In the instant matter, however, the record strongly suggests that at the time the petition was filed the petitioner lacked the support staff to enable the beneficiary to focus primarily on the executive and managerial responsibilities enumerated by counsel.

As properly pointed out by the director, the petitioner failed to provide any documentation to support the claims put forth in the organizational chart submitted in response to the RFE. 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)). In the instant matter, the evidence of record suggests that at the time the petition was filed, the petitioner's only business venture was a grocery store with the beneficiary as its only paid employee carrying out the store's daily operational tasks. While the beneficiary was likely to have been at the top of the petitioner's hierarchy by virtue of having been its only paid employee, precedent case law has established that 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). Thus, in examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

According to the broad job responsibilities listed in response to the RFE, the beneficiary functions as a top level executive who directs the organization by overseeing a staff of professional and managerial employees. However, the petitioner failed to define any of these broad objectives in the context of the petitioner's specific organizational structure as it existed at the time the petition was filed. For example, the petitioner did not specify how the beneficiary would "[f]acilitate the growth of the sales and marketing," "[p]rovide leadership and direction to the administrative and managerial staff," and delegate job responsibilities to a subordinate staff when there is no evidence that the petitioner had a paid staff aside from the beneficiary. The petitioner's description of the beneficiary's job responsibilities is not supported with documentary evidence and is

inconsistent with its organizational structure at the time the petition was filed. Counsel urges the AAO to review this matter with the understanding that while the beneficiary was directly involved in the day-to-day operational tasks during the petitioner's start-up phase of development, his involvement in non-qualifying tasks is no longer necessary. However, the evidence of record strongly suggests that at the time the petition was filed the petitioner was still in the initial stage of development and unable to support a primarily managerial or executive position. For this initial reason, this petition cannot be approved.

The second issue in this proceeding is whether the petitioner established its ability to pay the petitioner's proffered wage of \$35,000 per year.<sup>1</sup>

The regulation at 8 C.F.R. § 204.5(g)(2) states the following, in pertinent part:

Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will examine the net income figure reflected on the petitioner's 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 that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

In the instant matter, the petitioner's corporate tax return for 2002 indicates that the petitioner had no taxable income after having paid only \$10,750 as compensation of officers and no money at all in salaries and wages or cost of labor. As properly pointed out by the director, Schedule E of the petitioner's tax return does not name the officer to whom the \$10,750 was paid.

On appeal, counsel refers to the petitioner's 2003 tax return and claims that the petitioner currently has ten employees. However, as previously stated, the petitioner must establish its ability to pay as of July 18, 2002, the date it filed the Form I-140. See *Matter of Katigbak*, 14 I&N Dec. at 49. While the petitioner may have been able to pay the beneficiary's proffered wage in 2003 and/or 2004, the petitioner has the burden of

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<sup>1</sup> The petitioner failed to disclose the beneficiary's proffered wage in Part 6 of the Form I-140. However, page two of counsel's July 1, 2002 letter, which was submitted in support of the petition, indicates that the petitioner intends to pay the beneficiary \$35,000 per year.

establishing its ability to pay that wage as of the date the petition is filed, even if the beneficiary commences employment with the petitioning organization at some later date. The petitioner has failed to submit evidence establishing its ability to pay the beneficiary's proffered wage as of July 18, 2002. Based on this second ground of ineligibility, this petition cannot be approved.

Additionally, the petitioner noted that CIS approved nonimmigrant petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether she reviewed the prior approvals of the nonimmigrant petitions. If the nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Finally, though not addressed in the director's decision, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner is required to submit evidence that the prospective United States employer has been doing business for at least one year.

The regulation at 8 C.F.R. § 204.5(j)(2) states that "doing business" means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

In the instant matter, Part 5 of the Form I-140 indicates that the petitioner intends to operate as a general trading company. In the letter submitted in support of the petition, the petitioner indicated that its business operation consists of a grocery store and IT consulting. While the record contains documents attesting to the petitioner's rental of business premises for its grocery store as well as tax returns and a number of bank statements, these documents are not accurate indicators of whether a company was actually engaged in the regular, systematic, and continuous provision of goods and/or services for one year prior to the date the petition was filed.

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). Therefore, based on the additional ground discussed in the paragraph above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.