



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]
SRC 06 040 51160

Office: TEXAS SERVICE CENTER

Date: JUL 17 2007

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 Director, Texas Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant visa 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 Florida that is operating a restaurant. The petitioner seeks to employ the beneficiary as its operations manager.

The director denied the petition concluding that the petitioner had not demonstrated that: (1) the beneficiary had been employed by the foreign entity or would be employed in the United States in a primarily managerial or executive capacity; or (2) the petitioner and the beneficiary's foreign employer enjoyed a qualifying relationship on the date of filing.

On appeal, counsel challenges the director's denial of the petition and submits additional documentary evidence in support of both the beneficiary's employment as a manager or executive and the existence of a qualifying relationship between the foreign and United States companies.

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 first issue in this proceeding is whether the beneficiary was employed by the foreign 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.

The petitioner filed the immigrant visa petition on November 21, 2005. In an appended letter, dated November 1, 2005, the beneficiary was identified as having been in charge of the foreign entity's marketing department for three years prior to her entrance into the United States as a nonimmigrant.

In her October 27, 2006 decision, the director concluded that the beneficiary had not been employed by the foreign entity in a primarily managerial or executive capacity. The director stated that the beneficiary's performance of such tasks as determining promotions, sales and advertising campaigns, preparing the sales and marketing budgets, and handling media relations were not managerial or executive in nature, and

concluded that the "major part of the beneficiary's job assignment in Colombia falls outside the scope of those capacities." Consequently the director denied the petition.

On appeal, counsel fails to specifically address the beneficiary's employment in the foreign entity. On the Form I-290B, counsel merely requests that the AAO "review the record on the issues set forth in the denial of [the petition]." Included in the documentary evidence, counsel submits the foreign company's payroll records from November 16, 2006 through November 30, 2006. The limited evidence is not representative of the workers employed during the beneficiary's employment in September 1997 through August 2000 or of the capacity in which the beneficiary was employed during this period. Counsel's simple request to review the record is not sufficient to overcome the director's findings. The AAO concludes that the director correctly reviewed the record with respect to the non-qualifying job duties performed by the beneficiary while employed in the foreign company. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. 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). The petitioner has not demonstrated that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

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

In its November 1, 2005 letter, the petitioner stated that the beneficiary would occupy the position of general manager of the United States company, during which she would be responsible for the company's human resources, purchase orders, sales relationships, and operation, and the supervision of employees. The petitioner noted that the beneficiary would oversee employees in the following positions: assistant manager, two full-time and one part-time prep cook, two full-time and one part-time grill cook, three cashiers, and "a few" drivers. The AAO notes that the petitioner indicated on the Form I-140 a staff of eighteen employees, however, but for the above description, the record is devoid of evidence of the specific staffing levels maintained by the petitioner on the date of filing.

On December 20, 2005, the director issued a request for evidence requesting that the petitioner submit a statement describing the beneficiary's proposed employment, including: her position title; a list of all job duties and the percentage of time the beneficiary would devote to performing each; the managers or supervisors who would report directly to the beneficiary, and a brief description of their job duties and educational levels; the qualifications necessary to perform in the beneficiary's position; and, the level of authority held by the beneficiary. The director further asked that the petitioner explain who would provide the services offered by the petitioner.

In a letter dated February 14, 2006, the petitioner's president stated that as the general manager of the petitioning entity, the beneficiary would be responsible for human resources, including interviewing and hiring employees, determining salaries, training, and assigning work schedules. With respect to the company's sales and marketing functions, the petitioner noted that the beneficiary would be in charge of the company's in-store promotions, and the promotion of its catering service, as well as handling its advertising and direct mail campaigns. The petitioner stated that the beneficiary would also be responsible for selecting the vendors used by the petitioner, negotiating pricing, placing purchase orders, and determining expenses

and "food cost." The beneficiary was identified as supervising a marketing assistant, a manager, and an assistant manager.

The petitioner submitted a federal quarterly tax return ending December 31, 2005, which indicated that the petitioner employed a staff of ten workers in November 2005, the period during which the instant petition was filed. The AAO notes that while the petitioner submitted copies of its state quarterly reports for periods prior to and subsequent to the instant filing, none was submitted for the fourth quarter of 2005.

In her October 27, 2006 decision, the director concluded that the beneficiary would not be employed by the United States entity in a primarily managerial or executive capacity. The director noted the tasks to be performed by the beneficiary, but stated that the petitioner had not provided the requested allocation of the amount of time the beneficiary would spend performing each task. The director stated that as a result of the petitioner's failure to provide requested evidence, Citizenship and Immigration Services (CIS) could not determine whether the primary part of the beneficiary's employment would be managerial or executive in nature. Consequently, the director denied the petition.

On the Form I-290B, counsel claims that the beneficiary would be employed in a primarily executive capacity. Counsel submits what he describes as a "detailed letter" from the petitioner of the beneficiary's proposed employment, but which essentially identifies the beneficiary as the company's general manager, stating that she devotes 40 hours a week to the operation and control of the United States business. Counsel submits a second letter, dated September 28, 2000, in which the petitioner was accepted as a franchisee of the corporate franchise Chicken Kitchen Corporation.

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).

The job description suggests that the beneficiary would be performing primarily operational tasks related to the petitioner's marketing, sales, inventory, and purchasing functions. While the beneficiary would be responsible for the petitioner's hiring and firing, tasks that may be considered managerial or executive in nature, the remainder of the beneficiary's time would be spent performing such non-managerial and non-executive tasks as advertising through direct mailings, devising sales and marketing strategies, reviewing inventory, determining purchases, negotiating with vendors, and placing orders. As noted by the director, although requested, the petitioner did not designate the amount that the beneficiary would spend performing each task. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Based on the limited description, it appears that the beneficiary would be responsible for personally performing primarily non-qualifying tasks of the petitioner's business. 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).

Despite a similar finding by the director, counsel did not attempt to overcome this conclusion on appeal by providing an allocation of how the beneficiary's time would be divided among the specific tasks, or by

submitting supplemental evidence of the beneficiary's proposed employment in a primarily managerial or executive capacity. The petitioner's letter identifying the beneficiary as its general manager is not sufficient to overcome the finding that the beneficiary would be performing primarily non-managerial or non-executive tasks related to the company's marketing, sales, inventory, and purchasing functions. Again, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534.

The AAO notes that the inconsistencies in the petitioner's staffing levels cast doubt on the petitioner's claim that the beneficiary would be employed in a primarily managerial or executive capacity. Although the petitioner noted the existence of an 18-person staff on the Form I-140, its federal quarterly wage report indicates that the company employed ten workers during the month the immigrant visa petition was filed. Also, while the beneficiary was initially noted as overseeing assistant managers, cooks, cashiers, and drivers, the petitioner subsequently claimed in response to the director's request for evidence that the beneficiary would supervise a marketing assistant, a manager, and an assistant manager, positions not originally noted by the petitioner. 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). Moreover, despite the inconsistencies, none of the subordinate employees were identified as relieving the beneficiary from performing the above-stated non-qualifying job duties.

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

The third issue in this proceeding is whether at the time of filing, the petitioner and the foreign entity enjoyed a qualifying relationship.

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;

* * *

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 November 1, 2005 letter submitted with the immigrant visa petition, the petitioner indicated that it was a subsidiary of the United States company [REDACTED], stating that [REDACTED] owned 51.79 percent. The petitioner stated that [REDACTED] was a wholly owned subsidiary of the beneficiary's foreign employer, thus suggesting an indirect parent-subsidiary relationship between the petitioner and the foreign entity. The petitioner did not submit documentary evidence of the claimed qualifying relationship with the original filing.

In her December 20, 2005 request for evidence, the director asked that the petitioner submit evidence of the petitioner's ownership and control, such as copies of stock certificates, corporate by-laws, certified affidavits from corporate executives, or published annual reports.

In response, the petitioner submitted a copy of its articles of incorporation, filed on November 21, 2000, authorizing the company to issue 3500 shares of common stock and naming its shareholders as [REDACTED] and [REDACTED], each owning 1785 shares, or 51 percent, and 1715 shares, or 49 percent, respectively. An attached November 12, 2002 amendment to the articles of incorporation increased the company's authorized shares to 4500. In a February 16, 2006 letter, the petitioner's accountant confirmed that [REDACTED] is a 51.75 percent shareholder of the petitioning entity.

In her decision, the director concluded that the petitioner had not established the existence of a qualifying relationship between the United States and foreign entities. The director stated that the petitioner had not specified "the precise degrees of ownership and control by the [purported] parent [company]," and that the petitioner had not submitted the requested evidence of a qualifying relationship. Consequently, the director denied the petition.

On appeal, counsel submits: (1) a copy of the petitioner's amended articles of incorporation; (2) a number ten stock certificate, dated November 30, 2000, naming [REDACTED] as the owner of 1812 shares of the petitioner's issued stock; and (3) a number two stock certificate naming the beneficiary's foreign employer or as the sole owner of [REDACTED]

Upon review, the petitioner has not demonstrated the existence of a qualifying relationship between the United States and foreign entity at the time of filing the immigrant visa petition on November 21, 2005.

To establish a qualifying relationship under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e. a United States entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

Of particular relevance in determining the purported indirect parent-subsidiary relationship between the foreign and United States entities is the stock certificate offered on appeal naming [REDACTED] as the owner of 1812 shares of the petitioner's stock. Although the stock certificate is dated November 30, 2000, it reflects the number of shares authorized to the petitioner in its November 12, 2002 amendment to the articles of incorporation. In other words, the petitioner was not authorized to issue 4500 shares of stock until

¹ Based on the company's articles of incorporation, [REDACTED] is a Florida corporation established on November 20, 2000.

approximately two years after the date referenced on the stock certificate. As a result, the authenticity of the stock certificate and the corresponding claim that [REDACTED] holds a majority interest in the petitioning entity is highly questionable. 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.

Even if the AAO were to consider [REDACTED] as the owner of 1812 shares of the petitioner's stock, [REDACTED] would own only 40.26 percent of the United States company, as the company is authorized to issue an additional 2688 shares of stock. The AAO notes that the petitioner had not documented whether the remaining authorized stock has been issued, and if so, to whom. Also, the petitioner's original articles of incorporation naming [REDACTED] as the majority owner of 51 percent of the corporation are not probative of the parent-subsidary relationship, as it represents the company's ownership prior to its November 12, 2002 amendment, and does not correspond to the information presented on the stock certificate. 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. at 591-92.

Moreover, the present record of proceeding does not establish [REDACTED] as the subsidiary of the beneficiary's foreign employer, an element essential to establishing a qualifying relationship between the petitioner and the foreign entity. The only evidence submitted in support of the purported parent-subsidary relationship is a stock certificate naming either the beneficiary's foreign employer or [REDACTED] as the owner of [REDACTED]. The limited documentary evidence does not support the suggestion of an indirect parent-subsidary relationship between the petitioning entity and the beneficiary's foreign employer, as [REDACTED] has not been established as a wholly owned subsidiary of the foreign entity. 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)).

Based on the limited evidence, the AAO cannot determine whether the petitioner is a subsidiary of [REDACTED], and whether [REDACTED] is a subsidiary of the beneficiary's foreign employer. Thus, the record is not consistent with the petitioner's claim of an indirect parent-subsidary relationship with the foreign entity. The unresolved discrepancies prevent a finding of a qualifying relationship between the foreign and United States entities at the time of filing. For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the petitioner had the ability to pay the beneficiary her proffered 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 petitioner indicated on the Form I-140 that the beneficiary would receive wages in the amount of \$650 per week, or an annual salary of \$33,800. In response to the director's second request for evidence, issued on July 20, 2006, counsel for the petitioner stated that the beneficiary was not compensated by the petitioner, but rather, was paid by [REDACTED] in accordance with a management agreement between the two companies. Counsel stated that evidence of the beneficiary's compensation is reflected on Schedule C of the beneficiary's personal income tax return. Counsel submitted a copy of the beneficiary's 2004 and 2005 personal income tax returns. The AAO notes that the 2005 tax return does not contain a copy of the referenced Schedule C, although it does contain an IRS Form W-2 issued to the beneficiary by [REDACTED] in the amount of \$2,350. Schedule C of the beneficiary's 2004 income tax return identified the beneficiary as receiving \$42,322. The address provided on the tax return for the business was actually that of the beneficiary's personal residence. As a result, it is not clear from where the beneficiary received the \$42,322 in income during 2004.

The AAO notes that the regulations specifically require the beneficiary's *prospective United States employer*, or the petitioner, to demonstrate its ability to pay the beneficiary's proffered wages. 8 C.F.R. § 204.5(g)(2). 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 at the proposed salary.

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 *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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

As the petition's priority date falls on November 21, 2005, the AAO must examine the petitioner's tax return for 2005. The petitioner's IRS Form 1120 for calendar year 2005 presents a net taxable income of -\$22,685. The petitioner could not pay a proffered wage of \$33,800 per year.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets 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. Here, the petitioner's current liabilities are significantly higher than its current assets, resulting in a -\$268,732 in net current assets. As a result, the petitioner has not demonstrated its ability to pay the beneficiary's proffered wages. Therefore, the petition will be denied for this additional reason.

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).

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 appeal is dismissed.