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U.S. Citizenship
and Immigration
Services

B4

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FILE: [REDACTED]
EAC 03 051 53189

Office: VERMONT SERVICE CENTER

Date: FEB 22 2007

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:

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 Director, Vermont Service Center, denied the employment-based petition. The petitioner filed an appeal with Administrative Appeals Office (AAO), which the AAO dismissed in a decision dated June 1, 2005. The petitioner subsequently filed a motion to reopen or reconsider the AAO's decision. The Vermont Service Center incorrectly considered the motion and approved the petition on October 19, 2005. In a decision dated July 6, 2006, the director revoked the petition's approval, citing the regulation at 8 C.F.R. § 205.1(a)(3)(iii)(C), which allows for the automatic revocation of the approval of an employment-based petition on the basis of withdrawal by the petitioner. The director forwarded the instant matter to the AAO for review. In a letter dated November 1, 2006, the petitioner challenged the revocation, claiming that it had not filed a written notice of withdrawal of the petition.

The regulation at 8 C.F.R. § 103.5(a)(1)(ii) states that the official having jurisdiction over a motion to reopen or reconsider is "the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction." In this instance, jurisdiction over the petitioner's June 30, 2005 motion to reopen or reconsider remained with the AAO following its review of the petitioner's appeal. The Vermont Service Center did not have jurisdiction to consider the petitioner's motion. Accordingly, the director's October 19, 2005 decision approving the immigrant visa petition is withdrawn. The AAO will grant the petitioner's motion. The prior decision of the AAO is affirmed.

The petitioner filed the instant 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 New Jersey that is engaged in importing, exporting, and distributing scanners and computer parts. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. On appeal, the petitioner's former counsel challenged the director's decision that the beneficiary's proposed employment would not be primarily managerial or executive in nature.

In a June 1, 2005 decision, the AAO dismissed the appeal concluding that the limited and inconsistent documentary evidence offered by the petitioner with respect to the beneficiary's proposed employment and its staffing levels precluded the finding that the beneficiary would be primarily employed as a manager or executive. The AAO specifically noted a lack of evidence detailing the beneficiary's managerial or executive job duties, as well as discrepancies in the workers purportedly employed subordinate to the beneficiary. The AAO further observed that the petitioner had not established its ability to pay the beneficiary's proffered annual wages at the time of filing.

The petitioner files the instant motion to reopen and reconsider the AAO's decision, claiming the beneficiary's assignment in the United States organization is comprised of primarily executive duties. The petitioner submits a brief and its amended year 2002 income tax returns in support of the motion.

The regulation at 8 C.F.R. § 103.5(a)(2) states:

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [Citizenship and Immigration Services (CIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

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

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

* * *

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

The language of the statute is specific in limiting this provision to only those executives or managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in the instant proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;

(ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

(i) Directs the management of the organization or a major component or function of the organization;

(ii) Establishes the goals and policies of the organization, component, or function;

(iii) Exercises wide latitude in discretionary decision-making; and

(iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

On motion, the petitioner provides the following account of the beneficiary's proposed employment and its staffing levels:

[The beneficiary] performs the executive duties in the company setting policy dealing with budgets and dealing with product advances. One employee is working as our import export manager as well as sales manager. His work includes the direction of outside salespeople who work on a commission basis. One employee is responsible for maintaining the corporate book and records. Our consultant assists with the administration in the company and performs some sales functions.

All of the above people are professionals who are directed by [the beneficiary].

The petitioner also explains inaccuracies in its 2002 income tax return that were raised by the AAO in its initial review. Specifically, the AAO noted in its June 1, 2005 decision that the sole income tax return submitted by the petitioner "is replete with errors and discrepancies regarding the petitioner's ownership and the salaries the petitioner paid to its employees." The AAO noted that the petitioner had not corroborated its claim of employing four workers with independent concrete evidence of compensation paid to its purported

personnel. The petitioner explains in its brief on motion that its administrative director is paid by the petitioner as an outside consultant, while a second employee "is compensated through the provision of a car and all of the expense relating thereto." According to the petitioner, neither employee receives a salary from the petitioner. The petitioner also noted that its 2002 income tax return reflects its financials for the fiscal year from July 1, 2002 through June 30, 2003, and therefore, may not coincide with the salaries reported on its Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement. The petitioner submits an amended fiscal year 2002 income tax return reflecting an increase in the beneficiary's salary to \$78,500.

Upon review, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily 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).

As previously addressed by the AAO in its June 1, 2005 decision, the limited job descriptions offered for the beneficiary's proposed employment are insufficient to establish that he would occupy a primarily managerial or executive position. The brief statement submitted by the petitioner in response to the director's request for evidence indicated that the beneficiary would negotiate sales contracts for the petitioner, set company policies, "[make] all executive determinations," and notify the foreign entity of product developments. On motion, despite the AAO's observation of an inadequate job description, the petitioner states only that the beneficiary would make all executive decisions with respect to the company's policies, budget and product modifications. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The AAO notes that 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)).

Additionally, the petitioner has failed to resolve the noted inconsistencies in its staffing levels at the time the petition was filed. The petitioner attempts to reconcile the discrepancies in its personnel levels through an amended 2002 income tax return, which indicates that compensation in the amount of \$4,195 was paid to its administrative director as a "consulting fee" and \$4,800 was paid for auto expenses incurred by its corporate secretary. According to the petitioner's statements on motion, the corporate secretary's entire earnings for fiscal year 2002 amounted to \$4,800. The petitioner's representation that its administrative director and corporate secretary rendered full-time services to the petitioner in exchange for the extremely minimal amount in compensation is highly questionable, and casts doubt on the staffing levels purportedly maintained by the petitioner on the filing date. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The federal income tax return also reflects salaries in the amount of \$32,400. Based on the information contained on the 2002 IRS Forms W-2 issued by the petitioner, at least a portion of this amount was likely paid to its import-export manager. Regardless, in light of the various unexplained inconsistencies, the

petitioner has failed to corroborate its claim of employing workers in positions related to the company's administration, sales, marketing, import and export, and customer service functions. 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 petitioner's limited discussion on motion is not adequate to overcome the AAO's well-founded conclusion of insufficient evidence with respect to the beneficiary's specific managerial or executive job duties or the personnel that would purportedly support the beneficiary in a primarily managerial or executive capacity. 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 record, as presently constituted, does not demonstrate that the beneficiary would be employed by the petitioning entity in a primarily managerial or executive capacity. Accordingly, the prior decision of the AAO is affirmed.

The AAO will also consider the issue of whether the petitioner demonstrated its ability to pay the beneficiary's proffered annual wages at the time of filing.

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

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

The AAO noted in its June 1, 2005 decision the petitioner's failure to demonstrate its ability to pay the beneficiary's annual salary of \$60,000 as a result of conflicting evidence in the wages paid to the beneficiary in 2001 and insufficient documentation of the petitioner's ability to pay \$60,000 at the time of filing in December 2002. The AAO found that despite the beneficiary's receipt of \$48,000 in 2001, the year before the instant petition was filed, the petitioner had not offered quarterly wage reports filed in 2002 or the beneficiary's 2002 IRS Form W-2 suggesting that it had the ability to pay the beneficiary's additional proffered wages.

On motion, the petitioner submits a revised income tax return for fiscal year July 1, 2002 through June 30, 2003, on which the beneficiary is identified as receiving \$78,500 in compensation as an officer of the corporation. The petitioner provides a June 22, 2005 letter, in which its accountant states that a portion of the beneficiary's compensation as an officer was "misclassified" on the previous income tax return as purchase payments of the petitioning entity. The amended tax return reflects the beneficiary's receipt of \$78,500. The AAO notes that the petitioner's original income tax return for the fiscal year ending June 30, 2003 was not provided for the record however, the beneficiary's 2002 IRS Form W-2 reflects compensation in the amount of \$35,000.

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 for the proffered wages.

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.

In this case, the AAO notes uncertainty as to the veracity of the petitioner's amended income tax return for the fiscal year ending June 30, 2003. Of notable importance is the fact that the amended tax return relied upon by the petitioner on motion is not certified as being filed with the United States Internal Revenue Service. This omission is relevant, as the petitioner made changes to the beneficiary's salary after the inadequacy was raised by the AAO, thus creating suspicion as to the reliability of the petitioner's claims. 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). Also, the petitioner did not provide its original 2002 income tax return reflecting the purported "misclassification" of the beneficiary's salary as purchase payments of the petitioner. The accuracy of the amount in compensation paid to the beneficiary in 2002 is further questioned as a result of an earlier 2001 tax filing by the petitioner that also reported incorrect information with respect to the beneficiary's salary. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

The record does not contain independent and objective evidence sufficient to demonstrate that the petitioner had the ability to pay the beneficiary's proffered wages at the time of filing. Accordingly, the petitioner has not established the beneficiary's eligibility for the requested immigrant visa classification. The AAO's prior decision is therefore affirmed.

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 decision of the AAO dated June 1, 2005 is affirmed.