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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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FILE: [redacted] OFFICE: NEBRASKA SERVICE CENTER Date: MAY 07 2010
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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: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a Florida corporation that seeks to employ the beneficiary as its 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 denied the petition based on two independent findings: 1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity and 2) the petitioner failed to establish its ability to pay the beneficiary's proffered wage.

On appeal, the petitioner disputes the director's conclusion and addresses some of the director's adverse 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 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 would employ the beneficiary in the United States in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily--

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) 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--
>
> (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 Form I-140, the petitioner submitted an undated letter in which the beneficiary's role was described as that of a manager whose primary responsibility would be to organize, direct, and supervise the construction and home improvement and repair services the petitioner provides to its clientele. The petitioner stressed the beneficiary's autonomy and discretionary decision-making authority and provided a brief percentage breakdown of the beneficiary's key job responsibilities. As the director included the list of job responsibilities in the denial, the AAO need not repeat this information in the current decision. The petitioner also provided its organizational chart, which depicts the beneficiary at the top of the staffing hierarchy. The chart shows an administrative manager, a maintenance manager, and a sales manager as the beneficiary's direct subordinates. A maintenance assistant is placed at the lowest level of the organization and is depicted as the maintenance manager's subordinate.

On September 30, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a more detailed description of the beneficiary's specific day-to-day tasks the beneficiary would perform in his proposed job assignment as well as the percentage of time that would be allocated to each listed task. The petitioner was also asked to provide its federal tax return for 2006, including all schedules and attachments, as well as all four quarterly wage withholding returns for 2007 naming all of the petitioner's employees.

In response, the petitioner provided another description of the beneficiary's proposed employment. As the director restated the job description, verbatim, in his decision, the AAO need not restate this information in the current decision. The petitioner also provided quarterly wage withholding returns for the first, second, and fourth quarters of 2007. It is noted that the Form I-140 was filed on May 29, 2007 and therefore falls within the time period of the second quarterly withholding return during which the petitioner named two employees—the beneficiary and the individual who was identified as the sales manager in the petitioner's original organizational chart. Although the petitioner provided its 2007 federal tax return, no salaries, wages, or officer compensation is shown as having been paid and large portions of the form are incomplete despite the petitioner's submission of a copy of IRS Form W-3 showing $35,938 paid in wages and copies of two IRS Form W-2s, one issued to the beneficiary and the other issued to the sales manager.

In a decision dated January 22, 2009, the director denied the petition noting that the evidence shows only two employees working for the petitioner at the time of filing, despite the petitioner's organizational chart, which identified a total of five employees, the same number that the petitioner provided in the Form I-140. The director further observed a number of factual inconsistencies in the various tax documents the petitioner provided, including different versions of the petitioner's wage withholding returns for 2006 and IRS Forms W-2 for 2006, which listed inconsistent wages paid to the beneficiary and his spouse. The director found that the petitioner misrepresented the company's staffing and concluded that the petitioner failed to submit credible evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, the petitioner submits a letter dated February 17, 2009, claiming that the beneficiary would fill the role of a function manager and provided another brief overview of the beneficiary's alleged responsibilities in his proposed position. These statements, however, show the petitioner's lack of understanding of the role of a function manager and are generally not supported by the documentation on record.

First, the term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., 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. 8 C.F.R. § 204.5(j)(5). In the present matter, the petitioner did not and does not identify a specific essential function that the beneficiary would manage. Rather, the petitioner focuses on the beneficiary's leadership position as the head of the organization and lists job responsibilities that include personnel management, a concept that is separate and distinct from the concept of function management.

Second, the petitioner's claim that the beneficiary would oversee and guide senior managers and department managers is entirely inconsistent with the documentation that has been presented, which indicates that the petitioner was staffed with only two employees at the time the petition was filed. While the beneficiary may reach certain business goals by sparing the petitioner the added expense of a support staff, the petitioner's needs do not override the statutory provisions, which require that the beneficiary's time be primarily devoted to managerial or executive-level tasks. Here, the lack of an adequate support staff at the time of filing would likely result in the beneficiary having to perform various non-qualifying administrative and other operational tasks. Although some non-qualifying tasks are permitted, any petitioner that plans to employ a beneficiary in a managerial or executive capacity must establish that the non-qualifying tasks are only incidental to the beneficiary's job and do not consume the primary portion of the beneficiary's time. In the present matter, the petitioner has not provided sufficient evidence to establish that the operational tasks are merely incidental. Rather, the beneficiary appears to be devoting a majority of his time to such tasks.

Moreover, while the director acknowledged some information in the petitioner's tax returns that indicates the employment of sub-contractors, it is noted that any time spent supervising, directing, or overseeing the work of the petitioner's sub-contractors cannot be considered as being a qualifying managerial or executive duty. As the service provided by the petitioner is to act as a general contractor and oversee the work of sub-contractors, any duties performed by the beneficiary to provide this service would not be deemed to be a qualifying managerial or executive task. 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 "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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). As such, the AAO cannot conclude that the petitioner has established that it would employ the beneficiary in a primarily managerial or executive capacity.

Lastly, with regard to the various documented inconsistencies discussed in the director's decision, it is noted that the petitioner must resolve any inconsistencies in the record by submitting independent objective evidence. Any attempt by the petitioner to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the present matter, the petitioner indicates that the inconsistencies were the result of accountant errors, which purportedly stemmed from the petitioner's changing of accountants. 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)). The petitioner's explanation is insufficient to resolve the types of significant inconsistencies that were addressed in the director's decision. While the AAO acknowledges that the discrepancies that were noted were with regard to 2006 documents and therefore do not address the petitioner's eligibility at the time of filing, the AAO cannot overlook or discount the fact that inconsistent tax documents were submitted without proper resolution. It is noted that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. In light of the petitioner's failure to resolve the discrepancies noted in the director's decision, the AAO must question the reliability of the remainder of the documentation submitted in support of the petition.

Regardless, even if the AAO were to focus its analysis entirely on the documentation that pertains to the relevant time period during which the petition was filed, the evidence does not establish that the petitioner was adequately staffed to relieve the beneficiary from having to primarily perform non-qualifying operational

tasks. Despite the petitioner's claims, the record does not contain evidence of an organizational hierarchy that contains senior and department managers for the beneficiary to oversee. While it is likely that the beneficiary would oversee the work of contracted labor, as previously discussed, any tasks the beneficiary would perform in the course of overseeing the contract labor would be deemed non-qualifying. In light of the above, the AAO cannot conclude that the beneficiary would be employed in a capacity where the primary portion of his time would be allocated to managerial or executive level tasks.

The second issue in this proceeding is whether the petitioner has established that it has the ability to pay the beneficiary's proffered wage.

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 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, U.S. Citizenship and Immigration Services (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. In the present matter, the petitioner claims that it has employed the beneficiary since prior to the filing of the Form I-140. However, there is no indication that the beneficiary has been paid a salary 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 USCIS) 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.

In the present matter, the director expressly stated in his decision that the petitioner's 2007 tax return contained no information in Schedule L that would allow an analysis of the beneficiary's net current assets

and whether such assets were sufficient to make up the difference between the amount of wages paid and the beneficiary's proffered wage.

On appeal, the petitioner merely supplements the record with bank statements. However, the petitioner fails to explain why the documentation expressly named in 8 C.F.R. § 204.5(g)(2) would provide an inaccurate illustration of the petitioner's finances and its ability to pay the beneficiary's proffered wage. The submission of bank account statements does not meet the criteria set forth by relevant regulatory provisions and therefore can only be afforded minimal probative value. As such, the petitioner has failed to provide sufficient evidence establishing its ability to pay the beneficiary's proffered wage at the time of filing.

Furthermore, while not addressed in the director's decision, the AAO finds that the petitioner failed to meet the provisions of 8 C.F.R. § 204.5(j)(3)(i)(B), which states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, the director specifically addressed this issue in the RFE by instructing the petitioner to provide a detailed description of the beneficiary's daily activities during his employment abroad. However, the petitioner failed to provide the requested information. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As the petitioner failed to provide the requested documentation, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground of ineligibility discussed above, this petition cannot be approved.

As a final note, with regard to the petitioner's reference to its approved L-1 employment of the beneficiary, the AAO notes that 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. USCIS is unable to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. The prior nonimmigrant approvals do not preclude USCIS 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 USCIS will approve an immigrant petition filed on behalf of the same beneficiary. USCIS 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 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approvals 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 USCIS

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).

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 met that burden.

ORDER: The appeal is dismissed.