

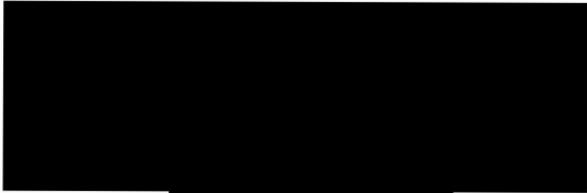
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U.S. Citizenship
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By

FILE: [Redacted]
SRC 06 068 50968

Office: TEXAS SERVICE CENTER Date: **JUL 24 2007**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

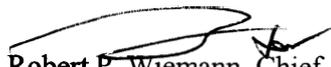
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



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 that 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 determined that the petitioner would not employ the beneficiary in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

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

The primary issue in this proceeding is whether the petitioner would employ the beneficiary in a 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) 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 Form I-140, the petitioner submitted a letter from the foreign entity dated December 19, 2005, which included the following statements regarding the beneficiary's proposed employment:

As [p]resident, [the beneficiary] continues to preside over and manage the day[-]to[-]day operations between Colegio Americano and [the petitioner]'s activities to ensure conformance with [the] company's operating procedures and regulations; administer the direction and administration of the corporation; develop and implement corporate goals; coordinate the general activities of the business' various departments; contract and maintain legal counsel regarding the business' operations, liabilities, and labor issues. He is the primary individual responsible for developing the company's long-range goals and objectives for continued expansion in the U.S. using the U.S. company as a launching point. The [g]eneral [m]anager will report directly to the [p]resident regarding budget and operating expenses, accounting

and record keeping, and promotional advertisement of our services, particularly in the Spanish-speaking sector.

On May 11, 2006, the director issued a notice of intent to deny (NOID) instructing the petitioner to provide the following information to assist Citizenship and Immigration Services (CIS) in determining the beneficiary's employment capacity in the proposed position in the United States: 1) a list of the beneficiary's job duties; 2) the percentage of time spent performing each duty; 3) job titles and brief job descriptions of the beneficiary's subordinates; and 4) a statement explaining who provides the products and/or services of the petitioner's business.

In response, the petitioner submitted a letter from the foreign entity dated June 8, 2006, which included the following breakdown of the beneficiary's proposed employment in the United States:

- Preside over and manage the day[-]to[-]day operations between [the foreign entity] and [the petitioner's] activities to ensure conformance with [the] company's operating procedures and regulations. 40%
- Administer the direction and administration of the corporation with emphasis on implementing operating policies; develop and implement corporate goals; [c]ontrols [sic] the company's budget and operating expenses; design the annual budget for the [c]orporation, including income and expenses on sales and services provided and submit for approval to the [b]oard of [d]irectors; consult with executive personnel (Mexico) on expansion developments, marketing strategies and balancing the firm's objective and customer satisfaction. 25%
- Coordinate the general activities of the business' various departments; contract and maintain legal counsel regarding the business' operations, liabilities, and labor issues. 10%
- Responsible for developing the company's long-range goals and objectives for continued expansion in the U.S. and overseas using the U.S. company as a launching point. 25%

The petitioner provided an organizational chart illustrating a hierarchy that is comprised of the beneficiary as the senior-most employee, a general manager, who reports directly to the beneficiary, an administrative assistant, a sales and marketing manager, a communications director, and an advertising assistant. It is noted that while the organizational chart lists a total of six employees, the petitioner indicated that it had a total of three employees. The record does not include documentation to establish which three employees were with the petitioning organization at the time the petition was filed.

On July 6, 2006, the director denied the petition noting, in part, that the petitioner provided a percentage breakdown indicating that "the major part of the beneficiary's duties is to be devoted to the business marketing, staff recruitment and supervision." However, neither of the job descriptions provided throughout this proceeding state that any portion of the beneficiary's time would be devoted to marketing, nor did the petitioner specify how much of the beneficiary's time would be devoted to staff recruitment and supervision. It is further noted that staff recruitment and supervision are not necessarily non-qualifying tasks. In order to make such an adverse finding, the director would first need to determine whether the beneficiary's

subordinates are managerial, supervisory, or professional employees. As there is no evidence that the director considered the relevant factors, there appears to be no basis for the director's adverse finding.

Furthermore, in making a determination as to "the major part of the beneficiary's duties" the director implies that the petitioner provided a detailed description specifying the duties to be performed; 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). However, in the present matter, the petitioner failed to provide a description of the beneficiary's specific day-to-day job duties. Rather, the petitioner's percentage breakdown was replete with general job responsibilities and references to a subordinate staff, which the petitioner has not substantiated with documentary evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). As previously indicated, the petitioner claimed only three employees when filing the Form I-140. Since the organizational chart lists a total of six employees, it can be reasonably concluded that the chart does not reflect the staffing composition during the relevant time period. Thus, the petitioner's failure to specify and document which three positions were filled when the Form I-140 was filed precludes a thorough analysis of the petitioner's organizational structure, which would have provided further information as to who was providing the daily operational tasks.

Notwithstanding the director's inaccurate finding, the ultimate conclusion regarding the beneficiary's employment capacity and the petitioner's overall eligibility was warranted. In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. 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. In the present matter, the petitioner's overly broad statements of the beneficiary's proposed employment fail to identify the specific tasks the beneficiary would perform on a daily basis. For instance, the petitioner claims that 40% of the beneficiary's time would be spent overseeing and managing daily operations between the petitioner and its foreign parent entity. However, the petitioner does not identify any specific duties that comprise the overall responsibility of overseeing daily operations. The petitioner also failed to state specific duties that are entailed in implementing operating policies, developing and implementing corporate goals, or controlling the company budget. Further, while the petitioner, indicated that the beneficiary would have some involvement with the company's marketing and customer service, it did not specify the extent of that role and what actual marketing and customer service related duties the beneficiary would perform. Finally, the petitioner claimed that another 25% of the beneficiary's time would be focused on developing long-term goals and objectives. Again, however, there is absolutely no indication as to the specific duties entailed in this general responsibility. Thus, while the petitioner has provided a percentage breakdown as requested by the director, the information contained in the job description is so general that the beneficiary's actual daily job duties cannot be ascertained. As previously stated, the actual duties themselves reveal the true nature of the employment. *Id.* at 1108.

On appeal, counsel reiterates the general responsibilities provided in response to the NOID and discusses the level of discretionary authority the beneficiary has over the petitioner's daily business operation. However, neither the position title nor the level of discretionary authority determines the beneficiary's employment capacity without a detailed description of the beneficiary's actual daily activities, which is clearly lacking in the present matter. Counsel also claims that the beneficiary has subordinates to handle the "lower-level

duties." However, the petitioner has provided no documentation to establish whom it employed during the time it filed the Form I-140. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The fact that an individual manages a small business does not necessarily establish eligibility for employment in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not include a definitive list of the beneficiary's proposed day-to-day job. Nor does the record provide documentation to establish its staffing composition at the time of filing the Form I-140. As such, the AAO cannot determine whether the beneficiary would primarily perform duties of a qualifying nature or whether the petitioner was adequately staffed at the time of filing to relieve the beneficiary from having to primarily perform daily operational tasks. As such, the petitioner has failed to provide sufficient evidence to establish that the beneficiary's prospective employment would be in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Namely, 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

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

In determining the petitioner's ability to pay the proffered wage, CIS will 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 has provided quarterly wage reports showing its prior employment of the beneficiary. However, the quarterly wage reports indicate that the beneficiary was compensated approximately \$14,400 during the 2005 tax year. Therefore, the beneficiary's salary at the time the Form I-140 was filed cannot be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's proffered annual salary of \$30,000.

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 December 28, 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 \$3,929. Even if the net income was added to the \$14,400 of compensation the beneficiary received in 2005, the documentation provided does not establish the petitioner's ability to pay a proffered wage of \$30,000 per year out of this income.

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. Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets during the year in question, however, were \$124.00. Even if this amount were added to the \$14,400, which was paid to the beneficiary in 2005, and to the \$3,929, which represent the petitioner's net assets, the total would be more than \$11,000 short of the proffered wage.

Despite the petitioner's claim that the foreign entity would continue paying the beneficiary's salary pending approval of the instant petition, the petitioner must establish its ability to pay the proffered wage at the time it filed its Form I-140. In the present matter, the petitioner has failed to meet this burden. As such, the AAO cannot conclude that the petitioner has established the ability to pay the beneficiary's proffered wage.

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 ground of ineligibility as discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if 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 at 1043, *aff'd*, 345 F.3d 683.

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.