



U.S. Citizenship  
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[Redacted]

FILE: [Redacted]  
WAC 02 132 54007

Office: CALIFORNIA SERVICE CENTER

Date: SEP 08 2006

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:

[Redacted]

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 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 an Arizona corporation that operates as a resort hotel. The petitioner seeks to employ the beneficiary as its president. 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 grounds: 1) the beneficiary would not be employed in a managerial or executive capacity; and 2) the petitioner has not established its ability to pay the beneficiary's proffered wage.

On appeal, counsel disputes the director's findings and submits a brief in support of her 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 first 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 submitted an employment offer stating that the beneficiary would direct the management of the petitioner's daily operations, set goals and policies, and hire and fire all personnel. The petitioner further stated that the beneficiary would exercise full discretion over company operations and would report to the shareholders. No additional information was provided regarding the beneficiary's duties under an approved petition.

On June 4, 2002, the director issued a request for additional evidence (RFE) instructing the petitioner to submit its organizational chart describing its managerial hierarchy and staffing levels as of the date the petition was filed in March of 2002. The petitioner was also instructed to clearly identify the beneficiary's position in the chart, his subordinates' names and job titles, and the subordinates' job duties and educational levels. Additional documentation was also requested in the form of the petitioner's wage reports for the last quarter of 2001 and for all available quarters of 2002. The petitioner was also asked to provide a more detailed description of the beneficiary's job duties.

The petitioner submitted a written response dated August 13, 2002 claiming that the beneficiary would be employed in a managerial and an executive capacity. The petitioner provided the following information about the beneficiary's job responsibilities:

As [p]resident, [the beneficiary] directs the management of the organization, he establishes its goals and policies, he exercises wide latitude in discretionary decision-making, and reports only to the shareholders. 8 C.F.R. [§] 204.5(j). As the controlling manager, [the beneficiary] manages the entire U.S. entity, supervises and controls the work of 5 employees (including two college graduates), hires and fires personnel, and exercises day-to-day operations of business activities. *Id.*

The petitioner also submitted an organizational chart showing four tiers of management with four hotel workers at the bottom of the company's hierarchy. The four tiers of management include the beneficiary as the petitioner's president; the vice president as the beneficiary's immediate subordinate; the secretary as the vice president's subordinate; and the general manager whose subordinates consist of two front desk workers, a maintenance worker, and a housekeeper. Information at the bottom of the chart further indicates that the vice president and secretary are primarily based at the petitioner's Canadian parent company.

The petitioner also submitted its quarterly tax returns (Forms 941) for the fourth quarter of 2001 and for the first two quarters of 2002. The first quarter 2002 tax return during which the petition was filed shows that the petitioner paid a total of \$8,695.32 in wages. Although the petitioner was instructed to submit its quarterly wage reports in addition to its quarterly tax returns it failed to do so.

On February 24, 2003, the director attempted to issue another RFE, which appears to have been resent on September 23, 2004. The director instructed the petitioner to submit the previously request quarterly wage reports for the first two quarters of 2002 and made another request for a more detailed description of the beneficiary's proposed duties. Additional evidence regarding the petitioner's ownership and control was also requested for the purpose of determining whether the petitioner had established a qualifying relationship with the beneficiary's foreign employer.

In response, the petitioner provided the requested quarterly wage reports, which indicated that, even though the petitioner employed a total of five employees during the course of the first quarter of 2002, it employed three individuals in March of 2002 when the petition was filed. Although all of the employees' names are provided in the wage report, there is no way to determine which of the employees the petitioner employed during the relevant time period. It is noted that of the five employees named in the quarterly wage report, only three of the names match the names shown in the petitioner's organizational chart.

On December 18, 2004, the director denied the petition stating that the petitioner failed to provide sufficient information about the beneficiary's specific job duties. The director also stated that the beneficiary's support staff does not appear to consist of supervisory, professional, or managerial employees and further noted that the record does not show that the petitioner actually employs the beneficiary despite the fact that the beneficiary has been an L-1 nonimmigrant since at least March 1999.

On appeal, counsel objects to the director's failure to discuss the submitted newspaper article, which counsel claims discusses the beneficiary's role in the company, or the previously approved I-129 petition, which

classified the beneficiary as an L-1A nonimmigrant. Counsel's objection, however, is without merit. While the newspaper article to which counsel refers does discuss the beneficiary's role in attempting to expand the petitioner's resort hotel, it does not address the subject of the beneficiary's specific daily job duties within the petitioning organization. Neither the director nor the AAO dispute the beneficiary's likely importance to the success of the petitioning entity. However, the actual duties themselves 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). The newspaper article submitted by the petitioner provides no insight as to the beneficiary's actual day-to-day duties and, instead, focuses on the beneficiary's role as an entrepreneur, which does not necessarily determine that the beneficiary is employed in a managerial or executive capacity pursuant to sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B), respectively.

In regard to the beneficiary having been approved for classification as an L-1A nonimmigrant, the director's decision does not indicate whether he reviewed the prior approval(s) of the other nonimmigrant petition(s). If the previous nonimmigrant petition(s) was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval(s) 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).

Counsel also states that the director failed to consider the beneficiary's supervision of [REDACTED] the petitioner's general manager. However, despite the petitioner's organizational chart, which includes Mr. [REDACTED] name and indicates that Mr. [REDACTED] is the petitioner's general manager, the petitioner's wage report for the first quarter of 2002 does not identify Mr. [REDACTED] as one of its employees. Nor has the petitioner submitted any other documentary evidence to support its claim. 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)). Furthermore, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Thus, while counsel reiterates the petitioner's claim regarding Mr. Nau's employment as the petitioner's general manager, it does not establish that the petitioner employed Mr. Nau at the time the petition was filed.

Counsel continues her argument asserting that the director improperly interpreted the petitioner's claim, which, according to counsel, does not include the claim that the beneficiary's position fits the statutory definition of managerial capacity. While counsel's argument holds true regarding the petitioner's initial claim, the petitioner's first RFE response, which was formulated by counsel on counsel's official letterhead, clearly indicates counsel's intent that the beneficiary's position is both executive *and* managerial. Counsel followed this assertion with excerpts of the regulatory definition of managerial capacity. *See* 8 C.F.R. § 204.5(j). Thus, counsel's objection to the portion of the director's decision that addresses the definition of managerial capacity is without merit and contrary to her previously made statements.

On review, the petitioner has failed to establish that the beneficiary would be employed in a managerial or executive capacity. In examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Service (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 a broad overview of the beneficiary's responsibilities, but it has failed to provide any specifics regarding his day-to-day job duties despite CIS's numerous attempts to elicit this relevant information. 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.

Furthermore, a comparison of the names provided in the petitioner's organizational chart and the information in the petitioner's quarterly wage report for the first quarter of 2002 indicates that the petitioner employed three nonprofessional, nonsupervisory, and nonmanagerial workers at the time the petition was filed. As previously stated, the record does not support the claim that the petitioner employed a general manager during the relevant time period. As such, the record lacks evidence that the petitioner had a sufficiently complex organizational hierarchy through which the beneficiary could have effectively directed the management of the petitioner's operation. Nor does the record suggest that the beneficiary's subordinate staff was comprised of professional, supervisory, or managerial personnel. Accordingly, the AAO cannot affirmatively conclude that the beneficiary would primarily perform managerial or executive duties. For this initial reason, the petition may not be approved.

The other issue in this proceeding is whether the petitioner had established its ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states the following, in pertinent part:

Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

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 Form 1120 corporate tax return for 2002 shows that the petitioner was operating at a net loss of \$30,160 the year during which the petition was filed. While counsel is correct in stating that the petitioner does not have to actually pay the beneficiary's proffered wage unless and until the



petition is approved, the fact remains that the petitioner must establish the ability to pay the beneficiary's proffered wage of \$48,000 per year at the time the petition is filed, which in the this case was March 11, 2002. The fact that the petitioner was operating with a net loss after paying only \$40,044 in wages suggests that the petitioner did not have the ability to pay the beneficiary's proffered wage, which would have been considerably higher than the total amount of wages paid that year by the petitioner.

Furthermore, while the petitioner is not required to employ the petitioner at the time the petition is filed, the petitioner in the instant matter has maintained the claim that the beneficiary has, in fact, been employed with the petitioning entity since prior to the filing of the petition and continuing to the present day. Thus, the petitioner's inability to show that the beneficiary has been compensated in any way throughout his alleged employment gives rise to doubts regarding the credibility of the petitioner's claims. 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 the instant matter, the petitioner has failed to submit evidence establishing its ability to pay the beneficiary's proffered wage at the time of the filing of the petition. For this additional reason, the petition cannot be approved.

Beyond the decision of the director, the petitioner has failed to submit sufficient evidence establishing that it has a qualifying relationship with the beneficiary's foreign employer.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

*Affiliate* means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

\* \* \*

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In support of the petition, the petitioner submitted a statement regarding the ownership breakdown of the petitioning entity and [REDACTED] the beneficiary's foreign employer, which is located in Canada. The petitioner stated that the beneficiary owns 25% of its outstanding shares while [REDACTED], a Canadian company, owns 50% of its outstanding shares. The petitioner claims that the same parties have the same ownership interests in the beneficiary's foreign employer. The petitioner also submitted a copy of a

stock purchase agreement identifying [REDACTED] and [REDACTED] (the [REDACTED] from here on) as one party and "a major shareholder" of the petitioning corporation. The same agreement transfers 1,000 of the [REDACTED] Class B nonvoting shares to [REDACTED]

In response to the director's second RFE, the petitioner submitted stock certificates 1-8 and the corresponding stock transfer ledger indicating that a total of 10,000 were issued. Of those 10,000 shares, 2,000 Class A voting shares are owned by the beneficiary, 7,000 Class B nonvoting shares are also owned by the beneficiary, and 1,000 nonvoting shares discussed in the stock purchase agreement are owned by [REDACTED]. Additionally, Schedule L, item no. 22(b) of the petitioner's 2002 and 2003 corporate tax returns show that \$10,000 worth of stock was issued by the petitioner. Thus, neither the tax return nor the stock transfer ledger reflects [REDACTED]'s alleged ownership of 50% of the petitioner's shares.

Furthermore, the stock certificate no. 3, which was submitted in support of the prior I-140 petition (with receipt number WAC0006850121) filed by the same petitioner, does not match the stock certificate no. 3 submitted in support of the instant I-140 petition. The latter stock certificate appears to have been altered without any explanation for the alteration or any prior disclosures by the petitioner regarding denial of the previously filed I-140 petition. As previously stated, 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. at 591-92. 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* at 591.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. Further, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. Thus, even if the petitioner were able to establish [REDACTED] ownership of 50% of the petitioner's shares, this information does not establish who controls the petitioning entity. In regard to ownership of the beneficiary's foreign employer, no evidence has been submitted to corroborate the petitioner's claim. As previously noted, 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. 165.

Accordingly, as a result of the conflicting documentation submitted in regard to ownership and control of the U.S. entity and the lack of any evidence regarding ownership and control of the foreign entity, the AAO concludes that the petitioner has failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

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 additional issues discussed in the above paragraphs, the AAO cannot sustain the appeal.

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.