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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 1 3 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: 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, Director
Administrative Appeals Office

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 Texas business that operates as a convenience store. It claims to be a subsidiary of Mercado Da Carreira De Tiro, Ltd., located in Mozambique. It seeks to employ the beneficiary as its president. 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 the following: 1) its ability to pay the beneficiary's proffered wage; 2) that the beneficiary would be employed in a managerial or executive capacity; and 3) that the petitioner and the foreign entity have been doing business.

On appeal, the petitioner disputes the director's findings and claims to have had ineffective assistance from counsel in the current matter.

It is noted that any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). In the instant case, the petitioner merely asserts that it has had ineffective assistance from counsel but fails to satisfy any of the above three prongs. Therefore, the AAO will not adjudicate this case in light of the petitioner's claim of ineffective counsel.

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):
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> * * *
>
> > (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 first issue in this proceeding is whether the petitioner has adequately established its ability to pay the beneficiary his proffered wage.

In 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. In the present matter, the petitioner did not establish that it had previously employed the beneficiary. 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 Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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 May 1, 2001, the AAO must examine the petitioner's tax return for 2001. The petitioner's IRS Form 1120 for calendar year 2001 presents a net taxable income of $1,737. The petitioner could not pay a proffered wage of $24,000 per year out of this income. Furthermore, No. 13 of the first page of the petitioner's tax return for 2001 indicates that the petitioner paid a total of $23,000 in salaries and wages. This sum does not amount to the proffered $24,000 as indicated on the original petition, nor is it sufficient to pay for the salaries of one full-time and two part-time employees, which the petitioner indicated in Part 5 of the petition.

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. In the instant matter, the petitioner's assets equal the exact amount of its liabilities. This factor, coupled with the information contained in other portions of the petitioner's tax return as well as its petition, leads the AAO to conclude that the petitioner does not have sufficient assets, and therefore has not established its ability to pay the beneficiary's proffered wage.

The second issue in this proceeding is whether the beneficiary was employed abroad and would be employed in the United States 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--
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> (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
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> (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.

Based on counsel's own admission, the petitioner did not submit any supporting evidence with the initial petition. Therefore, the director issued a notice requesting additional information on March 21, 2002. Among the requested documents, the director instructed the petitioner to submit evidence establishing that the beneficiary was employed for at least one year abroad and would be employed in the United States in a qualifying managerial or executive capacity.

In response, the petitioner submitted, among other documents, a translated letter, dated September 7, 1997, from an unknown source from the foreign entity stating that the beneficiary was employed as the "managing director" of the foreign company since 1982 and that "he was responsible for the development of our company to its successful pasture now in our country." The petitioner did not provide any specific information regarding the beneficiary's job duties abroad. In regard to the beneficiary's proposed position in the United States, the petitioner submitted a letter, dated September 17, 2001, signed by the general partner who stated that the beneficiary "will be responsible for all accepts [sic] of running our operation in the United States. [The beneficiary's] duties will be to manage the entire U.S. operation, which includes managing, purchasing, hiring and firing employees."

In the denial, dated March 11, 2003, the director points to the petitioner's lack of detail in discussing the beneficiary's position abroad, and further states that the employee salaries indicated on the petitioner's U.S. tax return for the relevant time period suggest that the beneficiary was directly involved in performing the petitioner's daily operational tasks.

On appeal, the petitioner submits a copy of a statement, dated July 4, 2003, from what appears to be the current president of the foreign entity. The statement contains the following descriptions of the beneficiary's job duties abroad and in the United States:

> [The beneficiary] worked for [the foreign entity] as a Managing Director from 1974 to 1997. He carried out the following duties: Supervising a team of top management personnel, provide[d] key strategic technology and project management directives to stay ahead in the food business. Manage finance operations, Personnel and Human Resources development policies. Set guidelines for quality management, technical support management, and attend trade shows. Identify potential trading deals.
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> As the president of our US organization, [the beneficiary] has been responsible to [sic] supervise management personnel who run the day-to-day operations. He provides detailed guidelines for development and growth of business. He oversees all accounting, hiring and terminating processes for employees. He develops the business and identifies potential business deals.

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). Furthermore, 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). In the instant case, the

descriptions of the beneficiary's past and present job lack the necessary details that would enable the AAO to determine what the beneficiary actually does on a daily basis. The petitioner fails to specify what actual tasks were involved in supervising management personnel or providing "key strategic technology and project management." Although the petitioner's description provides a general overview of the beneficiary's job objectives, it does not specify what the beneficiary actually did to achieve those objectives on a day-to-day basis. Furthermore, the petitioner does not describe the overseas entity's organizational hierarchy, thereby making it impossible to determine who the beneficiary's subordinates were, in terms of their job titles and job duties, and where they were located within the entity's hierarchical structure.

In regard to the beneficiary's proposed position in the United States, the petitioner provides a brief, and overly broad description of job duties that are entirely unsupported by the evidence of record. Although the description focuses on the beneficiary's personnel management duties, the petitioner has yet to submit sufficient evidence to establish who the company employs and what duties such individuals perform. As previously stated, the petitioner cannot establish the truth of the matter without providing documentary evidence in support of its claims. *See Matter of Treasure Craft of California, supra.* In the instant matter, the director informed the petitioner in the denial that based on the low amount paid in salaries for 2001, the year the instant petition was filed, the record is unclear as to the number of employees the petitioner had. Consequently, there is no concrete documentary evidence that the beneficiary has been and would be supervising anyone at all.

The petitioner also points out that the initial non-immigrant L-1A petition was approved, and asserts that such approval is an indication that the petitioner previously submitted sufficient evidence to establish that the beneficiary had the requisite one year of qualifying employment abroad. However, the director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, however, 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).

Furthermore, 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).

On review, the record contains insufficient evidence to demonstrate that the beneficiary has been and would 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's duties have been and would be primarily those of a managerial or executive nature. 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 was employed abroad or would be employed in the United States in a managerial or executive capacity. For this additional reason the petition cannot be approved.

The third and final issue in this proceeding is whether the petitioner and the foreign entity have been doing business.

Pursuant to the regulation at 8 C.F.R. 204.5(j)(3)(i)(D), the petitioner is required to submit evidence that the prospective United States employer has been doing business for at least one year.

The regulation at 8 C.F.R. 204.5(j)(2) further defines "doing business" as the 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.

In the request for additional evidence, the petitioner was instructed to submit documentation to establish that both the U.S. and foreign entities have been and continue to do business. As properly concluded in the director's denial, the tax returns submitted for each entity do not establish that each entity has been and continues to engage in the regular, systematic, and continuous provision of goods and/or services. However, the petitioner did not address this portion of the director's denial on appeal. Therefore, the AAO affirms the director's determination that the petitioner failed to submit sufficient evidence to establish that the U.S. and foreign entities have been and continue to do business. For this additional reason the 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.