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FILE: WAC 03 241 54269 Office: CALIFORNIA SERVICE CENTER Date: SEP 07 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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition seeking to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of California that is operating as a full-service motel. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, the petitioner claims that the beneficiary would be employed in an executive capacity, as he directs the eight-employee organization, establishes its goals and policies, exercise wide latitude in discretionary decision-making and receives only general supervision from the board of directors. The petitioner provides a letter and additional documentary evidence in support of the appeal.

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 or managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner filed the instant petition on August 22, 2003 requesting that the beneficiary be employed as the company's president. In an attached letter, dated July 23, 2003, the petitioner provided the following description of the beneficiary's position:

As President of [the petitioning organization] since November 2001, [the beneficiary] is responsible for the corporation and its development. He oversees the whole operation, guiding and training his Manager in corporation policies, procedures and goals, in order to achieve the corporate aims through her. He recruited qualified and experienced staff and has established a 'team' that works well together. He has prepared staff training courses, bettered efficiency and service to the public, reviewed and monitored local competition, investigated

other franchises for better marketing and visibility purposes, and is currently reviewing the addition of more business services for motel clients, and other business opportunities for the corporation. He holds the highest position within the corporate hierarchy, answering and reporting only to the Board of Directors of the parent company and the shareholders of the US subsidiary.

[The beneficiary] receives an annual salary of \$30,000, part of which is paid by the Kenyan parent company, so that profits are retained for development and expansion.

The petitioner asserted in its letter that the beneficiary's position satisfies the regulatory requirements of the definition of "executive capacity" as the beneficiary directs the manager of the corporation, establishes the company's goals and policies, exercises wide latitude in discretionary decision-making, and occupies the highest position in the petitioning organization receiving only general supervision from the company's board of directors and stockholders.

Appended to the petition was a comprehensive list of the beneficiary's responsibilities as well as the job duties performed by four of the subordinate employees. The beneficiary's job duties consisted of the following:

- Total responsibility for signing of all legal documents and other on behalf of the corporation
- Signing of all corporate checks on behalf of the corporation
- Establishment of corporate goals and policies
- Establishment of corporation financial budgets and cash flows
- Overall control of corporation and its development for profitability and success
- Overall control of finances of corporation
- Setting of procedures
- Monitoring of all financial matters and decision making on any changes necessary to improve profitability of corporation
- Training and delegation of duties to Managers to achieve corporation goals through them
- Preparation of Manager and staff training courses
- Delegation to Managers for training of staff and monitoring of work performances
- Recruitment, interviewing, hiring and training of managerial staff
- Promotion or firing of managerial staff when necessary
- Setting of all staff pay levels and vacation allowance
- Approval of all legal paperwork
- Approval of all Tax Returns prepared by accountant
- Assessment and monitoring of competition
- Review of alternative franchise and decision made on changing franchised trading name
- Organization of change of trading name and refurbishment of motel
- Obtaining estimates for refurbishment work, negotiating and decision made on contractors to use
- Organization and supervision of subcontractors for refurbishment work
- Approval of refurbishment work completed and approval of payment to contractors
- Research into improving services to business professionals, such as in house report typing, photocopying, conference room facilities, etc.

- Research into providing "special weekends" such as romantic weekends with candlelight dinners, golfing weekends, etc.
- Preparation for marketing facilities for weddings, birthdays, etc.
- Will travel between California and Missouri following 50% acquisition of liquor store and will direct the managers of both operations and monitor progression
- Will assess liquor store's operation and make changes in procedures and policies as he sees fit for betterment of customer relations and profitability
- Will reassess marketing strategy for liquor store and compare competitors
- Will train liquor store staff to be fully knowledgeable on products and required customer relations policy
- Reports only to the Board of Directors of the Kenyan parent company

The petitioner also attached an organizational chart identifying the beneficiary as its president and the following lower-level positions: manager, maintenance, head housekeeping, maid, desk manager, and desk clerk. The position of "desk clerk" was noted to be "under review."

In an August 12, 2004 request for evidence, the director asked that the petitioner provide the following documentation regarding the beneficiary's employment in a qualifying capacity: (1) a detailed description of the job duties performed by the beneficiary on a "typical day"; (2) an organizational chart reflecting the petitioner's personnel levels on the date of filing the petition, including a brief description of the tasks performed by each employee and the source of remuneration; (3) California Employment Development Forms DE-6, Quarterly Wage Report, for all employees during the third and fourth quarters of 2003 and the first quarter of 2004.

The petitioner responded in a letter dated October 25, 2004. In an attached statement, the petitioner outlined the daily job duties performed by the beneficiary. As the outline is already part of the record, it will not be entirely repeated herein. The petitioner also submitted a more detailed list of the job duties performed by the lower-level employees. In an attached payroll register provided by the petitioner, seven employees, including the beneficiary were identified as being employed at the time of filing the petition. The AAO notes that three employees listed on the petitioner's payroll register were not identified on the organizational chart, while one employee noted on the organizational chart was not identified on the petitioner's payroll. The petitioner also provided the requested copies of its quarterly state wage reports, which reflected the September 2003 hiring of the "head housekeeper," bringing the petitioner's total number of employees to eight.

In a November 29, 2004 decision, the director determined that the petitioner had not demonstrated that the beneficiary would be employed in a primarily managerial or executive capacity. The director stated that the "vague and nonspecific" job description of the beneficiary fails to explain what the beneficiary would do on a daily basis. The director noted that the beneficiary's specific job duties do not "define the goals, policies, [or] strategies, or clarify who actually performs the marketing, budgeting, finance and accounting, advertising, and personnel functions." The director also stated that a comparison of the petitioner's organizational chart with its third quarter payroll records for 2003 indicates the employment of only one full-time employee and three part-time employees. The director concluded that, based on the petitioner's organizational chart, the beneficiary would assist with the day-to-day non-supervisory duties of the company. The director stated that, despite the beneficiary's title as "president," the performance of these duties precludes the beneficiary from being considered an executive. Additionally, the director determined that the beneficiary would not be employed as a functional manager. Consequently, the director denied the petition.

In an appeal filed on December 29, 2004, the petitioner claims that the beneficiary's employment satisfies the four criteria outlined in the regulatory definition of an executive. In its December 22, 2004 letter, the petitioner states:

[The beneficiary] directs the organization which trades as a full service motel in Salinas, employing 7 members of staff who carry out the day to day operational duties. [The beneficiary] works through his Manager, [REDACTED] to achieve corporate goals. [The manager] is responsible for the supervision of the daily trading, directing mid management staff in their duties and reporting to [the beneficiary].

The petitioner challenges the director's finding that the petitioner employs only one full-time worker besides the beneficiary, providing a revised organization chart, in which the petitioner identified the three workers previously omitted from the chart. The petitioner also identified an employee in the position of "desk clerk." With regard to the personnel structure, the petitioner further explains that its manager was granted a leave of absence due to illness and pregnancy from June 2003 through March 2004. The petitioner states that during this time, the job duties performed by the manager were assumed by the desk manager, and that the previous manager would come into the office on a part-time basis to oversee and supervise the desk manager. The petitioner notes that the manager was not paid during this time, but was guaranteed her position when she returned. The petitioner submits an affidavit from the manager confirming her leave of absence from the petitioning entity, outlining her job duties as manager, and identifying the petitioner's lower-level employees.

As additional evidence of the beneficiary's employment in a qualifying capacity, the petitioner submits affidavits from the petitioner's accountant and a supplier, both of whom attest to the beneficiary's performance as an "effective executive" and "staff organizer" who "reorganized the corporate goals and policies and encourages staff participation." The petitioner also provides two lists of the goals, policies and discretionary decisions made by the beneficiary as the company's president. As these lists are already part of the record, they will not be repeated herein. Additionally, the petitioner includes a letter from the director of the foreign entity confirming that the beneficiary makes decisions for the corporation without supervision from the board of directors.

Upon review, the record does not demonstrate that the petitioner would employ the beneficiary in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While the petitioner provided a comprehensive list of the job duties performed by the beneficiary, many of the beneficiary's specific tasks are non-managerial or non-executive. For example, the beneficiary would be responsible for the corporation's finances and marketing, and for personally negotiating and obtaining estimates from contractors for renovations and researching improved motel services and travel packages to offer to guests. Although a portion of the beneficiary's time would be spent performing executive and managerial tasks, the record does not indicate the amount of time the beneficiary would devote to these tasks, or, more importantly, whether the beneficiary would be primarily performing the non-qualifying job

duties previously listed. Based on the current record, the AAO is unable to determine whether the claimed executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial and non-executive operational functions of the business. 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).

Moreover, the petitioner's explanation regarding the performance of the manager's job duties during her absence is not persuasive. Despite the petitioner's claim that the desk manager assumed the manager's position, there is no additional evidence demonstrating the desk manager's employment as the "manager," such as an increase in wages for her performance in an upper-level position.<sup>1</sup> Also, the petitioner does not confirm that the desk manager is qualified to assume these higher-level job duties. Nor does the petitioner identify another employee who would, in turn, perform the duties of desk manager.<sup>2</sup> Furthermore, the petitioner's claim that the previous manager monitors the desk manager on a part-time basis is questionable. It seems implausible that the manager would continue "to oversee and supervise the [desk manager]" while on medical and/or maternity leave and despite not receiving any compensation from the petitioning organization. Based on the record, it is reasonable to conclude that the beneficiary may be performing the manager's lower-level tasks during her absence. Again, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* Regardless, the petitioner has not demonstrated that the beneficiary's subordinate employees relieve the beneficiary from performing the above-outlined non-qualifying job duties.

The AAO will not consider the beneficiary's proposed responsibilities related to the petitioner's anticipated partnership in the operation of a liquor store. The record does not demonstrate that at the time of filing the petition the petitioner held an interest in the liquor store.<sup>3</sup> 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).

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue in this proceeding is whether the beneficiary was employed overseas in a primarily managerial or executive capacity as required in the Act at section 203(b)(1)(C). The petitioner provided a vague job description in its July 23, 2003 letter that the beneficiary oversaw and ensured the stability and growth of the foreign organization, "directed and worked through his management to achieve company goals set by him," and was responsible for the company's decision-making and policies. The petitioner failed to submit a detailed job description of the beneficiary's overseas position as

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<sup>1</sup> The petitioner's organizational chart identifies the position of "desk manager" as subordinate to the manager.

<sup>2</sup> The AAO notes that at the time of filing the petition the petitioner had not yet employed a desk clerk who could assume the role of desk manager during this absence.

<sup>3</sup> The AAO acknowledges the July 1, 2003 letter from a partner of Patel & Desai LLC, the owner of the liquor store, expressing an interest in a partnership with the petitioner. The record, however, does not contain a partnership agreement between the two organizations. Additionally, on its organizational chart, the petitioner refers to the liquor store as a "proposed" investment.

required by the regulations. *See* 8 C.F.R. § 204.5(j)(5). 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). For this additional reason, the petition will be denied.

An additional issue not addressed by the director is whether at the time the priority date was established the petitioner had the ability to pay the beneficiary's proffered wage as required in the regulation at 8 C.F.R. § 204.5(g)(2). 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, although the petitioner previously employed the beneficiary, the petitioner stated in its July 23, 2003 letter that a portion of the beneficiary's \$30,000 salary is paid by the foreign entity.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

As the petition's priority date falls on August 22, 2003, the AAO must examine the petitioner's tax return for 2003. The petitioner's IRS Form 1120 for calendar year 2003 presents a net taxable income of zero. The petitioner could not pay a proffered wage of \$30,000.

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. Schedule L of the petitioner's 2003 tax return reflects a cash balance in the amount of \$375 and zero in current liabilities. As the petitioner's net current assets are \$375, the petitioner is not able to pay the beneficiary's annual \$30,000 salary. Consequently, the petition will be denied for this additional reason.

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).

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. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.