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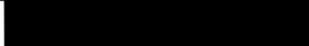
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FILE:



Office: NEBRASKA SERVICE CENTER

Date: JUN 28 2006

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IN RE:

Petitioner:



Beneficiary:

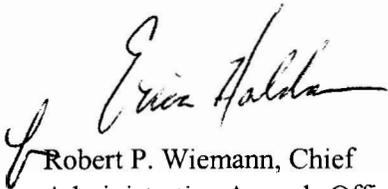
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based visa petition. The matter was subsequently certified to the Administrative Appeals Office (AAO) for review. The director's February 8, 2006 decision is withdrawn, and the matter is remanded to the director for review and the entry of a new decision.

The petitioner filed the instant immigrant petition 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 Oregon that is engaged in the export of products to Russia. The petitioner seeks to employ the beneficiary as its president.<sup>1</sup>

The director denied the immigrant petition concluding that the petitioner was not an "American firm or corporation" for purposes of section 316(b) of the Act, 8 U.S.C. § 1427(b). The director referenced a January 11, 2006 Citizenship and Immigration Services (CIS) memorandum and an AAO decision, *Matter of Chawathe*, as providing guidance in the analysis of an "American firm or corporation" as referenced at section 316(b) of the Act. The director stated that because the petitioner had not demonstrated its status as an "American firm or corporation," it could not be deemed to be a "United States employer" eligible for requested visa petition.

On appeal, counsel for the petitioner contends that the director misapplied the law to the instant matter, stating that section 316(b) of the Act "is irrelevant to the current petition for a [m]ultinational [e]xecutive or [manager] immigrant visa." Counsel challenges the director's analysis of the petitioning entity as an "American firm or corporation," claiming that the phrase is not interchangeable with the term "United States employer," which is used in the governing regulations for this immigrant visa classification. Counsel submits a brief 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

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<sup>1</sup> The AAO notes that on May 27, 1999 the petitioner filed an I-140 immigrant petition requesting employment of the beneficiary herein as the company's export manager. The petition was denied by CIS on February 18, 2000. Despite certification under the penalty of perjury, the information provided by the petitioner in Part Four of Form I-140 indicates that the beneficiary had not previously had an immigrant visa petition filed on his behalf. The petitioner appears to have been represented in that proceeding by the same counsel as in the instant matter.

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. See 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether CIS' adopted interpretation of the term "American firm or corporation" under section 316(b) of the Act is applicable to a determination as to whether a petitioner is a "U.S. employer" for purposes of an immigrant visa petition for classification as a multinational manager or executive.

Section 316 of the Act, titled *Requirements of Naturalization*, subsection (b) pertains to the preservation of residence of an applicant seeking to be naturalized as a United States citizen. With respect to the director's decision in the instant matter, subsection (b), specifically references the term "American firm or corporation" in its discussion of an applicant's absence from the United States during the period for which continuous residence is required for admission to citizenship.

In a decision dated February 8, 2006, the director concluded that the petitioner was not an American firm or corporation. The director held that the petitioner must demonstrate its status as "a United States employer," and consequently applied section 316(b) to the instant matter. The director referenced a January 11, 2006 CIS memorandum, in which the Acting Deputy Director adopted the AAO decision of *Matter of Chawathe* as a precedent for demonstrating the requirements necessary for a publicly-held corporation to be deemed an "American firm or corporation." Memorandum from Robert C. Divine, Acting Deputy Director, *Matter of Chawathe* (January 11, 2006). Following his analysis, the director determined that the petitioner had not demonstrated its status as an American firm or corporation. Consequently, the director denied the petition.

On appeal, counsel for the petitioner contends that section 316(b) of the Act applies only to naturalization proceedings and is irrelevant to an immigrant visa petition for a multinational manager or executive. Counsel also claims that CIS should not consider the terms "United States employer" and "American firm or corporation" to be interchangeable, as "American firm or corporation" is a term of nationality, while a "United States employer" begs the issue of location. As counsel's appellate brief is already part of the record, it will not be entirely repeated herein.

Upon review, the director erred in his application of section 316(b) of the Act to the instant matter.

In *Matter of Chawathe*, the AAO concluded that a publicly held corporation may be considered an "American firm or corporation" for purposes of section 316(b) of the Act "if the applicant establishes that the corporation is both incorporated in the United States and trades its stock exclusively on U.S. stock markets." As

specifically stated in the AAO's decision, *Matter of Chawathe* applies only to the preservation of residence for purposes of naturalization. The analysis of the term "American firm or corporation" does not apply to immigrant proceedings, or, as in the instant matter, a petitioner's eligibility to request classification of an alien as a multinational manager or executive under section 203(b)(1)(C) of the Act. Accordingly, the director's decision will be withdrawn.

The AAO notes that first-preference immigrant status under section 203(b)(1)(C) of the Act requires that the beneficiary have a permanent employment offer from the petitioner. A petitioner who is a nonimmigrant temporary worker is not competent to offer permanent employment to an alien beneficiary for the purpose of obtaining an immigrant visa for the beneficiary under section 203(b)(1)(C) of the Act. *Matter of Thornhill*, 18 I&N Dec. 34 (Comm. 1981); *see also*, 8 C.F.R. § 204.5(j)(1) (stating that only a "United States employer" may file the immigrant visa petition). Here, the petitioner is a United States corporation, and is therefore competent to file the instant immigrant visa petition.

Although the director's decision will be withdrawn, the record as presently constituted does not establish the beneficiary's eligibility for the requested immigrant visa classification. Accordingly, the petition will be remanded to the director for further review and entry of a new decision.

The petitioner has not demonstrated that 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 noted on the Form I-140 and its accompanying June 30, 2005 letter that the beneficiary would be employed in an executive capacity as the company's president. However, the evidence submitted by the petitioner in support of the beneficiary's employment in a qualifying capacity does not demonstrate the beneficiary's eligibility for the classification sought. For example, in its June 30, 2005 letter the petitioner provided broad statements that the beneficiary would direct "several major components of the organization," establish the company's policies, objectives and procedures, and review its activity reports and financial statements. An appended undated statement of the beneficiary's job duties as "export manager/president" outlines equally vague job duties, such as "[a]nalyzing markets" and the "activity" of the company, "defining the company's staff functions and duties," making business decisions, and overseeing the work of the company's accounting/traffic manager, who incidentally is not identified on the petitioner's organizational chart. The petitioner has not clarified what the beneficiary would do on a daily basis in the position of president or outlined his specific managerial or executive job duties. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Additionally, several of the job responsibilities held by the beneficiary suggest that he would be performing non-qualifying operational tasks of the company. Specifically, the beneficiary would represent the petitioner in contract negotiations with suppliers and customers, act as an intermediary in "customers' problems," locate suppliers, and establish business relationships. Based on the petitioner's representations, it appears that the beneficiary would be personally responsible for performing the non-qualifying tasks associated with the petitioner's sales, including meeting, negotiating, and locating customers and suppliers, responsibilities that are not typically deemed to be managerial or executive in nature. *See* 101(a)(44)(A) and (B). Additional evidence in the record further suggests that the beneficiary would occupy a non-qualifying position in the United States company, including the petitioner's organizational chart, on which it identified the beneficiary's responsibilities as "[s]ales, [p]urchasing, and [p]ersonnel." While the petitioner identified two subordinate employees in the positions of logistics and "[r]eceptionist, sales/purchasing assistant," each employee is represented as working approximately four hours per day. It is not clear from the record whether these employees would relieve the beneficiary from performing the above-noted non-qualifying tasks. The AAO notes 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The AAO also notes a discrepancy with regard to the beneficiary's subordinate staff. The record indicates that the petitioner's vice-president received compensation in 2004 that is approximately \$12,000 more than the beneficiary's proffered salary. It is not clear why a subordinate employee of the beneficiary would receive a greater salary than the beneficiary's proposed salary. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

An additional issue not addressed by the director is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity for at least one year during the three years preceding his entry into the United States as a nonimmigrant.

In support of the beneficiary's qualifying overseas employment, the petitioner represented in its June 30, 2005 letter that the beneficiary worked for the foreign entity in a primarily managerial or executive capacity from February 1996 through March 1997. CIS records, however, indicate that the beneficiary entered the United States on April 17, 1996 in B1/B2 nonimmigrant status and was subsequently granted a change of status to that of an H-1B nonimmigrant in March 1997. The immigrant visa petition previously filed by the petitioner on June 1, 1999 on behalf of the beneficiary also indicated that the beneficiary arrived in the United States as a nonimmigrant in April 1996. This contradicts the petitioner's statement with respect to the beneficiary's length of employment as the foreign entity's import manager, as well as the information contained in the beneficiary's "work book," which suggests that the beneficiary was employed by the foreign entity from September 1992 through October 1997. Based on the current record, the beneficiary was not employed by the foreign entity in a primarily qualifying capacity for the requisite period of at least one year in the three years prior to his entry into the United States as a nonimmigrant. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt 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 addition to the above-noted discrepancies, the record does not establish that the beneficiary occupied a primarily managerial or executive role while employed by the foreign entity. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, many of the responsibilities held by the beneficiary in the overseas company are not deemed to be managerial or executive. See *id.* For example, the petitioner explained in its June 30, 2005 letter that as the foreign company's import manager/vice-president, the beneficiary directed foreign sales, including negotiating sales contracts, "interacting with sales personnel," "arrang[ing] import sales . . . with U.S. suppliers," "sales forecasting, analysis of market and price control," "preparing and examining invoices, sales confirmation, and shipping documents," and "develop[ing] . . . training programs, presentation materials and promotional brochures." Based on the petitioner's representations, it appears that the beneficiary was primarily performing non-qualifying operational tasks of the company's sales and import functions, rather than primarily directing the performance of these tasks. Additionally, the petitioner has not explained why the beneficiary's responsibility of preparing training programs and presentation materials, which the petitioner indicated consumed approximately thirty percent of the beneficiary's time, should be considered managerial or executive in nature. While counsel identified a subordinate staff of the beneficiary's in her November 17,

2005 response to the director's request for evidence, there is insufficient evidence to conclude that the beneficiary's subordinates relieved him from performing the above-outlined non-managerial and non-executive job duties. Again, 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

A final issue not addressed by the director is whether at the time the priority date was established, the petitioner demonstrated its ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

Any petition filed by or for any 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.

The petitioner noted on the Form I-140 that the beneficiary would receive an annual salary of approximately \$47,000.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner did not establish that it had previously employed the beneficiary at 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.

As the petition's priority date falls on July 5, 2005, the AAO must examine the petitioner's tax return for 2005. While the petitioner submitted its tax returns for the years 1995 through 2003, the record does not contain its 2004 or 2005 federal tax returns. The record is also devoid of annual reports or audited financial statements that would demonstrate the petitioner's ability to pay the proffered salary. 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)).

For the foregoing reasons, the record as presently constituted does not establish the beneficiary's eligibility for the requested immigrant visa classification, and the petition will therefore be remanded to the director for further action and consideration. The director is instructed to consider the issues of whether the beneficiary was employed abroad and would be employed in the United States in a primarily managerial or executive capacity, as well as the petitioner's ability to pay, and, if necessary, request additional evidence. The director should enter a new decision based on his review of the record and any additional documentary evidence.

**ORDER:** The decision of the director dated February 8, 2006 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.