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U.S. Citizenship and Immigration Services

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FILE: WAC 05 173 53380 Office: CALIFORNIA SERVICE CENTER Date: AUG 07 2006

IN RE: Petitioner:
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:

[redacted]

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 an Arizona corporation engaged in the business of marketing and distribution of modular and custom cabinetry manufactured by the claimed parent organization, which is located in Canada. The petitioner seeks to employ the beneficiary as its operations 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 on two independent grounds of ineligibility: 1) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer; and 2) the petitioner failed to establish its ability to pay the beneficiary's proffered wage of $70,000 per year.

On appeal, counsel disputes the director's conclusions and submits a statement and additional documentation 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):
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> * * *
>
> > (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 has a qualifying relationship with a foreign entity.

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;

* * *

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*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 the statement dated May 26, 2005 the petitioner stated that the beneficiary's foreign employer owns 72.9% of the petitioner's outstanding issued shares. In support of this assertion, the petitioner provided an annual report for the state of Arizona indicating that the petitioner is authorized to issue 100,000 shares of common stock at a par value of $.01 and that it had, in fact, issued 10,968 shares cumulatively to 592813 Alberta, Ltd. And to [redacted] The petitioner also provided a corporate profile sheet stating the place and date of the petitioner's incorporation as well as the authorized and issued shares and their par value. The profile indicates that 8,000 shares were issued to 592813 Alberta, Ltd., 2,968 shares were issued to [redacted] and 1,935 shares were issued to the petitioner itself as treasury stock (as opposed to common stock).

On October 15, 2005, Citizenship and Immigration Services (CIS) issued a request for additional evidence in an attempt to determine whether the petitioner adequately documented its claimed relationship with 592813 Alberta, Ltd., the beneficiary's foreign employer. Namely, CIS instructed the petitioner to provide the following: 1) proof of stock purchase, including original wire transfers, cancelled checks, deposit receipts, or other bank documentation showing that the foreign entity paid for its ownership of the petitioner's stock; 2) stock certificates; 3) stock ledger showing any stock certificates issued or cancelled as well as the purchase price of any stock sold and the party to whom it was sold; and 4) the petitioner's articles of incorporation.

In response, the petitioner provided the following documentation:

1) The petitioner's stock ledger indicating that stock certificates nos. 1-4, which were issued in 1994, and stock certificate no. 7, which was issued in 1996, were all cancelled. The date of cancellation of the first four stock certificates is not provided, while stock certificate no. 7 appears to have been cancelled in 2001. Stock certificate no. 5 issued 8,000 shares of the petitioner's stock on November 28, 1994 to the beneficiary's foreign employer; and stock certificate no. 6 issued 2,968 shares to [redacted] on September 13, 1996. The ledger further shows that certificate no. 7, in the amount of 1,935 shares, remains issued as "treasury."

2) Copies of stock certificates 5 and 6 reiterating the information provided in the stock ledger and further showing that the par value of the petitioner's stock is $.01.

3) Subscription Offer dated April 29, 1994 stating that the beneficiary's foreign employer was the subscriber of 10,000 shares of stock for which it would pay $10,000.

4) Minutes of Special Meeting of Shareholders dated November 28, 1994. The document states that the petitioner initially issued 10,000 shares of its stock to the beneficiary's foreign employer and that 2,000 of those shares were subsequently transferred to [redacted] on a unanimous shareholder motion.

5) Minutes of Special Meeting of Board of Directors dated September 13, 1996 stating that 1,935 shares of the petitioner's stock at a par value of $.01 were issued to [redacted] by a unanimous shareholder motion. The document further indicated that an additional 968 shares would be issued to [redacted] to compensate him for the overvaluation of the stock initially issued to him.

6) The petitioner's unaudited financial statement as of September 30, 2005 and the petitioner's tax returns from 1994 through 2004. With the exception of the tax returns for 1995 and 2002, all of the remaining documents show that the petitioner retained $80,000 in share capital. It is noted that the 2002 tax return was incomplete and Schedule L of the petitioner's 1995 tax return shows that the petitioner started the year with $10,000 in stockholder equity and ended the year with $80,000.

7) The petitioner's articles of incorporation stating that the petitioner was authorized to issue up to 100,000 shares of its stock at a par value of $.01.

On January 25, 2006, the director denied the petition concluding that the record contains inconsistent information documenting the petitioner's ownership. Namely, the director questioned the origin of the additional $70,000 of stockholder equity that first appeared in the petitioner's 1995 tax return.

On appeal, counsel asserts that the documentation provided by the petitioner is sufficient to establish that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer. The petitioner also resubmits several of the documents previously provided.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the instant matter, the director properly pointed out the documentation provided by the petitioner is fraught with significant inconsistencies. Specifically, the director questioned the significant change in the petitioner's capital stock from $10,000 to $80,000, which appeared in Schedule L, Item 22(b) of the petitioner's 1995 tax return. The documentation on record does not explain this change, nor does it explain the origin of the initial

$10,000 in capital stock in light of the number of documents on record, which indicate that the par value for any sale of the petitioner's stock is $.01. Based on the par value assigned by the petitioner, in order to obtain $10,000 the petitioner would need to sell 1,000,000 shares of stock, which it is prohibited from doing based on the documentation authorizing the petitioner to issue no more than 100,000 shares of stock. Thus, while indicating that the petitioner can only issue 100,000 of stock, which would amount to $1,000 in stock holder equity capital, the petitioner's 1995 tax return indicates that the petitioner issued $80,000 in stock, which would indicate that the petitioner is authorized to issue 8,000,000 shares of its stock. 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). In the instant matter, the petitioner has failed to even acknowledge, much less provide documentation, to resolve these considerable inconsistencies. While counsel states that the petitioner's claim is adequately documented, the AAO notes that the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based on the evidence of record, the AAO concludes that the petitioner has failed to provide credible documentary evidence to establish that a majority of its stock is owned by the beneficiary's foreign employer as claimed. Therefore, the petitioner has not established that it has met the requirement specified in 8 C.F.R. § 204.5(j)(3)(i)(C).

The second 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.

The director determined that the petitioner failed to establish its ability to pay the beneficiary's proffered wage of $70,000 per year. This determination appears to have been primarily based on the petitioner's tax returns from 1994 through 2004. However, the AAO notes that the petitioner only has the burden of establishing its eligibility at the time of filing, which took place in 2005, continuing until the beneficiary is granted lawful permanent residence. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, none of the documentation from 1994 through 2004 can be used to determine the petitioner's ability to pay the beneficiary's proffered wage.

Notwithstanding the director's apparent faulty reasoning, the AAO concurs with his conclusion concerning the petitioner's ability to pay.

On appeal, counsel discusses the petitioner's gross and net annual income and claims that this income pays the salaries of 24 employees as well as various long-term business investments. Counsel refers to the petitioner's gross profit as cited in the financial statement dated December 31, 2005.

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 submits a letter dated February 23, 2006 from its vice president stating that the beneficiary currently earns $70,000 annually and refers to a copy of the beneficiary's 2005 W-2 wage and tax statement, which indicates that the beneficiary's wages and tips for 2005, the year during which the Form I-140 was filed, were in the amount of $50,572.19. Thus, contrary to counsel's assessment of the evidence, the record does not show that the beneficiary received the proffered wage in 2005. While the petitioner is only required to establish its ability to pay the proffered wage rather than show that it actually was paying that wage when the Form I-140 was filed, the AAO notes that counsel's statements suggest that the petitioner was actually paying the proffered wage at the relevant time period. This statement is not, however, corroborated by the beneficiary's 2005 W-2 statement.[1] 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 unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As an alternate means of determining the petitioner's ability to pay, the AAO may 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). Since the petition's priority date falls on June 6, 2005, the relevant tax return is the one that covers the 2005 calendar year. The petitioner has not submitted its 2005 tax return on appeal, thereby precluding the AAO from conducting an analysis of the relevant documentation.

Finally, the AAO may review the petitioner's net current assets, which 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. Although the petitioner has provided its balance sheet to account for the 2005 calendar year, this document was not audited. As the record lacks sufficient documentation to enable an accurate analysis of

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[1] It is noted that the beneficiary appears to have only begun employment with the petitioner in April 2005. As such, it is possible that the beneficiary would have been compensated $70,000 total if he had been employed the entire year. However, this was not the case and payroll records were also absent prohibiting CIS from verifying that the beneficiary's pay rate would have supported such a conclusion. As is, CIS cannot conclude that the beneficiary was paid at a rate of $70,000 at the time the petition was filed or whether the rate was later increased or a one-time bonus was given, inflating the beneficiary's compensation following the date the petition was filed.

the petitioner's liquid assets, the AAO cannot affirmatively determine that the petitioner had the ability to pay the beneficiary's proffered wage at the time it filed the Form I-140.

Additionally, though not addressed in the director's decision, the record does not establish with a sufficient degree of clarity that the beneficiary was employed abroad and would be employed by the U.S. petitioner in a qualifying 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). In the instant matter, the petitioner's descriptions of the beneficiary's past and proposed duties are overly broad, focusing primarily on the beneficiary's general responsibilities rather than specific job duties the beneficiary has performed and would perform in executing those responsibilities. 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). As the petitioner has not provided specific information regarding the beneficiary's actual duties, the AAO cannot determine whether the beneficiary would be employed in a primarily managerial or executive capacity.

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 issues raised in the above paragraph, this petition cannot be approved.

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, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The approval of a nonimmigrant petition or multiple petitions 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 at 1043, *aff'd,* 345 F.3d 683.

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.