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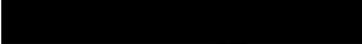
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FILE: 
WAC 03 244 54611

Office: CALIFORNIA SERVICE CENTER Date: AUG 26 2005

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.


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a California corporation in the business of designing, importing, and selling garments and home furnishings. It seeks to employ the beneficiary as its president at a salary of \$30,000 per year. 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 beneficiary would not be employed in a managerial or executive capacity and denied the petition.

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

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

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

- (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 described the beneficiary as an accomplished designer and businesswoman whose managerial skills have been instrumental in commencing business in the United States. The petitioner claims that the beneficiary's key responsibility is management of the company, which includes having the authority to sign contracts, oversee execution of the contracts, "plan and arrange the infrastructure required, arrange the finances required, devise the client fee structure, hire staff as required, and supervise and manage the day[-]to[-]day operations."

On July 27, 2004, the director issued a request for additional evidence (RFE) instructing the petitioner to submit in part a more detailed description of the beneficiary's job duties and its organizational chart describing the company's managerial hierarchy and staffing levels as of the date the petition was filed in August 2003. The petitioner was also instructed to clearly identify the beneficiary's position in the chart, her subordinates' names and job titles as well as their job duties and educational levels. Additional documentation

was also requested in the form of the petitioner's wage reports for the last four quarters, which includes the quarter during which the petition was filed (third quarter of 2003).

The petitioner responded with a letter dated October 14, 2004 and various supporting documents. The petitioner repeated the description of job responsibilities provided initially in support of the petition and added that the beneficiary "has the ultimate authority to manage the organization. She has the ultimate right, authority and responsibility for each managerial and executive decision in the organization." The petitioner claimed that it would be difficult to provide a percentage breakdown of the beneficiary's duties, but attempted to do so with the following list of job responsibilities:

Planning & [D]eveloping Policies

The beneficiary spends about 25% of her time on these issues. She is helped in this issue by her employees [redacted] who provide her with the [m]arketing research in their respective sections.

Directing Legal Affairs

The beneficiary spends approximately 5% of her time on these matters. She takes consultation from Bhatia & Co., Inc[.] and Transnative Associates, Inc[.] in these matters.

Planning & [S]upervising [M]arketing

The beneficiary spends about 25% of her time on planning and supervising marketing. She is helped by [redacted]. All these persons are on [the petitioner's] payroll. [redacted] helps [the beneficiary] in the marketing research and marketing for the [g]arments section and [redacted] helps [the beneficiary] in the marketing research and marketing of the [h]andicrafts.

Supervising Office, Web [S]upport, Financial & Administrative [M]atters

[The beneficiary] spends about 15% of her time taking care of financial & administrative matters wherein she is assisted by Harish, [m]anager and Mr. Gera for web support. They work in coordination with [redacted] (CPA) of Bhatia & Co., Inc. Bhatia & Co[.], Inc[.] is a professional organization who [sic] are rendering [the petitioner] professional services and assistance in several matters[,] including federal and state tax matters, corporate matters, payroll[,] and other matters.

However, the percentage of time spent by the beneficiary in all the above managerial or executive functions could vary from time to time depending upon the need and importance of each of the functions in various situations and at [sic] different times. Besides, she has to take care of [a] lot of other issues pertaining to the business. For example[,] she has to take care of the imports coming in [sic] into the U[.]S[.], device [sic] a pricing strategy, arrange infrastructure required, office management, other day-to-day operations and any other managerial duties[,] etc[,] which she performs with the assistance of all her subordinates.

It is noted that the petitioner's percentage breakdown accounts for only 70% of the beneficiary's time. Based on the last paragraph of the above description, it appears that the remaining 30% of the beneficiary's time would be spent arranging for the import of merchandise, deciding how to price the merchandise, and performing daily office management tasks.

The petitioner also submitted its organizational chart showing the beneficiary as head of the company. According to the chart, the beneficiary's three direct subordinates include a handicrafts supervisor, a garments supervisor, and an office and marketing manager. The chart also shows that the handicrafts supervisor oversees an individual who was hired approximately one year after the petition was filed, while the office and marketing manager oversees an individual who was hired more than one year after the petition was filed. Thus, despite the managerial and supervisory position titles of the beneficiary's subordinates, none of the employees were managing or supervising anyone at the time the petition was filed.

As a supplement to the organizational chart, the petitioner provided a separate list of its employees as well as their brief job duties and each individual's salary or wage. The list indicates that the garments and handicrafts supervisors each earn \$7 per hour. Although the petitioner failed to submit its wage report, Form DE-6, for the third quarter of 2003, that year's fourth quarterly wage report suggests that neither the garments nor the handicrafts supervisor was employed on a full-time basis. In fact, based on their respective wages, as indicated in the petitioner's fourth quarterly wage report, the garments supervisor worked approximately 171 hours for the entire quarter, which is approximately 15 hours per week; and the handicrafts supervisor worked about 239 hours for the entire quarter, which is approximately 20 hours per week. Although the petitioner's Form DE-6 for the fourth quarter of 2003 indicates that the office manager earned a salary commensurate with that of a full-time employee, there is no evidence on record to indicate that this individual consistently works 40 hours per week. This point is particularly emphasized in the petitioner's Form DE-6 for the first quarter of 2004, which indicates that the office manager worked only four hours for the entire quarter. As the petitioner failed to submit the relevant wage report for the third quarter of 2003, a conclusion cannot be made as to the number of hours of services each of the beneficiary's subordinates contributed to the petitioner's overall workforce during the time period the petition was filed. Furthermore, there is no indication as to who performed/performs the tasks of the office manager and the handicrafts and garments supervisors during their respective absences.

On December 8, 2004, the director denied the petition noting that the petitioner failed to submit sufficient detail regarding the beneficiary's actual job duties. The director concluded that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity.

On appeal, counsel states that the beneficiary's job responsibilities are managerial and executive and repeats the general statement of responsibilities initially provided in support of the petition. Counsel further claims that the beneficiary supervises professional level employees.

Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term 'profession' includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teacher of elementary or secondary schools, colleges, academies, or seminaries." Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term "profession" includes not only the occupations listed in section 101(a)(32) of the Act but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

In the instant matter, the job descriptions of the beneficiary's subordinates do not fit the above statutory and regulatory guidelines. Therefore, the AAO cannot conclude that the beneficiary primarily oversees the work of professional personnel.

Nevertheless, the above conclusion is not dispositive. A beneficiary may be deemed a manager or executive based on his/her managing an essential function and functioning at the top of the petitioner's hierarchy with respect to the function pursuant to section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), or based on the beneficiary's directing an organization or a major function of the organization pursuant to section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). In examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant matter, the petitioner has provided little more than cursory descriptions of the beneficiary's overall responsibilities without any detailed descriptions of the beneficiary's actual day-to-day duties. 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 provides CIS with no insight as to the specific duties involved in planning and developing policies and in planning and supervising marketing. Nor does the petitioner explain how the beneficiary "take[s] care of the imports coming in." As the organizational chart does not indicate that any of the petitioner's employees have been assigned with any warehousing functions, it appears that taking care of the imports means accepting their delivery and assuming any of the related warehousing duties.

Furthermore, the claim that the beneficiary's efforts are not needed in the daily performance of non-qualifying operational tasks is entirely unsupported by the evidence on record. Rather, the evidence suggests that the petitioner lacked the personnel structure to relieve the beneficiary from having to perform primarily non-qualifying tasks. As the petitioner failed to submit the necessary DE-6 wage report for the third quarter of 2003, the AAO is unable to determine who was actually working for the petitioner during the time the petition was filed and which of the employees was employed on a full-time basis. As previously discussed, the petitioner's fourth quarterly wage report for 2003 suggests that the petitioner had only two full-time employees, including the beneficiary, at the time the petition was filed. Despite the petitioner's failure to submit a detailed description of the beneficiary's tasks, the lack of a sufficient support staff strongly suggests that the petitioner relies on the beneficiary to both manage and perform the petitioner's essential tasks. 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).

While the petitioner is not required to have a large staff in order to classify the beneficiary as a multinational manager or executive, the petitioner has the burden of establishing that it is equipped with the necessary personnel or is able to contract individuals to relieve the beneficiary from having to spend her time primarily performing the petitioner's daily operational tasks. The evidence submitted thus far by the petitioner suggests that the petitioner lacks the organizational complexity to support a primarily managerial or executive position. Although the petitioner has indicated its intention to hire additional employees and, in fact, may have done so by this time, a 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). As such, the AAO must consider the petitioner's organizational hierarchy as it existed at the time the petition was filed. As previously stated, the record indicates that the petitioner did not have the hierarchy in place to support a primarily managerial or executive position. Therefore, regardless of the beneficiary's discretionary authority, the AAO cannot conclude that the petitioner was prepared to employ the beneficiary in a qualifying capacity at the time the petition was filed. For this reason the petition cannot be approved.

It is noted that the record shows evidence that two of the petitioner's L-1 nonimmigrant petitions were previously approved. However, the director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory 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 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).

Beyond the director's decision, two additional factors preclude the AAO from sustaining the appeal. The first factor is the lack of sufficient evidence establishing the petitioner's 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, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986)(citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D.Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. 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 instant matter, the petitioner's 2003 tax return shows that the petitioner's net income was \$8,215. This amount is insufficient to cover the beneficiary's proffered salary of \$30,000. The record contains no evidence to overcome the adverse indication found in the relevant tax return.

The second factor is the petitioner's failure to establish that it had been doing business for one year prior to filing the petition as required by 8 C.F.R. § 204.5(j)(3)(i)(D). Although the record contains a significant number of bank records and bills, these are not accurate indicators of whether a company is doing business. The record also contains bills issued to the petitioner for customs house services and a number of purchase invoices for various merchandise. While these documents are accurate indicators of whether a company is doing business, none of the submitted documents reflect transactions that took place from August 2002 to August 2003, the one-year period prior to the filing of the petition. 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)). As the record lacks the relevant documentation, the AAO cannot conclude that the petitioner had been doing business for the requisite length of time during the relevant time period.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the two factors discussed in the paragraphs above, this petition cannot be approved.

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 its 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.