

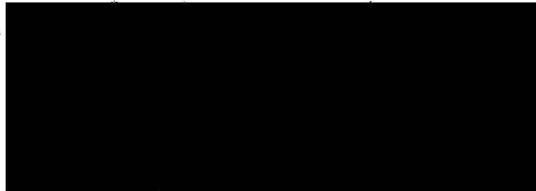


U.S. Citizenship
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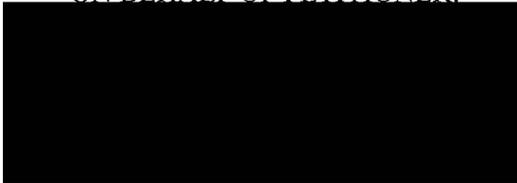
FILE: [REDACTED]
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Office: TEXAS SERVICE CENTER Date: **AUG 01 2006**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

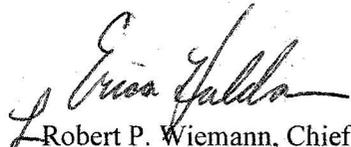
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter will be remanded to the director for further review of the record and entry of a new decision.

The petitioner filed the instant immigrant petition 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 incorporated under the laws of the State of Texas that is operating a dry cleaning and laundry business. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not demonstrated that: (1) at the time the priority date was established, the petitioner demonstrated its ability to pay the beneficiary's proffered salary; or (2) the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner contends that the petitioner has demonstrated its ability to pay the beneficiary's annual salary of \$40,000 by compensating the beneficiary such wages in 2003 and 2004, and during 2005. Counsel claims that the beneficiary would be employed as a "Manager/Executive" in the United States. While not addressed by the director, counsel further claims that the beneficiary's employment abroad meets the statutory requirements of "managerial capacity" and "executive capacity." Counsel submits a brief in support of the appeal.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. – An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives 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 first issue in this proceeding is whether at the time the priority date was established the petitioner demonstrated its ability to pay the beneficiary's proffered annual salary as required in the regulation at 8 C.F.R. § 204.5(g)(2).

The regulation at 8 C.F.R. § 204.5(g)(2) states:

Any petition filed by or for any 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.

The petitioner filed the instant immigrant petition on November 27, 2002, noting on the Form I-140 that as the company's president the beneficiary would receive an annual salary of \$40,000. The petitioner submitted its 2001 income tax return, which identified the beneficiary's salary for that year as \$10,000. As the petitioner did not submit any additional documentary evidence of its ability to pay, the director issued a request for evidence on May 6, 2005. While the director requested that the petitioner provide evidence of its ability to pay the beneficiary's \$40,000 salary, the AAO notes that the director referenced the incorrect date of filing, and consequently requested that the petitioner submit documentary evidence of its ability to pay beginning in the year 2003 rather than 2002. The director asked that the petitioner submit its corporate tax returns, annual reports, and audited financial statements for 2003 and 2004, and Internal Revenue Service (IRS) Form W-3, Transmittal of Wage and Tax Statements, for the workers employed during 2004.

Counsel responded in a letter dated July 25, 2005, addressing the petitioner's ability to pay. The AAO notes that, in his letter, counsel also referenced the incorrect filing date, and submitted the petitioner's 2003 and 2004 income tax returns, IRS Form W-3, and bank statements for September 2004 and the months January, March and May 2005. The petitioner's tax returns reflected that the beneficiary had received compensation in the amount of \$40,000 for each year.

In a decision dated September 9, 2005, the director concluded that the petitioner had not demonstrated its ability to pay the beneficiary's proffered salary. The director focused on the petitioner's net income for each year, as well as its net assets, and determined that the petitioner did not possess sufficient funds to pay the beneficiary \$40,000.

On appeal, counsel contends that the "[p]etitioner has now and has always had the ability to pay the proffered wage of \$40,000 per annum." In an appended brief, counsel references the documents previously submitted by the petitioner as evidence of its ability to pay, and stresses that the 2003 and 2004 IRS Form W-2 demonstrate that the beneficiary has been receiving the proffered salary.

Upon review, the matter will be remanded to the director with instruction to request documentary evidence of the petitioner's ability to pay at the time the priority date was established.

Pursuant to the regulation at 8 C.F.R. § 204.5(d), the priority date in the instant petition is November 27, 2002. Both the director and counsel incorrectly cited the priority date as September 15, 2003, and consequently the evidence submitted by the petitioner pertains to the years 2003 through 2005. The petitioner

has not offered documentary evidence in the form of annual reports, federal tax returns, or audited financial statements confirming its ability to pay the beneficiary's proffered salary in 2002. *See* 8 C.F.R. § 204.5(g)(2) (requiring that evidence of a petitioner's ability to pay "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.") 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 director is instructed to request a certified copy of the petitioner's 2002 income tax return, as well as IRS Form W-2, Wage and Tax Statement, issued to the beneficiary in 2002, payroll records for the same year and bank statements corroborating the claimed amount of compensation paid to the beneficiary in 2002.

The director's decision with regard to this issue is withdrawn and the matter is remanded for further review and the entry of a new decision.

The AAO will next consider 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.

On the Form I-140, the petitioner noted the beneficiary's proposed position as president of the United States company. Although the director did not request additional evidence of the beneficiary's proposed position, the petitioner submitted with its response to the director's request for evidence the following job description for the beneficiary:

Responsible for management and growth of the Business. Manages hiring and payment of wages to employees. Makes decisions on [a]dvertising, coupon mailing, and sponsorship of events such as sporting events at the local [high school]. Responsible for [e]quipment purchase and dealing with suppliers for purchase of equipment spares and consumables like chemicals etc.

In her September 9, 2005 decision, the director concluded that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Referencing the information contained on the petitioner's tax returns and IRS Form W-3, the director stated that it was likely the petitioner did not employ any full-time subordinate employees. The director acknowledged the "managerial and supervisory job titles" assigned to its staff, but concluded that "those employees primarily engage in the firm's day-to-day operational tasks despite their titles." The director also noted that none of the beneficiary's subordinates are professionals. The director concluded that the petitioner did not clarify the beneficiary's position in the United States company, and as a result, failed to establish that the beneficiary would be employed as a manager or executive. Consequently, the director denied the petition.

On appeal, counsel for the petitioner claims that the beneficiary is employed as a "Manager/Executive" in the United States. Counsel notes the present employment of a full-time manager, operator/assembler, and presser, as well as two part-time clerks, but states that at the time of filing, the petitioner contracted its work related to cleaning, equipment, pressing and assembly. Counsel states that "through his manager, [the beneficiary] managed the [contracted] employees assigned to his business."

Counsel cites the regulatory definition of "managerial capacity," and claims that the beneficiary satisfies the criteria in that he: (1) "is the owner and senior executive of [the United States entity]; (2) supervises the company's day-to-day operations through subordinate managers, and "manages accountants, lawyers, [and] regulatory personnel"; (3) "has absolute authority to hire and fire" the petitioner's employees; and (4) "plans, executes and controls all executive functions of the company and has complete and unrestricted discretion over the day-to-day operations" of the company.

Counsel submits a letter from the beneficiary stating that "[he] manage[s] the overall dry cleaning policies and business issues," and noting the petitioner's use of "leased staff" to perform its functions. The beneficiary explains that as a result of a health condition, he is physically unable to "run the day-to-day operations of [the

petitioning entity]." An attached note from the beneficiary's doctor addresses the beneficiary's physical restrictions with regard to "prolonged standing."

Upon review, despite counsel's response on appeal to the beneficiary's purported employment in a managerial capacity, the director's decision is withdrawn, and the matter will be remanded to the director for the issuance of a request for evidence and the entry of a new decision. The regulation at 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation.

Here, the director based his denial of the immigrant petition partly on the petitioner's failure to "enhance an understanding of the precise daily duties the beneficiary performs," including the proportion of time the beneficiary would spend performing managerial or executive tasks. Prior to the issuance of the director's request for evidence, the petitioner had not provided any description of the beneficiary's proposed position or evidence related to its staffing levels. The limited job description provided by the petitioner in its July 25, 2005 response fails to identify the specific managerial or executive job duties performed by the beneficiary in his position as manager. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Additionally, the petitioner's brief statement addresses responsibilities of the beneficiary that are not typically deemed to be managerial or executive in nature, including interacting with suppliers with regard to equipment and product purchases, and determining the petitioner's avenues for advertising. The petitioner has not explained why these responsibilities should be considered managerial or executive. Despite counsel's explanation on appeal that the beneficiary would not perform non-qualifying tasks of the business as a result of his physical ailments, the non-managerial and non-executive tasks of the petitioner's business extend beyond the actual dry cleaning and pressing of garments. Such non-qualifying tasks may include performing the job duties related to the petitioner's marketing, sales and advertising functions, as well as its bookkeeping, payroll, and banking. The AAO notes that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The director is instructed to request a comprehensive job description of the managerial or executive tasks to be performed by the beneficiary in his position as president, as well as an allocation of the amount of time to be spent on each. The petitioner's response should also include an outline of the petitioner's staff, including documentary evidence of the workers employed at the time of filing in November 2002. The petitioner should also document its claimed use of contracted workers, and provide an explanation of who is performing the above-noted administrative and operational tasks of the organization. Accordingly, the director decision with regard to this issue is withdrawn for further review of the record and requested evidence, and the entry of a new decision.

Although not addressed by the director, counsel for the petitioner contends on appeal that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. Upon review, the record as presently constituted, does not demonstrate the beneficiary's previous employment as a manager or executive. The petitioner provided the following description of the beneficiary's role as the owner and general manager of the foreign entity:

Responsible for management and growth of the Business. Makes final decisions on hiring and remuneration of employees. Gives final approval to Asst. General Manager for quantity of imports from various suppliers and inventory levels.

The limited job description does not identify the specific managerial or executive job duties performed the beneficiary in the overseas company. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The director is instructed to review the record, and, if necessary, request additional evidence of the beneficiary's employment capacity in the foreign entity. The director shall enter a decision based on her review of the record and any additional evidence.

Beyond the decision of the director, the AAO notes an additional issue of whether the petitioner demonstrated the existence of a qualifying relationship between the foreign and United States entities at the time of filing.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In its November 25, 2002 letter, the petitioner suggested an affiliate relationship between the foreign and United States entities as a result of the beneficiary's ownership of both organizations. Schedule E of the petitioner's 2001 corporate income tax return identified the beneficiary as owning 100% of the petitioner's issued common stock. In its July 25, 2005 response to the director's request for evidence, counsel for the petitioner "confirm[ed]" the beneficiary's ownership of the foreign organization stating:

Under United Arab Emirates law concerning foreign investments in Dubai, the business is registered under the name of the sponsor, Mr. [REDACTED] (U.A.E. National) per the Trade License issued by the Economic Department in Dubai, United Arab Emirates. The sponsor does not contribute to the capital nor is he entitled to share any profit or loss of the concern as shown in the letter from Sponsor regarding ownership of the Foreign Entity.

Counsel referenced a business registration document for the foreign entity, in which [REDACTED] noted his sponsorship of the foreign corporation, but stated that the beneficiary "wholly owned and operated" the foreign business.

The record does not substantiate the petitioner's claim of an affiliate relationship between the foreign and United States entities. Specifically, the record is devoid of evidence sufficient to establish that the beneficiary is the owner of the United States entity or the foreign entity. The petitioner did not submit documentary evidence in the form of a stock certificate or stock transfer identifying the beneficiary as the owner of the petitioner's issued stock. The information reported on the petitioner's income tax return is not sufficient for purposes of establishing ownership. 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. at 165.

Additionally, the record contains documentation that undermines the claim that the beneficiary is the owner of the foreign entity. None of the documents submitted with regard to the foreign corporation identify the beneficiary as the proprietor of the foreign company. The notes accompanying the company's March 31, 2002 financial statements state that the company "is a proprietary concern of [REDACTED] as per the trade license issued by the Economic Department, Dubai," and recognize the beneficiary only as the financier of the operation. The petitioner has not offered documentation in the form of translated business licenses¹ or tax registries naming the beneficiary as the proprietor of the foreign company. Additionally, the parties to the foreign company's tenancy agreement are [REDACTED] and the property owner, thereby undermining the claim that the beneficiary is the foreign company's owner. Moreover, the petitioner has not offered evidence of the law of the United Arab Emirates supporting its claim of ownership. In immigration proceedings, the law of a foreign country is a question of fact which must be proven if the petitioner relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). The petitioner has failed to demonstrate that a qualifying relationship existed between the foreign and United States entities at the time of filing. The director is instructed to consider this additional issue on remand and enter a decision based on her review of the record and any additional documentary evidence.

ORDER: The decision of the director dated September 9, 2005 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.

¹ While the petitioner submitted with the petition a commercial license, it has not been translated. Because the petitioner failed to submit a certified translation of the document, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.