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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 13 2004

IN RE: Petitioner: [redacted]
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:

[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

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DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida business claiming to be engaged in purchasing and selling of electrical materials. It indicates that it is a subsidiary of Tableros Electricos Industriales C.A. (TAELINCA), located in Venezuela. It seeks to employ the beneficiary as its president and general 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 failed to establish that the beneficiary would be employed in a managerial or executive capacity and denied the petition. The director also noted that the petitioner failed to submit a properly executed Form G-28 and that as a result the attorney named in the most recent G-28 would not be recognized. The petitioner has since fixed the deficiency by providing a Form G-28 signed by the petitioner and its new counsel. Accordingly, the AAO acknowledges the change in counsel and will send a copy of this decision to the petitioner and to the most recent attorney of record as indicated in the Form G-28 dated, February 23, 2004.

On appeal, counsel submits a brief disputing the director's findings.

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 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 this proceeding is whether the beneficiary would be employed in a capacity that is managerial or executive.

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--
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> (i) directs the management of the organization or a major component or function of the organization;
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> (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.

In support of the petition, the petitioner submitted the following description of the beneficiary's proposed duties in the United States:

> [The beneficiary] continues to be vested with total discretionary authority to develop, plan and administer our business operations in the United States to comply with our company's goals and expansion plans. [He] is responsible for managing all related activities to initiate and continue our business operations, including fulfilling all budgetary and human resources

requirements. He continues to direct the company's activities and operations related to the purchase and sales of electrical material and equipment. He is responsible for developing and directing the import and distribution of our products manufactured by our Venezuelan company throughout the Latin American market. He develops and maintains potential clients and business relationships, as well as establishing business strategies, developing business and marketing programs . . . . [The beneficiary] continues to exercise final decision making authority with regard to all personnel management issues, recruiting and selecting professional and administrative staff. He is accountable for acquiring professional services from subcontractors when needed, as well as managing the day-today [sic] business activities and operations of our U.S. company. He is responsible for the research and development of marketing and sales strategies, as well as the introduction, promotion and business development of TAELINCA's electrical panels and products.

Furthermore, [the beneficiary] is accountable for conducting feasibility and economic studies for the installation of a manufacturing facility in the Miami, Florida area to enable us to fulfill our international client base's purchase orders from Miami. In this regard [the beneficiary's] regional responsibilities include managing purchase and sales, directing and controlling all aspects of the negotiation process and insuring customer service satisfaction from Miami and Venezuela. He continues to be responsible for our production efforts in Venezuela, including quality control of our products and services, product introduction, printed material, etc. . . . [The beneficiary] is responsible for establishing and overseeing all professional/managerial staffing requirements on behalf of both companies. . . .

In addition to the above, [the beneficiary] is aggressively developing and expanding our U.S. operations and continues to exercise independent judgment and final decision making authority with regard to all contract negotiations, proposals, new business opportunities, marketing strategies, etc. Implicit in his authority is to establish new business relationships and negotiate contracts with new suppliers, distributors and potential clients.

On October 14, 2003 the director issued a notice requesting initial evidence. The petitioner was instructed to submit a comprehensive list of the beneficiary's proposed job duties with a percentage breakdown of time spent performing such duties. The petitioner was also asked to provide position titles, duties, and educational levels of all employees for 2002, as well as those individuals' W-2 tax statements for 2002. Finally, the petitioner was instructed to provide its own tax return for 2002, as well as its quarterly wage report for the last quarter of 2002 and the first quarter of 2003.

The petitioner responded with a letter, dated January 8, 2004, providing the following position description and percentage breakdown of the beneficiary's duties:

- Establishing business strategies and company objectives: 10%

- Developing business and marketing programs for the introduction of the company's electrical panels and products [in] the industry within the region: 30%

- Exercising final decision making authority with regards to all personnel management issues, recruiting and selecting professional and administrative staff. He also develops corporate

structure policies and establishes responsibilities to be followed [b]y lower management staff: 30%

- He is responsible for key implementation plans and decisions regarding the company: 5%
- He is responsible for directing all import and distribution of [the] company's products: 5%
- He is in charge of personally studying, approving and signing [the] company's report expenses and business checks: 10%
- He develops pricing strategies and supervised production costs in order to ensure maximizing of [the] company's profits and/or market share: 10%

The petitioner also submitted an employer quarterly tax return for the first three quarters of 1998, along with the list of people employed by the petitioner during each respective quarter.

On February 5, 2004 the director denied the petition noting that the breakdown of duties attributed to the beneficiary in response to the request for evidence accounted for only 90% of the beneficiary's time. However, upon further review of the record, it appears that the director focused on a draft breakdown of the beneficiary's duties rather than the official percentage breakdown included with the response letter. Therefore, the director's comment was inaccurate and is hereby withdrawn. However, the director properly focused on the petitioner's personnel structure at the time of the filing of the petition and accurately concluded that three employees (including the beneficiary) would not be sufficient to relieve the beneficiary from having to perform non-qualifying duties.

On appeal, counsel asserts that the beneficiary "manages the whole company" and has created a distribution department, which is also directed by him. However, the fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. Furthermore, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the instant case, there is no evidence that the "GBP Distributors" subdivision, referenced by counsel in the appellate brief, was in existence at the time the petition was filed. Therefore, it is entirely irrelevant in the present case and cannot be considered in determining eligibility for the preference visa sought by the petitioner.

Counsel also claims that the director did not take into consideration the beneficiary's role as a function manager and focused primarily on his role as a personnel manager. While counsel is correct in differentiating between a personnel and function manager, if it is claimed that the beneficiary's role is that of function manager, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Thus, in examining the executive or

managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant case the seemingly lengthy job description provided in response to the request for evidence lacks sufficient detail concerning the beneficiary's actual daily activities. For instance, the petitioner indicated that 10% of the beneficiary's time is spent establishing strategies and objectives and another 30% of his time is spent making decisions regarding hiring staff and designating responsibilities to other employees. Combined, these duties constitute 40% of the beneficiary's time, yet the petitioner did not specify any strategies or objectives the beneficiary purportedly created; nor did the petitioner's personnel structure at the time of the filing of the petition require the beneficiary to spend one third of his time on personnel-related management tasks.

The breakdown of the beneficiary's duties also states that 30% of the beneficiary's time will be spent developing business and marketing programs. However, a thorough review of the petitioner's personnel structure indicates that at the time the petition was filed the petitioner did not have an employee in place to perform marketing duties. Furthermore, the petitioner submitted two letters, one dated November 27, 2002 and another dated December 2, 2002, from two different distributors. Both letters directly addressed the beneficiary and the second letter clearly indicated that the beneficiary approached the distributor to discuss sales and marketing plans. The fact that the beneficiary personally approached distributors suggests that the petitioner did not have a sufficient staff in order to relieve the beneficiary from having to perform non-qualifying duties. Thus, a review of the overall job description shows that a significant portion of the beneficiary's time would be consumed with duties that are either undefined or simply non-qualifying.

In addition, counsel repeatedly cites portions of a dissenting opinion of a circuit court case. *See Republic of Transkei, et al., v. Immigration and Naturalization Service*, 923 F2d. 175, 287 U.S. App. D.C. 352 No. 89-5357 Jan. 8, 1991. However, as counsel readily admits, the cited opinion is not the majority opinion. Therefore, it is in no way binding, either in the instant matter or in any other proceeding.

On review, the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity. The description of the duties to be performed by the beneficiary in the proposed position does not persuasively demonstrate that the beneficiary will primarily perform managerial or executive duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Nor does the record sufficiently demonstrate that at the time the petition was filed the beneficiary was relieved from performing non-qualifying duties. CIS is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. For this reason the petition cannot be approved.

Beyond the decision of the director, the year 2002 tax return submitted by the petitioner in response to the request for evidence suggests that the petitioner has not established its ability to remunerate the beneficiary's proffered wage.

The regulations at 8 C.F.R. § 204.5(g)(2) states the following, in pertinent part:

> 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining the petitioner's ability to pay the proffered wage, the Bureau will examine the net income figure reflected on the petitioner's 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 that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

In the instant case, the petitioner's 2002 tax return indicates that its net income was at a net loss of nearly $4,000. As such, the record suggests that at the time the petition was filed, the petitioner lacked sufficient funds to pay the beneficiary's salary. It is noted that 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). As such, due to the additional ground discussed in this paragraph, this petition cannot be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.