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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

By

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: AUG 03 2007  
SRC 06 027 51809

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER: SELF-REPRESENTED

**INSTRUCTIONS:**

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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation operating as a wholesale distributor of ceramics. It seeks to employ the beneficiary as its executive manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director denied the petition based on four independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; 3) the petitioner failed to establish that it was doing business for the full one-year time period prior to the date of filing the Form I-140; and 4) the petitioner failed to establish its ability to pay the beneficiary's proffered wage.

On appeal, the beneficiary, on behalf of the petitioner, disputes the director's conclusions and submits a brief in support of his arguments.

A review of the record on appeal shows that the petitioner provided sufficient documentation to show that it was doing business since November of 2004, one year prior to the date the Form I-140 was filed. This documentation was provided in response to the director's request for additional evidence (RFE).<sup>1</sup> Therefore, the AAO hereby withdraws the third ground for the director's denial. The AAO will fully address the three remaining grounds in the discussion below.

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.

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<sup>1</sup> 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been engaged in the "the regular, systematic, and continuous" course of business for one year prior to filing the petition. Pursuant to the definition found in 8 C.F.R. § 204.5(j)(2), doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

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 two issues in this proceeding call for an analysis of the beneficiary's job duties during his employment abroad as well as his proposed job duties in his prospective position with the U.S. petitioner.

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 Part 6, item 3 of the Form I-140, the petitioner stated that the beneficiary would plan, manage, and supervise the operation and activities of the U.S. entity. The petitioner did not provide any information regarding the beneficiary's employment abroad.

Accordingly, on December 6, 2005, the director issued the RFE, which is referenced above, instructing the petitioner to provide a list of job duties performed abroad and expected to be performed as part of his employment with the U.S. entity. The petitioner was asked to assign a percentage of time that would be allocated to each duty listed and to discuss the job titles, job duties and educational levels of the beneficiary's subordinates, if any. Additionally, the petitioner was asked to provide evidence of both entities' staffing as well as the petitioner's quarterly tax returns for 2005.

In response, the petitioner provided a letter dated February 27, 2006, which included the following description of the beneficiary's employment abroad:

[The beneficiary] work[ed] for our company in Peru as an [o]perations [m]anager since 1995, being responsible for managing the sales, marketing and purchasing functions of the foreign company. Management of operation included supervising purchasing functions. This included directing the collection of financial data and the preparation of financial reports and statements in order to ascertain adherence to budgetary constrain[t]s and conformance to corporate goals. Sales duties required the beneficiary to monitor the performance of the sales department in establishing pricing policies, dividing the sales territories and allocating sales assets. Administrative duties included monitoring the efficiency of the clerical department involved in organizing and preparing bud requests, invoices, expense statements, correspondence and customs paperwork. He set sales corporate goals, monitored the subordinates['] performance, implemented marketing and advertising campaigns, and exercised his decision-making authority pursuant to his conclusions on a daily basis. He had complete hiring and firing authority over all managerial and subordinate personnel.

He was responsible for coordinating, directing and supervising the overall operations of the company. He supervised and direct[ed] all employees working in marketing and development of channels of distributions for merchandise and services. He supervised sales, budgets and personnel. He devise[d] and ensure[d] the enforcement of all sales and fiscal policies. He analyzed financial data and devised strategies to operate business in a more cost effective manner. [The beneficiary] was responsible for devising and organizing financial plans and other investments strategies in order to successfully penetrate markets of interest at the lowest cost possible. He executed contracts on behalf of the company with important clients and vendors. He was also responsible for supervising, managing and directing all personnel and had full discretion over the hiring and firing of employees, manage and direct all domestic and international sales and marketing functions of the company; recruit[ing] and train[ing] sales and marketing personnel; prepare[d] sales manual and conduct[ed] sales seminars; formulate[d] sales goals and policies, establishe[d] incentive programs and monitor[ed] performance; establishe[d] hiring and firing standards for sales personnel and

administer[ed] [the] same; establishe[d] pricing and mark[-]up policies and review[ed] [the] same periodically.

With regard to the beneficiary's prospective employment in the United States, the petitioner stated the following:

[The beneficiary] has hired an assistant to help him in the operation of the company. This assistant is the only one who report[s] directly to him and the duties for that position included office job, billing, contact[ing] and execut[ing] the orders pending as well as the shipments. [The beneficiary] is in charge of plan[ning], direct[ing] and coordinate[ing] and execut[ing] the operations of the company. Formulating policies, managing daily operations and planning the use of material and human resources, but [sic] are too diverse and general in nature to be classified in any one functional area of management or administration, such as personnel, purchasing, or administrative services. Mover over [sic] [the beneficiary], [sic] handle[d] and control[led] the day[-]to[-]day of [sic] the [sic] operations in the company.

[The beneficiary] holds [sic] the position of [e]xecutive [m]anager in the U.S. entity. According to the success of the company in [the] U[.]S[.]A[.], we hope we will need to hire three or four sales persons to cover all the geographic extension[s] where we plan to go and to keep going in this process of expansion. Today, our products and services are well[-]known and hired.

He use[s] 40% of his effective working time to [sic] the [i]nternational acquisitions, contacts, agreements, shipments and deliveries[;] 30% on sales, marketing, coordination, hiring and training[;] [a]nd 30% on administrative and executive duties as all the manage [sic] of the office. Taking [sic] decisions regarding investments, financial situation of the corporation, legal facts connected to the corporation as all the requirements needed for the proper operation of our subsidiary in [the] U.S.A.

[The beneficiary] is in charge of plan[ning], direct[ing] and coordinate[ing] the operations of companies. Duties and responsibilities include formulating policies, managing daily operations, and planning the use of materials and human resources, such as personnel, purchasing, or administrative services. He is able to determine the demand for products and services offered by the company and its competitors and identify potential customers. Develop pricing strategies with the goal of maximizing the company's profits or share of the market while ensuring the company's customer[s] are satisfied. He is prepared to provide high level administrative [sic] perform [sic] by conducting research, statistical reports, handling information requests, and clerical functions as correspondence, receiving visitors, arranging conferences and scheduling meetings. He directs also the actual distribution or movement of a product or service to the customer. [He] [c]oordinates sales distribution by establishing sales territories, [sic] quotas. [He] [a]nalyze[s] sales statistics gathered by staff to determine sales potential and inventory requirements and monitor[s] the preferences of the customers.

In a decision dated March 10, 2006, the director denied the petition concluding that the petitioner failed to establish that the beneficiary primarily performed qualifying duties during his employment abroad or that he

would primarily perform qualifying duties as part of his proposed employment in the United States. The director specifically noted that the petitioner failed to describe the job duties of the beneficiary's subordinates abroad or to provide sufficient information to establish that they were professional or managerial employees. Though not specifically noted in the denial, the petitioner also failed to provide the requested percentage breakdown of the beneficiary's job duties.

With regard to the beneficiary's proposed employment, the director referred to the percentage breakdown attributed to the beneficiary's general responsibilities and to the portion of the job description where the petitioner discussed the beneficiary's assistant. The director noted that the petitioner's Form 941 for the last quarter of 2005 during which the Form I-140 was filed shows only one employee and, therefore, does not support the claim that an assistant was hired to help the beneficiary with daily tasks. The director ultimately found the absence of a support staff within the petitioning organization an indication that the beneficiary would likely perform the petitioner's non-qualifying operational tasks and would not spend a majority of his time performing qualifying managerial or executive duties.

On appeal, the beneficiary, on behalf of the petitioner, submits a statement dated April 6, 2006 in an effort to overcome the grounds of ineligibility cited in the director's decision. While the beneficiary generally states that both the position abroad and the proposed position in the United States entail a broad range of responsibilities, he failed to provide any further detail or to address the specific comments made by the director regarding the beneficiary's position abroad. Furthermore, the information provided fails to establish that the beneficiary's employment abroad was primarily comprised of qualifying managerial or executive tasks. The petitioner's description of the beneficiary's overseas employment is replete with general oversight responsibilities. However, reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. 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). In the present matter, the petitioner failed to specify the actual duties the beneficiary performed on a daily basis in an effort to carry out the goals and responsibilities enumerated in the response to the RFE. Without this necessary information, the AAO cannot conclude that the beneficiary primarily performed tasks of a qualifying nature during his employment abroad.

With regard to the beneficiary's proposed position in the United States, the beneficiary explained that he "has to fulfill and cover all the positions in [the] United States office." He further admits that he "has been doing everything related with the business" and stated that hiring additional employees is planned for the future. However, 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). In the present matter, the evidence of record suggests that the petitioner did not have the requisite support staff to relieve the beneficiary from having to primarily perform the daily operational tasks at the time the Form I-140 was filed. Thus, while the AAO does not dispute that the beneficiary has the ultimate decision-making authority and is the senior-most employee within the petitioner's organizational hierarchy, such is inevitable when the beneficiary is the sole employee. In order to merit classification of multinational manager or executive, the petitioner must establish that the beneficiary would primarily perform managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. Without others to relieve the beneficiary from having to primarily perform the non-qualifying operational tasks, the petitioner lacks the ability to enable the beneficiary to primarily perform tasks within a managerial or executive capacity.

Additionally, 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 description of the beneficiary's job duties is general and does not convey an understanding of exactly what the beneficiary will be doing on a daily basis. Thus, while the AAO can conclude, based on the beneficiary's own admissions and in light of the lack of support personnel, that the beneficiary's time would primarily be consumed with daily operational tasks, the job description provided is devoid of the necessary detail that would enable the AAO to determine what actual tasks the beneficiary would carry out on a daily basis. Despite the beneficiary's claim that additional staff would eventually be hired as the business expands, the petitioner has not demonstrated that it has reached a level of organizational complexity wherein managerial tasks constitute significant components of the duties performed on a day-to-day basis. Therefore, based on the evidence furnished, it cannot be found that the beneficiary has been employed abroad or will be employed in the United States in a qualifying managerial or executive capacity.

The remaining issue in this proceeding is whether the petitioner has established its 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 the denial, the director provided a comprehensive analysis, which first focused on the beneficiary's current salary, as a salary equal to or greater than the proffered wage is considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the Form I-140 did not indicate what the beneficiary's proffered wage would be under an approved petition. Accordingly, the director addressed this issue in the RFE to which the petitioner responded claiming that the beneficiary's proffered wage would be \$36,000 per year. The 2005 quarterly wage statements showed that beneficiary was compensated \$3,600 for the quarter, or \$14,400 per year, which was also the beneficiary's compensation during 2004 according to the 2004 W-2 statements submitted. Therefore, the petitioner did not provide *prima facie* evidence of its ability to pay the beneficiary's proffered wage.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now 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 November 15, 2005, the AAO must examine the petitioner's tax return for 2005. The petitioner's IRS Form 1120 for calendar year 2005 presents a net taxable income of \$3,063. Thus, even when adding the net income to the \$14,400 that the beneficiary was compensated in 2005, the AAO cannot conclude that the petitioner could pay a proffered wage of \$36,000 per year.

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. As properly determined by the director in the denial, the beneficiary's net current assets for 2005 were \$27,502, which is still \$8,500 short of the beneficiary's proffered wage of \$36,000.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown 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.