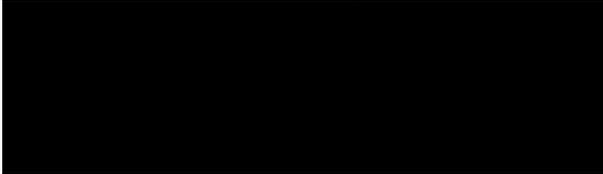


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FILE: WAC 05 209 51340 Office: CALIFORNIA SERVICE CENTER Date: **AUG 02 2006**

IN RE: Petitioner:  
Beneficiary:

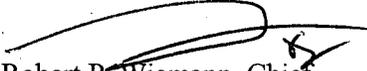


PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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

The petitioner is a Nevada corporation operating as a restaurant. It seeks to employ the beneficiary as its chief financial manager. 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 denied the petition based on three independent grounds of ineligibility: 1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; 2) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 3) the petitioner failed to establish its ability to pay the beneficiary's proffered wage.

On appeal, the petitioner disputes the director's findings and submits a brief in support of its 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 two issues in this proceeding call for an analysis of the beneficiary's employment capacity. The first issue is whether the beneficiary was employed abroad in a primarily managerial or executive capacity, and the second issue is whether the petitioner established at the time it filed the Form I-140 that the beneficiary would be primarily 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 Form I-140, the petitioner provided a letter<sup>1</sup> dated July 18, 2005 discussing the beneficiary's general career background and employment history. However, a description of her foreign job duties was not provided. The petitioner did, however, provide the following description of the beneficiary's proposed position in the United States:

1. Elaboration and updating of the company's [f]inancial [p]lan

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<sup>1</sup> The AAO notes that the support letter was written on the letterhead of [REDACTED], a dissolved company in Nevada, instead of the petitioner's name, [REDACTED], a currently active corporation in that state.

[The beneficiary] is responsible for providing a five-year projection for income, expenses, and funding sources. She has to continuously adjust her planning to allow for funding at various stages of the company's growth. She has to explain the rationale and assumptions used to determine [sic] the estimates. She based her assumptions based on industry/historical trends.

2. Establishment of the financial goals and policies of the company. [sic]  
[The beneficiary] every December, provides the [p]resident and the other member[s] of the management team . . . with the main financial goal for the next year. She also provides the month[-]by[-]month sales and expenses projection, for reaching the main goal for the year. Every month, she adjusts her projections accordingly to the real results of the past month. Based on those results she establishes the new monthly objectives, or the new policies for reaching the main goal.
3. Establishment of the [s]trategic [p]lanning. [sic]  
Together with the [c]ompany's [f]inancial [p]lan and the establishment of the financial goals and policies of the company, [the beneficiary] is in charged [sic] of determining the strategies for obtaining and using resources to achieve those goals. [The beneficiary] determines the best way to use resources. She has the power of decision to adjust the budgets or to redirection funds to the different areas of the company. She decides whether the company needs to spend more money in [m]arketing (advertising or promotional material) or to spend more money in quality and cost control.
4. Elaboration of [f]inancial [r]eports. [sic]  
Every month and [e]specially at the end of each year, [the beneficiary] has to provide to the [p]residency [sic] of the corporation with [sic] a complete [f]inancial [r]eport. It includes a complete analysis of the [b]alance [s]heet with [r]atio [a]nalysis and interpretation of their results. . . . [The beneficiary] uses the financial data in order to elaborate strategies for improving the health and financial strength of the company.
5. [The beneficiary] is currently involved in the analysis for [c]apital [e]xpenditures in our company. As it is known[,] these expenditures require a huge portion of the organization's funds. [The beneficiary] believes that the current moment is the very moment for expanding the company. . . . [She] has analyzed the trends of the real estate market in Las Vegas, and she believes that prices of properties in this city will continue to rise at least for the next 10 years.

The petitioner also provided its organizational chart identifying the beneficiary's position as directly subordinate to the company's chief manager. The chart further shows that the beneficiary's subordinates include a warehouse employee and some type of office employee. The chart indicates that the organization has an operating manager and a marketing employee, whose positions are at the same tier within the company's hierarchy as that of the beneficiary.

On December 9, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation to assist in determining the petitioner's eligibility for the immigration benefit sought: 1) an organizational chart for the beneficiary's foreign employer clearly identifying the beneficiary's position and the names, job titles, and brief job descriptions for the employees subordinate to the beneficiary; 2) a detailed description of the beneficiary's proposed day-to-day duties with a percentage of time assigned to each duty in order to indicate how much of the beneficiary's time would be devoted to each of the listed duties; and 3) the petitioner's organizational chart illustrating its staffing levels and identifying its employees by name and position title.

The petitioner submitted a response dated December 21, 2005 addressing the issues brought forth in the RFE. The petitioner provided an organizational chart of the foreign entity showing the beneficiary's position as subordinate only to that of the company's president. A financial manager, operating manager, and marketing employee are shown as the beneficiary's immediate subordinates. The petitioner stated that the beneficiary's responsibilities included controlling the foreign entity's budget and finances. The beneficiary supervised and analyzed the company's accounting and financial results, conducted audits, and provided advice regarding various investments.

The petitioner submitted its own organizational chart, which was virtually identical to the one submitted initially in support of the petition. There were two distinctions between the earlier chart and the one provided more recently in response to the RFE. The first distinction is the job title of the head of the company. The first chart referred to him as the chief manager, while the more recent chart refers to him as the company president. The other distinction is that the first organizational chart indicated that the chief manager occupied two positions within the company's hierarchy—the position of chief manager as well as the marketing position. In the more recent organizational chart, the marketing position is filled by the same individual that fills the position of kitchen chief. Generally, when responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). In the instant matter, the petitioner does not indicate when the changes within its organization occurred.

Although the petitioner provided a position description for the beneficiary, the description is virtually identical to the one provided initially in support of the petition. The main distinction is the assignment of a percentage of time attributed to the job responsibilities in nos. 1-3 above. The petitioner indicated that the elaboration and updating of the company's financial plan would consume 25% of the beneficiary's time; the establishment of financial goals and policies would consume 50% of her time; and establishing strategic plans would consume another 25% of her time. Although the petitioner included the responsibility discussed in no. 4 above (from the previous job description), it was not assigned a percentage of time.

In a decision dated January 23, 2006, the director denied the petition noting that the description of the beneficiary's proposed position in the United States suggests that the beneficiary would primarily perform non-qualifying job duties. The director further found that the beneficiary would not oversee the work of professional, supervisory, or managerial personnel who could relieve her from having to perform non-qualifying tasks.

With regard to the beneficiary's proposed employment in the United States, the director found that the petitioner failed to indicate who actually performs the financial services the beneficiary purportedly oversees and concluded that the petitioner failed to establish that the beneficiary would primarily perform tasks of a qualifying nature.

On appeal, the petitioner recites the statutory<sup>2</sup> definition of managerial capacity and states that the beneficiary is responsible for directing the preparation of the petitioner's financial reports and forecasting the petitioner's financial status. While this claim suggests that someone other than the beneficiary would actually prepare the petitioner's financial reports (in this matter, the operating manager and marketing employee), it also suggests that the beneficiary herself would create a financial plan for the petitioner. In fact, it appears that her discretion over the company's budget is primarily based on the financial plan she creates. While the creation of a financial plan seems to consume only 25% of the beneficiary's time and, therefore, cannot be deemed the beneficiary's primary duty, the remainder of the beneficiary's job description is primarily comprised of broad job responsibilities, which are undefined with specific duties. Stating that the beneficiary's job primarily consists of analyzing reports, making financial forecasts, and setting the petitioner's financial goals and policies only provides a general scope of the beneficiary's job. It does not, however, illustrate the beneficiary's typical day in terms of specific job duties. In examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The actual duties themselves 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). In the instant matter, this necessary information has not been provided.

Furthermore, the petitioner suggests throughout the beneficiary's job description, that the beneficiary oversees the company's two department heads. However, this claim is not illustrated in the petitioner's organizational chart, which illustrates a hierarchy where the beneficiary is on equal footing with the department heads she is purportedly managing. In fact, the first organizational chart indicates that the head of company was carrying out the marketing duties. If the beneficiary is purportedly overseeing the work of the operating manager and marketing employee, the beneficiary would have had to have been overseeing the work of her direct superior. 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). The petitioner has not resolved this considerable inconsistency.

With regard to the beneficiary's position abroad, the director concluded that the description of duties was too broad to determine what the beneficiary actually did on a daily basis.

In response, the petitioner merely reiterates the claim that the beneficiary was employed in a qualifying capacity. However, no further information is provided with regard to the beneficiary's specific day-to-day duties. As properly stated by the director, specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103.

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<sup>2</sup> The petitioner also cited a number of sections from the regulations pertaining to L-1A nonimmigrant petitions. However, the AAO notes that the instant matter concerns a Form I-140 immigrant petition. Therefore, the relevant eligibility provisions are found in 8 C.F.R. § 204.5(j), not 8 C.F.R. § 214.2(l). As this error is not outcome determinative, the AAO merely notes the correct information for the record.

Thus, a review of the instant record indicates that the petitioner has failed to provide sufficient information to enable the AAO to conclude that the beneficiary's duties abroad and her prospective duties in the United States would be primarily within a managerial or executive capacity. For this reason, the petition may not be approved.

The remaining issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary's proffered wage.

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

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

On Part 6, Item 9 of the petitioner's Form I-140, the petitioner indicated that the beneficiary would be compensated \$1,500 per week. Based on an average 52-week year, the beneficiary's annual compensation would be \$78,000. In an effort to establish its ability to pay, the petitioner has submitted the beneficiary's 2005 W-2 wage and tax statement showing that she was compensated a total of \$56,100. The AAO acknowledges that until the petition is approved the petitioner is not required to pay the beneficiary's proffered wage. Regardless, the fact that the petitioner compensated the beneficiary nearly \$22,000 less than the proffered wage does not establish that the petitioner is able to compensate the beneficiary \$78,000 per year.

That determination can alternatively be made by analyzing 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. In the instant matter, the petitioner's most recent tax return is for the year 2004. As the petition itself was not filed until the year 2005, the AAO cannot use the 2004 tax return to determine the petitioner's ability to pay.

The AAO can also review the petitioner's net current assets in order to establish the petitioner's ability to pay. However, despite the petitioner's claim that the income statement from January to November of 2005, which the petitioner submitted on appeal, is audited, there is no evidence that it is in fact audited. The record merely shows that it was completed by an agent licensed to provide income tax services. As such, based on the

documentation submitted, the AAO cannot affirmatively conclude that the petitioner had the ability to pay the beneficiary's proffered wage.

As a final note, service records show the petitioner's previously approved L-1 employment of the beneficiary. With regard to the beneficiary's L-1 nonimmigrant classification, it should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. See §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. Cf. §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427.

In addition, the approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1 petitions. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported 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).

Finally, 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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown 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.