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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 10 2005
SRC 02 068 50468

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.

for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was approved by the Director, Texas Service Center. Subsequent review of the record suggested that the petition did not warrant approval. Accordingly, the director issued a notice of her intent to revoke approval of the petition and allowed the petitioner time in which to respond to the adverse findings. The petitioner provided a timely response. Nevertheless, the director issued a final notice of revocation on February 15, 2005. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation engaged in the sale and distribution of dairy products. 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 revoked approval of the petition based on the following independent grounds of ineligibility: 1) the petitioner stopped doing business in November 2004 and, therefore, has not established that it has been doing business on a continuous basis; 2) the beneficiary is not employed in the United States in a managerial or executive capacity; and 3) the petitioner failed to establish its ability to pay the beneficiary's proffered wage.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 been doing business on a continuous basis. The director determined that the petitioner stopped doing business as of November 1, 2004 pursuant to a

restraining order, which was issued by the Texas Attorney General. The director determined that the petitioner was ordered to stop shipping goods and, therefore, stopped doing business.

The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "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."

On appeal, the petitioner submits a number of invoices and shipping documents reflecting transactions that took place in November and December of 2004 after the restraining order was issued. The petitioner also submits a copy of the restraining order, which suggests that the petitioner was ordered to stop engaging in the various unlawful acts in which it was allegedly engaged. Contrary to the director's interpretation of the restraining order, the petitioner was not ordered to stop shipping goods or engaging in the ordinary course of business. It was merely ordered to stop engaging in unlawful activity. Thus, based on the evidence submitted on appeal, the petitioner has overcome this ground of ineligibility.

The second issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity.[1]

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.

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[1] It is noted that while the petitioner must establish that it is ready and able to employ the beneficiary in a primarily managerial or executive position at the time the I-140 petition is filed, the petitioner is not required to establish that the beneficiary is actually employed in a qualifying capacity at such time. The beneficiary is not required to actually commence the qualifying employment unless and until the I-140 petition is approved and lawful permanent residence has been obtained.

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.

In support of the petition, the petitioner submitted a letter dated December 20, 2001, which provided the following description of the duties to be performed by the beneficiary under an approved petition:

- formulate administrative and operational policies and procedures;
- direct and coordinate marketing operations;
- review and analyze expenditure, financial, and operations reports to determine the need for increasing profits;
- recommend capital expenditures for acquisition of new equipment;
- approve requisitions for equipment, materials, and supplies;
- enforce compliance of operations personnel with administrative and governmental rules and regulations;
- negotiate contracts with customers and equipment and materials suppliers; and
- act as representative of [the petitioner] before governmental commissions or regulatory bodies.

On November 17, 2004, the director issued a notice of her intent to revoke (ITR) the approval of the petition. The director instructed the petitioner to submit additional evidence including a more detailed description of the beneficiary's job duties accompanied by a percentage breakdown of time spent performing each of the duties listed in the job description. The petitioner was also instructed to provide the job titles, duties, and educational levels of the beneficiary's subordinates as well as the W-2 wage and tax statements for each of those employees for years 2001-2003.

The petitioner responded with a letter dated December 16, 2004, which included the following breakdown of the beneficiary's duties:

- Formulate administrative and operational policies and procedures relating to the manufacturing/processing of food products for export to Mexico – 75%.
- Review and analyze expenditures, financial, and operational reports to determination [sic] of [sic] strategic planning – (within above 75%).
- Recommend capital expenditures for acquisition of new equipment – (within above 75%).
- Approve requisitions for equipment, materials, and supplies – (within above 75%).
- Reinforce compliance of operations personnel with administrative and governmental rules and regulations relating to the processing of food products – (within above 75%).
- Approve negotiated contracts with customers and equipment and materials suppliers – 5%.
- Serve as representative of [the petitioner] before state and federal governmental commissions or regulatory bodies – 2%.
- Approve all contacts with customers to arrange for purchasing and delivery of food products – 2%.
- Approve all orders with suppliers of raw materials to plant for food product processing – 2%.
- Direct, through subordinate supervisory personnel, workers engaged in processing of food products – (within 75% of job duties).
- Direct and coordinate activities concerned with dismantling, moving, installing, or repairing of machines and equipment used in processing of food products – 1%.
- Approve plant payroll and payments for purchased materials or products [–] 2.5%.
- Estimate quantities for foods for processing required and orders foods, materials, supplies, and equipment needed – 5%.
- Hire, transfer, and discharge employees – (within 75% of job duties).

The director also provided the W-2 wage and tax statements it issued in 2001 as well as its organizational chart accounting for the employees that were part of its organization as of December 24, 2001, the date the petition was filed.

The petitioner's organizational chart identified five employees with the beneficiary occupying the top position of president/general manager. The beneficiary's immediate subordinates included an office manager, a maintenance engineer, and two production supervisors. Each production supervisor supervised a machine operator. The petitioner identified the individuals, who occupied each of the filled positions.

After reviewing the evidence submitted, the director issued a final notice of revocation dated February 15, 2005. The director compared the employees listed in the organizational chart with the W-2 wage and tax statements issued by the petitioner in 2001 and noted that the chart listed individuals for whom there were no W-2 statements or other proof of employment. The director also noted that one of the part-time employees to whom a W-2 statement was issued was not identified in the petitioner's organizational chart. As such, pertinent information like the employee's position title and place within the organizational structure is unknown. The director stated that with the limited number of employees to support the beneficiary's position, it is reasonable to conclude that the petitioner was not ready to employ the beneficiary in a primarily managerial or executive capacity at the time the petition was filed.

On appeal, counsel states that Citizenship and Immigration Services' (CIS) decision to approve the petitioner's I-129 nonimmigrant petitions is inconsistent with its subsequent decision to revoke the most recent approval of the I-140 petition. Counsel questions CIS's logic in reaching its most recent decision given its prior favorable determinations based on the same statutory definitions.

However, with regard to the L-1 nonimmigrant petitions approved on behalf of the beneficiary, it should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

In addition, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and CIS normally accords the petitions a less substantial review. *See* 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30 (recognizing that CIS approves some petitions in error).

Moreover, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The prior nonimmigrant approvals do not preclude CIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS,* 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, 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).

Finally, 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).

Counsel also addresses the noted inconsistency between the organizational chart, which lists seven employees, and the W-2 statements, which were only issued to five employees. Counsel explains that the petitioner's staffing varies depending on its needs at a particular time and claims that the petitioner has consistently had a staff of at least six employees. However, 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)). In the instant matter, the petitioner has submitted no evidence showing that it employed six individuals at the time the petition was filed. In fact, the Form I-140 itself indicates that the petitioner claimed five, not six, employees at the time the petition was filed. 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). Not only is there no evidence to support counsel's assertions, but counsel puts forth a claim that is inconsistent with the petitioner's own claim. While counsel acknowledges the petitioner's initial claim in the I-140 petition, he provides no explanation for introducing inconsistent information on appeal.

Additionally, counsel reproduces the petitioner's description of the beneficiary's proposed job duties asserting that the beneficiary acts as a manager and executive. However, in choosing to represent the beneficiary as both an executive *and* a manager, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. In the instant matter, the petitioner's claim is primarily based on a set of broad job responsibilities, which suggest a general sense of the beneficiary's heightened degree of discretionary authority but which fail to convey an understanding of what the beneficiary would actually be doing on a daily basis. 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). The petitioner does not define the actual duties involved in reinforcing compliance with government regulations or directing subordinate supervisory personnel. Although the petitioner indicates that reviewing and analyzing expenditures, recommending capital expenditures, and hiring and firing personnel are all part of formulating policies and procedures, which is a responsibility that consumes 75% of the beneficiary's time, the petitioner does not specify exactly how much time is spent carrying out these individual duties. Furthermore, the percentage breakdown accounts for only 94.5% of the beneficiary's duties, leaving unaccounted 5.5% of his time.

In examining the executive or managerial capacity of the beneficiary, 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 proceeding, the petitioner failed to provide sufficient detail regarding the beneficiary's daily job duties. Although counsel chose to represent the beneficiary as both a manager and executive, he failed to provide an explanation of how the beneficiary's duties fall within the statutory requirements of managerial and executive capacity. As previously indicated, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503.

On review, the record as presently constituted is not persuasive in demonstrating that at the time the petition was filed the petitioner was ready to employ the beneficiary in a primarily managerial or executive capacity. The record is unclear as to what the beneficiary's actual daily activity at the relevant time period would be and fails to establish that at the time the petition was filed it had a sufficient support staff to relieve the beneficiary from having to engage in nonqualifying duties. It is noted that 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). Based on the evidence furnished in the instant matter, it cannot be found that the beneficiary has been employed primarily in a qualifying managerial or executive capacity.

The third issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary's proffered wage of $52,000.

The regulation 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, 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 claims that it has employed the beneficiary since prior to the filing of the Form I-140. In the instant matter, the beneficiary's W-2 wage statement for 2001 indicates that the beneficiary was compensated $29,700, which is not a salary that is equal to or greater than the proffered wage.

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. Furthermore, in order to add depreciation expenses back to net income, a petitioner would need to establish that the depreciation deduction was properly taken. This would require corroborating evidence documenting the deductions. In the instant matter, the petitioner has not submitted such corroborating evidence. In fact, the petitioner's submitted tax returns were not certified. Thus, the AAO cannot accept counsel's argument that the director should have added the petitioner's depreciation expense back to the net income amount. Although the AAO agrees that the beneficiary's 2001 salary should be added to the petitioner's net income, as the beneficiary was clearly employed by the petitioner at the time the petition was filed, the sum of the two figures is less than $52,000. Therefore, the petitioner has not established its ability to pay the beneficiary's proffered wage.

Finally, it is noted for the record that the ability to pay is not required to be established for nonimmigrant L-1A petitions. Therefore, this basis for the revocation and denial of the instant immigrant petition could not inconsistent with the prior CIS approvals of the beneficiary's L-1 status.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused it discretion with respect to all of the AAO's enumerated grounds. 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).

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.