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U.S. Citizenship  
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 01 2006  
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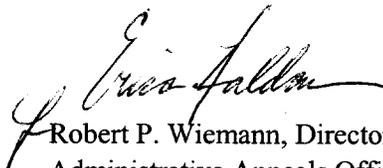
IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:  
[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, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based petition. The petitioner subsequently filed an appeal, which the Administrative Appeals Office (AAO) summarily dismissed. The matter is again before the AAO on a Citizenship and Immigration Services (CIS) motion to reopen pursuant to the regulation at 8 C.F.R. § 103.5(a)(5). The AAO will affirm the director's August 6, 2003 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 organized under the laws of the State of California that is operating as an investment company. The petitioner seeks to employ the beneficiary as its president and chief executive officer.<sup>1</sup>

In an August 6, 2003 decision, the director denied the petition concluding that the petitioner had not established its ability to pay the beneficiary his proffered annual salary as required in the regulation at 8 C.F.R. § 204.5(g)(2). Counsel for the petitioner filed an appeal on September 4, 2003, stating on Form I-290B that a brief and evidence would be submitted to the AAO within thirty days. The record indicates that counsel submitted to the director a brief and documentary evidence presented as a motion to reconsider, dated October 2, 2003.<sup>2</sup> Counsel, however, failed to submit additional evidence in support of the appeal to the AAO. Consequently, the AAO summarily dismissed the appeal in a decision dated May 18, 2004.

Pursuant to the regulation at 8 C.F.R. § 103.5(a)(5), the AAO will reopen the proceeding and consider the brief and documentary evidence submitted by counsel in regard to the instant issue.

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

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<sup>1</sup> The petitioner, Erv USA, Inc., noted in its October 22, 2002 letter that the beneficiary "has taken on the role of President and CEO of Biocare," a company that the petitioner claims is a subsidiary of the petitioning entity.

<sup>2</sup> In an undated notice to counsel, CIS rejected the motion due to the pending I-290B appeal before the AAO. It appears that the motion was also rejected in a notice dated November 7, 2003 as a result of the petitioner's failure to submit the proper fee of \$110.00. In a letter to the director, dated October 20, 2003, counsel claims that under the regulation at 8 C.F.R. § 103.5(a), the petitioner is granted "an appeal for the denial of his latest immigrant petition for an alien worker."

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 issue is whether at the time the priority date was established the petitioner demonstrated its ability to pay the beneficiary his proffered salary.

The petitioner filed the immigrant petition on October 25, 2002, thereby establishing the same priority date. On Form I-140, the petitioner, ERV USA, Inc., noted that the beneficiary would be employed at a proposed salary of \$6,000 per month.<sup>3</sup>

In a request for evidence, dated January 15, 2003, the director asked that the petitioner submit evidence of its ability to pay the beneficiary's proposed salary. The director referenced the petitioner's quarterly wage reports, which the director had requested in relation to a separate issue, and noted that the reports would be reviewed to determine the petitioner's ability to pay. The director further noted that the petitioner could also submit additional evidence in the form of corporate annual reports or audited financial statements.

Counsel for the petitioner responded in a letter dated February 26, 2003, stating that "[t]he ability to pay is inherent and plainly obvious in this case, because the company has already been paying the salary of [the beneficiary]." Counsel referenced the petitioner's quarterly wage reports and its 2001 corporate tax return as evidence of the petitioner's ability to pay.

In a decision dated August 6, 2003, the director concluded that at the time the priority date was established the petitioner did not have the ability to pay the beneficiary proposed salary of \$72,000. The director addressed the petitioner's more than \$27,000 loss in taxable income in 2001 as evidence of its inability to pay the beneficiary's proposed salary.

Counsel subsequently filed an appeal on September 4, 2003, which the AAO summarily dismissed in a decision dated May 18, 2004 due to counsel's failure to demonstrate an erroneous conclusion of law or statement of fact as a basis for the appeal. The record reflects that counsel submitted a brief to the director

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<sup>3</sup> The AAO notes that in the petitioner's October 20, 2002 letter submitted with the immigrant petition, the petitioner noted that the beneficiary would be compensated by the petitioning entity at a monthly rate of \$3,000.

prior to the AAO's May 18, 2004 decision. The AAO will consider counsel's brief in support of the present issue herein.<sup>4</sup>

Counsel states that Form I-140 contained a "clerical error" in that the beneficiary's proffered monthly wage is \$3,000 rather than \$6,000. Counsel submits a new Form I-140 reflecting the revised wages. Counsel claims that the beneficiary's compensation identified on the petitioner's 2002 quarterly wage reports, as well as the amount reported on the beneficiary's Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, demonstrate that "the employer" had the ability to pay the beneficiary's proposed annual salary of \$36,000 at the time the priority date was established. Counsel acknowledges an approximately \$20,000 loss in taxable income recognized by [REDACTED] the petitioner's purported United States subsidiary, in 2002, but requests that the AAO "consider the wages already paid to the beneficiary when determining the ability to pay for the tax year 2002." Counsel submits an incomplete 2002 corporate tax return for [REDACTED] quarterly wage reports for the quarters ending December 31, 2001 through June 30, 2003, the beneficiary's year 2002 Form W-2 from [REDACTED] and a copy of the petitioner's October 22, 2002 letter, in which the petitioner identified the beneficiary's proposed monthly wage of \$3,000.

Upon review, the petitioner has not demonstrated that at the time the priority date was established it had the ability to pay the beneficiary's proposed salary.

The AAO will consider the petitioner's ability to pay the proposed annual salary of \$72,000. Counsel's request on appeal to amend the petition is not properly before the AAO. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. *See Id.* at 176. Accordingly, the petitioner's revised Form I-140 submitted on appeal will not be considered.

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 did not establish that it had previously employed the beneficiary. The documentary evidence submitted in support of the petitioner's ability to pay, including IRS Form W-2, corporate income tax returns, and quarterly wage reports for the year 2002, identifies [REDACTED] as the payor of the beneficiary's salary rather than the petitioning entity. The record contains limited evidence of the petitioner's financial status. The regulation at 8 C.F.R. § 204.5(g)(2) states that the "prospective United States employer" must demonstrate its ability to pay the proffered wage. Parts one and five of Form I-140 identify

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<sup>4</sup> The AAO notes that pursuant to the regulation at 8 C.F.R. § 103.3(a)(2)(viii), an appellate brief shall be titled such and shall be submitted directly to the AAO. Here, following the filing of Form I-290B, counsel submitted to the California Service Center a "Motion to Reconsider," and did not provide the AAO with additional evidence in support of the appeal. CIS cannot be expected to guess at counsel's intentions and consider untimely and improperly submitted materials. Accordingly, the AAO's summary dismissal of the September 4, 2003 appeal was proper.

the petitioner, "ERV USA, Inc.," as the prospective employer. The petitioner further stated in its October 22, 2002 letter that the beneficiary would be compensated by ERV USA, Inc. Accordingly, as result of the limited documentary evidence associated with ERV USA, the petitioner has not established its ability to pay the beneficiary his proffered salary. 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 AAO notes a discrepancy in counsel's attempt to satisfy the "ability to pay" requirement through financial documentation of the company [REDACTED]. Relevant to counsel's claim is the proposition [REDACTED] subsidiary of the petitioning entity. The petitioner has not satisfied this essential element.<sup>5</sup> Therefore, counsel's claim that Biocare's tax documents and quarterly wage reports demonstrate the ability to pay the beneficiary's proffered wage is misplaced.

Based on the above discussion, the petitioner has failed to demonstrate its ability to pay the beneficiary's proffered salary at the time the priority date was established. Accordingly, the AAO will affirm the director's August 6, 2003 decision.

Beyond the decision of the director, the petitioner has not demonstrated that the beneficiary would be employed by the petitioning entity in a primarily managerial or executive capacity. In its October 22, 2002 letter, the petitioner provided a job description of the beneficiary's proposed position as "President of ERV-USA." However, in the same letter, the petitioner described the beneficiary's job responsibilities with [REDACTED] where the petitioner noted the beneficiary "[had taken] on the active role of President and CEO in April 2000." Again, the petitioner's claim that the beneficiary's employment with [REDACTED] satisfies the requirement of proposed employment in a managerial or executive capacity is misplaced. The petitioner has not satisfied the crucial requirement demonstrating a qualifying relationship with [REDACTED] and the petitioning entity. Based on the petitioner's representations and the financial documents discussed above, the beneficiary is clearly not working for the petitioner in any employment capacity.

Even if the AAO were to consider the beneficiary's role with [REDACTED] the provided job description is too limited to conclude what managerial or executive the beneficiary would primarily perform within the company. The petitioner has provided such broad claims as the beneficiary "supervise[s] other managers," "directs business strategies," "formulates financial plans," "establishes policies and overall operational guidelines," "exercises wide latitude in personnel management," "[reviews] financial reports and budget plans," and "negotiates contracts." 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). Accordingly, the petition will be denied for this additional reason.

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<sup>5</sup> As evidence of [REDACTED] ownership interests, the petitioner submitted three stock certificates, numbered thirteen, fourteen, and fifteen, identifying the petitioner as the owner of a cumulative amount of 5,000 shares of stock. The petitioner did not provide stock certificates one through twelve. In addition, the AAO notes a discrepancy in that stock certificate number fourteen, dated August 6, 1999, was issued after stock certificate number fifteen, issued on July 31, 1999. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The issue of a qualifying relationship will be further discussed herein.

An additional issue not addressed by the director is whether the petitioner demonstrated the existence of a qualifying relationship between the United States entity and the beneficiary's foreign employer. The regulation at 8 C.F.R. § 204.5(j)(3) requires that the petitioner demonstrate that "the prospective employer in the United States is the same employer or subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas." Based on the record, the beneficiary is employed by the company Biocare. As previously discussed, the record does not demonstrate [REDACTED] maintains a qualifying relationship with the beneficiary's foreign employer. To establish a qualifying relationship, the petitioner would have to demonstrate that the foreign employer indirectly owns and controls [REDACTED] its ownership of the petitioning entity. However, there is insufficient evidence that [REDACTED] owned and controlled by the petitioning entity. As evidence of Biocare's ownership interests, the petitioner submitted three stock certificates, numbered thirteen, fourteen, and fifteen, identifying the petitioner as the owner of a cumulative amount of 5,000 shares of stock. The petitioner did not provide stock certificates one through twelve. This information is essential to determining whether the petitioning entity owns a majority interest in [REDACTED]. Again, 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. In addition, the AAO notes a discrepancy in that stock certificate number fourteen, dated August 6, 1999, was issued after stock certificate number fifteen, issued on July 31, 1999. Moreover, the petitioner has not reconciled these claims with the information contained on Biocare's 2001 U.S. Corporation Income Tax Return, on which [REDACTED] is identified as the owner of 55 percent of the company's stock. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. For this additional reason, the petition will be denied.

A third issue not considered by the director is whether the petitioner had been doing business in the United States for at least one year at the time of filing. The regulation at 8 C.F.R. § 204.5(j)(2) defines "doing business" as:

[T]he regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

Here, the petitioner has not offered documentary evidence of its "regular, systematic, and continuous" operations in the United States. The petitioner's corporate income tax return indicates that the company did not incur any sales during the year 2001 and realized a negative net taxable income. Additionally, other than bank statements for the years 1999 through 2000, the petitioner has not offered any statements establishing business activity performed by the petitioner during the year prior to the filing of the petition. 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.

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).

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. See, e.g., *Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003).

However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after CIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. In this case, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of the beneficiary's eligibility is not credible. Accordingly, the petitioner has not established the beneficiary's eligibility for the requested immigrant visa classification.

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. Here, that burden has not been met.

**ORDER:** The director's August 6, 2003 decision is affirmed.