

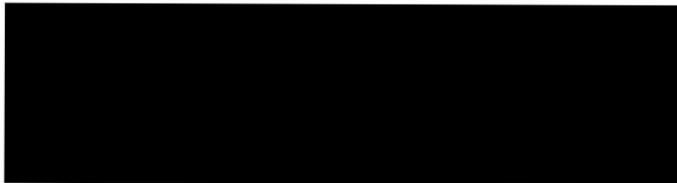
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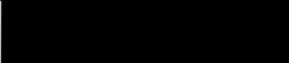
U.S. Citizenship and Immigration Services

**PUBLIC COPY**



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FILE:



Office: TEXAS SERVICE CENTER

Date:

**APR 03 2006**

SRC 04 233 51155

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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

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 The director's decision will be withdrawn and the petition will be remanded to the Texas Service Center for further review and entry of a new decision.

The petitioner is a limited liability company organized and authorized to conduct business in the State of Louisiana in August 2001. The petitioner is engaged in the construction business. The petitioner seeks to employ the beneficiary as its marketing 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 determined that the petitioner had not established its ability to pay the beneficiary the proffered wage.

On appeal, counsel for the petitioner submits a brief and additional evidence to establish the petitioner's ability to pay the proffered wage.

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 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 that 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. See 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered annual wage of \$38,000.<sup>1</sup>

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.

When determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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. As the petition's priority date falls on August 31, 2004, the AAO must examine the petitioner and beneficiary's tax records for the 2004 year.

The petitioner provided an Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, issued to the beneficiary for \$31,120.23 in the 2004 year. In an August 10, 2005 response to the director's May 11, 2005 request for further evidence, counsel for the petitioner noted that the beneficiary had also received \$23,130 for professional services rendered to the petitioner as substantiated by an IRS Form 1099, Miscellaneous Income. The petitioner did not provide the IRS Form 1099 for review. On appeal, the petitioner provides an IRS Form 1099 purportedly issued to the beneficiary in 2004 in the amount of \$17,475.40.

When analyzing a petitioner's ability to pay the proffered wage, the fundamental focus is whether the employer is making a "realistic" or credible job offer and has the financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977).

However, it is not possible to conclude from the inconsistent information provided whether the petitioner actually paid the beneficiary an amount over and above the salary claimed on the IRS Form W-2 and annotated on the petitioner's 2004 IRS Form 1065, U.S. Return of Partnership Income. 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). Further, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R.

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<sup>1</sup> The petitioner's Form I-140, Immigrant Petition for Alien Worker, indicated the proffered wage would be \$38,000. The petitioner's August 26, 2004 letter in support of the petition indicated that the beneficiary's salary had been and would continue to be \$42,000 per year plus bonus.

§ 103.2(b)(2)(i). Counsel's reference to an IRS Form 1099 but failure to provide it in response to the director's request for evidence, undermines the legitimacy of the IRS Form 1099 submitted on appeal.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In this matter, the petitioner's 2004 IRS Form 1065, U.S. Return of Partnership Income, shows it had sufficient net income in the amount of \$8,823 when added with the beneficiary's IRS Form W-2 salary to pay the beneficiary the proffered wage of \$38,000. The director's decision will be withdrawn as it relates to the issue of the petitioner's ability to pay the proffered wage.

Beyond the decision of the director, the petitioner has not provided adequate evidence that the beneficiary's position with the United States petitioner will be in a managerial or executive capacity. For this reason, the petition will be remanded to the director for further proceedings consistent with the discussion below.

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.

On the Form I-140, Immigrant Petition for Alien Worker, the petitioner indicated that the beneficiary would be employed as its marketing manager and would establish and execute marketing goals, policies, strategies, and procedures. In the petitioner's August 26, 2004 letter appended to the petition, the petitioner indicated that it needed a marketing manager who had knowledge of general construction as well as information technology and that the beneficiary had experience in these areas.

In a statement attached to counsel's response to the director's request for evidence, the petitioner indicated that the beneficiary would plan and implement commercial and marketing activities for the petitioner's three business units (projects, commercialization, and services). The petitioner also listed the beneficiary's duties as:

1. Contribute to the development of policy and strategy for the Commercial, Marketing and Customer Service Areas (10%)
2. Plan and implement marketing strategy, including advertising and promotion (10%)
3. Establish and manage agreements as agents/distributors of building products providers (10%)
4. Perform Market Analysis studies (10%)
5. Plan and implement sales and customer retention, development and service (5%)
6. Plan and manage commercial and marketing resources according to planned budgets (5%)
7. Maintain administration and relevant reporting and planning systems (5%)
8. Participate in attainment [sic] financial resources for the projects through Bank building loans and investors (10%)
9. Select and manage external agencies; establishing alliances; sales organization and commercial agreements with Real Estate agents for formulating, promoting and selling the building Projects; evaluating and developing proposals and projects (20%)

10. Establish and execute goals, policies, strategies and procedures with in [sic] the information technology area including Web site administration (10%)
11. Maintain and develop corporate image and reputation, internal communications and awareness of corporate direction; mission, goals and activities (5%)
12. Execute the responsibilities of a company director according to lawful and ethical standards.

The petitioner noted that this position was essentially in an executive capacity and that the beneficiary would direct the functions of establishing goals and policies and making decisions in the definition of projects, agreements with providers, agents, and other independent service providers. The petitioner indicated that the essential function performed by the beneficiary is related to the commercial promotion and sales of the petitioner's different business units and participation in the development and execution of the initial creation of the subsidiary, and managing commercial relations with the providers, clients and allies.

The petitioner further indicated that the beneficiary had the authority to hire and fire agents, personnel, contractors, and providers; establish commercial accounts, formulate and approve business plans and building projects; sign contracts with investors, buyers, sellers, providers, contractors, financial institution, and investors; develop business relationships; and define and implement technical (IT) and commercial/marketing policies.

The petitioner also provided its IRS Forms W-2, for the 2004 year. The petitioner's IRS Forms W-2 showed that it had employed the beneficiary, an individual holding both the general manager and technical director positions who was paid \$38,603.54, and an individual employed part-time earning only \$4,079.30 for the 2004 year. The petitioner's organizational chart depicted the beneficiary as directly below the position of general manager and over a real estate agency and unidentified sales agents, contractors, and providers.

When examining the managerial or executive capacity of a beneficiary, CIS reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy.

In this matter, the petitioner provides a general description of the beneficiary's duties. Developing, planning, implementing a marketing strategy and sales and customer retention, development and service, and establishing goals, policies, strategies, and procedures are broad and ill-defined duties. 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). 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. at 1108.

The petitioner's indication that the beneficiary will perform market analysis, maintain the petitioner's web site administration and relevant reporting and planning systems, and obtain financial resources, suggest that the beneficiary will perform routine operational tasks associated with the beneficiary's marketing and public relations function. 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). Likewise, the beneficiary's tasks of selecting and managing real estate agents and evaluating and developing proposals and projects is more akin to an individual providing first-line supervisory duties over salespersons and performing the petitioner's services.

The record in this matter suggests that the petitioner employs the beneficiary primarily to sell its completed custom constructed houses while the petitioner's other full-time employee, the general manager/technical director, finds the projects and supervises the construction. The record does not contain documentary evidence that the petitioner employs other individuals or contractors to carry out these operational tasks. The record is not sufficient to establish that the beneficiary's position is more than that of a first-line supervisor. 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 petitioner's indication that the beneficiary is an executive performing an executive function is not persuasive. First, the petitioner's description of the beneficiary's job duties does not correspond to the duties of an individual responsible primarily for managing or directing the management of a function, essential or otherwise. If a petitioner claims that the beneficiary is managing an essential function or directing the management of a function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function or **directing the management of the function.** 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. Again, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. at 604.) In this matter, the petitioner has not provided evidence that establishes that the beneficiary satisfies the criteria of an executive who directs the management of a function.

The AAO recognizes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, the totality of the record in this matter raises questions regarding the legitimacy of the beneficiary's claimed managerial or executive position. Upon review, the description of the beneficiary's duties, the petitioner's type of business when the petition was filed, the petitioner's organizational chart, and the absence of evidence confirming the employment of individuals other than the beneficiary, one full-time employee and a part-time or intermittent employee, cast doubt on the legitimacy of the petitioner's offer of employment in a qualifying capacity. In this matter, the AAO finds that

the petitioner's description of the beneficiary's duties does not show a realistic relationship with the nature of the petitioner's business.

On review, the record as presently constituted does not contain sufficient evidence to establish that the beneficiary's duties for the petitioner will comprise primarily executive or managerial duties. The director is instructed to request: a detailed description of the beneficiary's duties, including the duties the beneficiary performs on a daily basis; that the petitioner identify the specific function(s) the beneficiary manages or directs, if any, and the employees or independent contractors who carry out the specific functions the beneficiary manages or directs; independent documentary evidence of the beneficiary's claimed subordinates including their names, titles, and managerial, supervisory, or professional duties, if any; and any other evidence the director deems necessary to establish the beneficiary's eligibility for this visa classification as of the date of filing the petition.

The AAO acknowledges that CIS approved L-1A nonimmigrant transferee petitions that had been previously filed on behalf of the beneficiary. With regard to the similarity of the eligibility criteria, 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 general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Accordingly, many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Moreover 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. *See* 8 C.F.R. § 103.8(d). The approval of a nonimmigrant petition does not guarantee that CIS will approve an immigrant petition filed on behalf of the same beneficiary.

In addition, 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).

Further, 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). The petitioner has not provided evidence or argument on appeal sufficient to overcome the director's decision.

In this matter, the petitioner has not demonstrated the beneficiary's eligibility for this immigrant visa classification. Thus the matter must be remanded and the petitioner must be given adequate time to address the deficiencies in the record as discussed above.

ORDER: The director's September 8, 2005 decision is withdrawn. The petition is remanded to the director for further proceedings in accordance with this decision.