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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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APR 28 2009

File:

SRC 08 059 52569

Office: TEXAS SERVICE CENTER

Date:

IN RE:

Petitioner:

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:

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.

John F. Grissom

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will remand the matter to the director for further review and entry of a new decision.

The petitioner filed the instant petition seeking 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 petitioner, a Delaware corporation, is a wholesale distributor of metal building materials. It seeks to employ the beneficiary in the position of Sales Manager (Phoenix Region).

The director denied the petition on May 14, 2008, citing two separate and independent grounds for denial. Specifically the director determined that the petitioner failed to establish: (1) that it will employ the beneficiary in the United States in a primarily managerial or executive capacity; and (2) that it has the ability to pay the beneficiary's proffered annual salary of \$104,300.

The petitioner subsequently filed an appeal on June 13, 2008. On appeal, counsel for the petitioner asserts that the director erred by denying the petition without first giving the employer an opportunity to correct perceived defects, in violation of U.S. Citizenship and Immigration Services (USCIS) policy. Counsel asserts that there was no clear evidence of ineligibility, as claimed by the director. Counsel further asserts that the director erred in the substance of the denial by not considering the petitioner's audited financial statements as evidence of its ability to pay the beneficiary's proffered salary, and by making unreasonable assumptions regarding the staffing of the U.S. company and the beneficiary's actual job duties. Counsel submits a brief, but no additional evidence, in support of the appeal. Counsel requests that the petition be approved or remanded to the service center director for issuance of a request for additional evidence. In the alternative, counsel requests oral argument before the AAO.

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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

As a threshold issue, the AAO will address counsel's claim that the director should have first requested additional evidence prior to denying the instant petition.

Title 8 C.F.R. § 103.2(b)(8)(ii), the revision of which went into effect on June 18, 2007, states as follows:

If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, [USCIS] in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by [USCIS].

Id.; *see also* 72 Fed. Reg. 19100 (April 17, 2007). As the instant petition was filed on December 13, 2007, the director was not obligated to request additional evidence if the petition failed to demonstrate eligibility for the benefit sought. As further discussed below, however, the AAO finds that the initial evidence did in fact demonstrate the petitioner's ability to pay the beneficiary's proffered wage. Furthermore, a review of the director's decision reveals that the director's determination that the beneficiary will not be employed in a managerial or executive capacity was based on an unreasonable assumption regarding the petitioner's staffing levels and an incomplete review of the evidence of record. Contrary to the director's findings, the required initial evidence was in fact submitted, and such evidence did not suggest that petitioner and beneficiary are clearly ineligible for the benefit sought. Due to the errors made by the director in analyzing the submitted evidence, the director's decision will be withdrawn.

However, the AAO agrees that the evidence of record raises questions regarding the petitioner's and beneficiary's eligibility for the classification sought. Accordingly, the matter will be remanded to the director for further action and entry of a new decision.

The first issue to be addressed is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 immigrant petition was filed on December 13, 2007. The petitioner stated on Form I-140 that the U.S. company has 70 employees and will employ the beneficiary as sales manager for the Phoenix, Arizona sales territory. While the petitioner is headquartered in Houston, Texas, it states that its affiliate leases an office/warehouse in Phoenix. The petitioner described the beneficiary's proposed duties as follows:

The Sales Manager will exercise discretionary decision-making authority over the day-to-day operations of our company's personnel serving the Phoenix, Arizona territory. He will be directly responsible for the sales of the company's products that are produced in Mexico, Argentina, and Venezuela to the western region of the United States.

The Sales Manager for Phoenix, Arizona sales territory will exercise budgetary authority. He will prepare the monthly and yearly budgets, sales forecasts, and expense reports for our

Phoenix, Arizona office/warehouse and its sales territory. He will ensure that the budgets are in line with our company's overall performance in relation to the company's international efforts.

The petitioner indicated that the beneficiary will report to a commercial manager and perform the following duties:

- Direct the development of new markets and customers for the Company's products.
 - Direct the efforts of our company's Planning Department in providing cost of production, pricing and target product information for presentation to customers and potential customers,
 - Direct the company's Planning Department in coordinating specific bids for pricing and engineering applications for our products to the customer.
- Direct the facility and tracking of customer's Purchase Orders
 - Direct Inside Sales personnel in confirming customer's Purchase Orders.
 - Confirm Inside Sales direction in submitting and prioritizing customer's orders with the company's Production Units.
 - Direct Inside Sales personnel in coordinating Purchase Orders with company's Logistics Department.
- Direct company's Logistics Department with completing transportation and inventory maintenance programs.
 - Direct delivery of customers' products through the transportation and export facilities of our company's Logistics Department.
 - Develop and maintain product inventory levels for customers, directing implementation through our Logistics Department.
- Direct company's mechanisms and procedures for collecting payments for outstanding invoices to customers.
 - Implement and manage collection procedures through company's Credit & Collection Department.
 - Review reports from Credit & Collection Department concerning outstanding balances and collection efforts.
- Direct all aspects of customer complaints and claims concerning adequacy of product.
 - Direct company's Customer Service Department in responding to customers claims regarding quality control for product.
 - Direct Customer Service resolution of customers' complaints or claims.
 - Receive reports from company's Quality Control Department regarding customer's complaints or claims.

The petitioner also submitted a list of the beneficiary's achievements as sales manager, as follows:

- Maintains commercial relationship with over 50 clients in the Phoenix and West Coast area as well as the rest of the United States.
- Defines, supervises and controls the inventory levels needed for the Phoenix location.
- Continuously develops new profitable accounts for the company.
- Promotes and sells product from Mexico, Argentina and Venezuela.
- Actively participates in Sales Strategy at the Corporate Level.
- Prepares and presents monthly reports of his results at the Corporate Level.
- Has the authority for discretionary decision-making on a day-to-day basis for this location.
- Meets with Contractors and Architects regarding their technical needs during the construction of Schools, Churches, Buildings and Steel Structure.

The petitioner stated that it was submitting a copy of its organizational chart in support of the petition, but the chart is not in the record.

The director denied the petition on May 14, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. In denying the petition, the director stated:

According to information you provided, your company approximately operates 35 subsidiaries and employs 70 employees. Based on this information USCIS may reasonably conclude that each subsidiary employs 2 employees.

When a company has a limited number of employees, it becomes questionable as to whether the beneficiary is acting primarily in a managerial or executive function.

The director's conclusion was based solely on an erroneous conclusion that the petitioning company has only two employees. The director did not address the petitioner's description of the beneficiary's duties. With respect to the "35 subsidiaries" referenced by the director, the AAO notes that the record contains audited financial statements for the petitioner's parent company, [REDACTED], a Luxembourg company, which includes a list of approximately 35 subsidiaries of that company, only five of which are located in the United States. The AAO finds it reasonable to assume that the 70 employees claimed by the petitioning company, a Delaware corporation, are in fact employed by the petitioner and that the figure provided does not include employees of foreign or domestic affiliates.

However, the AAO does find insufficient evidence in the record with respect to the beneficiary's duties and the staffing of the Phoenix, Arizona location to which the beneficiary will be assigned. Therefore, the petition will be remanded to the director, who is instructed to request additional evidence in accordance with the discussion below.

When examining the executive or managerial capacity of the beneficiary, the USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner's description of the job

duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

While the petitioner has provided a lengthy description of the beneficiary's job duties, the description is insufficient to establish that the beneficiary's duties would be primarily managerial or executive in nature. The majority of the beneficiary's stated duties involve "directing" company functions through subordinate personnel of various departments, including the planning, inside sales, logistics, credit and collection, customer service and quality control departments. The record does not contain evidence to corroborate the existence and staffing levels of such departments. Because the beneficiary's responsibilities appear to be largely dependent on the delegation of duties to subordinate personnel, such evidence is critical to USCIS' analysis of the beneficiary's employment capacity.

Furthermore, some of the petitioner's statements suggest that the beneficiary is directly involved in sales activities, rather than supervising, coordinating or directing such activities through subordinates. For example, the petitioner indicates that the beneficiary himself "maintains commercial relationships with over 50 clients," "develops new profitable accounts," "promotes and sells product[s]," and meets with clients to discuss their technical needs for building materials.

Therefore, based on the current record, the AAO is unable to determine whether overseeing all of the company's activities and departments constitutes the beneficiary's primary function, or whether the beneficiary is primarily involved in non-managerial tasks such as promoting and selling the company's products. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The director is instructed to request a comprehensive, specific description of the duties performed by the beneficiary, including a breakdown of the percentage of time he will devote to those duties on a weekly basis, and a description of the duties he performs on a "typical day." The description should reflect the beneficiary's actual duties as of December 2007.

When examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The record as presently constituted does not contain documentary evidence establishing the number of employees working for the petitioner as of the date the petition was filed, their job titles, or their job duties. As such, it is not possible to determine that the lower-level staff would relieve the beneficiary from performing the non-qualifying duties associated with operating the petitioner's Phoenix, Arizona location on a day-to-day basis.

Accordingly, the petitioner should provide an organizational chart for the U.S. entity's Phoenix, Arizona office, job titles and complete job descriptions for all subordinate employees working for the petitioner as of December 2007, as well as information regarding the number of hours they work, and their educational background, if it is claimed that any of the employees are professionals. The petitioner should also submit documentary evidence of wages paid to employees working in Arizona since the last quarter of 2007, including IRS Forms 941, Employer's Quarterly Federal Tax Returns, and Arizona State quarterly wage reports. If any of the beneficiary's subordinates work in states other than Arizona, the petitioner should provide documentary evidence of their employment.

If the petitioner utilized outside contractors to perform any functions as of the date of filing, it should submit documentary evidence to substantiate the employment of these individuals, and describe the scope and nature of services they provide. The petitioner should specifically explain how the subordinate employees relieve the beneficiary from primarily engaging in the day-to-day operations of the company.

It is emphasized that the petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, December 13, 2007. Documentation of business activity and hiring that occurred after the date of filing is not probative of the petitioner's eligibility and will not be considered.

The remaining issue addressed by the director is whether the petitioner established its ability to pay the beneficiary the proffered annual salary of \$104,300. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. 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.

Federal regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed or when the visa is issued by a United States consulate. 8 C.F.R. § 245.1(a), 22 C.F.R. § 42.41. The petitioner bears the ultimate burden of establishing eligibility for the benefit sought, and that burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

In determining the petitioner's ability to pay the proffered wage, USCIS 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. The beneficiary's most recent available Forms W-2 show that he received wages in the amount of

\$16,460.37 from the petitioner in 2006, and wages in the amount of \$87,839.56 from the petitioner's affiliate, [REDACTED], for a total of \$104,300. The record shows that the beneficiary was initially employed by [REDACTED] in L-1A status, and that the petitioner filed a petition to amend and extend his L-1A status in September 2006. Since it is not clear exactly when he joined the petitioning company, it cannot be concluded that it was paying him the proffered 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.

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.

The record of proceeding contains the following:

- A Balance Sheet as of December 31, 2006 for the U.S. company, which indicates current assets in excess of \$118 million, current liabilities of \$112 million, and net profit in excess of \$3.75 million
- Audited consolidated financial statements for the years ended December 31, 2006, 2005 and 2004 for the petitioner's parent company and subsidiaries, which includes financial results of the petitioning company.
- The petitioner's 2004 Form 1120, U.S. Corporation Income Tax Return, for the fiscal year ended on June 30, 2005. The tax return was filed in 2006 and indicates net income of \$3.1 million.

- The petitioner's audited financial statements for the years ended June 30, 2005 and June 30, 2004.

The AAO finds the evidence submitted sufficient to establish that the petitioner has the ability to pay the beneficiary's proffered salary of \$104,300 as of the date of filing. As the petition will be remanded, the director is instructed to request evidence of the petitioner's continuing ability to pay the beneficiary's proffered salary. Such evidence may include, but is not limited to, copies of recent quarterly wage reports, Forms W-2 from 2007 and 2008, and the petitioner's most recent tax return.

Although not specifically addressed by the director, the AAO finds insufficient evidence to establish that the petitioner has a qualifying relationship with the beneficiary's last foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. 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").

The petitioner indicates that the beneficiary's last foreign employer was [REDACTED] located in Mexico, and that the employer is a [REDACTED]. The audited financial statements for [REDACTED] list approximately 35 "principal subsidiaries," many of which were formerly known by [REDACTED] names. However, the beneficiary's Mexican employer is not included on the list by any name. Accordingly, the petitioner shall be instructed to submit evidence that [REDACTED] maintains a qualifying relationship with the petitioning company and evidence that it continues to do business in Mexico.

Finally, although not specifically addressed by the director, the AAO also finds insufficient evidence to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. *See* 8 C.F.R. § 204.5(j)(3)(i)(A). The petitioner has not adequately described the beneficiary's duties while employed by the foreign entity as Sales Chief Direct Sales for the export department. The petitioner indicates that the beneficiary introduced the company to new clients interested in buying steel, "managed sales to direct customers," "developed export sales" to customers in the United States, Canada and Puerto Rico, hired a sales team, and directed all quality aspects of the export department. Based on the description provided, it cannot be concluded that the beneficiary's duties were primarily managerial or executive in nature, as it appears that he may have personally been involved in sales, promotion and technical functions. The petitioner should be instructed to submit a detailed comprehensive description of the duties performed by the beneficiary with the foreign entity, as well as the percentage of time he spent on each duty on a weekly basis.

The petitioner should also be instructed to provide an organizational chart clearly depicting the beneficiary's position within the company's hierarchy and providing the names, job titles, job duties, and educational levels of all employees who reported to the beneficiary in his last foreign position.

Further evidence is required in order to establish that the petitioner and beneficiary meet the requirements for the requested immigrant visa classification as of the date of filing the petition. The director's decision will be

withdrawn and the matter remanded for further consideration and a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence he deems necessary.

ORDER: The decision of the director dated May 14, 2008 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.