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U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **NOV 01 2007**
SRC 04 149 52809

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

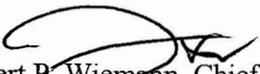
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 R. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed the director's decision to the Administrative Appeals Office (AAO) where the appeal was dismissed. The matter is now before the AAO on motion to reconsider. The AAO will grant the petitioner's motion. However, the AAO's underlying decision dismissing the appeal and affirming the director's denial of the petitioner's Form I-140 will be affirmed.

The petitioner is a Florida corporation engaged in the operation and management of Quiznos franchises and commercial real estate investment. It seeks to employ the beneficiary as its marketing 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 the conclusion that the beneficiary would not be employed within a managerial or executive capacity.

In its appellate review of the matter, the AAO affirmed the director's decision and dismissed the appeal based on the ground cited by the director as well as one additional ground, i.e., the petitioner's failure to establish its ability to pay the beneficiary's proffered wage of \$24,000 per year.

On motion, counsel challenges the AAO's dismissal on both grounds and puts forth his arguments in a supplemental brief.

Counsel's first item of contention is the AAO's dismissal of the appeal on a ground that was not previously cited by the director, which in the present matter is the petitioner's ability to pay.

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.

The AAO acknowledges that a detailed discussion of this issue was not provided in its prior decision. Such a discussion will, however, be provided herein. First, contrary to counsel's apparent misconception as suggested by his discussion of the petitioner's 2003 tax return, the above regulations are clear in stating that the petitioner's ability to pay must be established as of the date the Form I-140 is filed. The petitioner must continue to demonstrate its ability to pay until such time as lawful permanent residence is obtained by the beneficiary. In the present matter, the petitioner filed its Form I-140 on April 29, 2004, thereby precluding the 2003 tax return from being deemed sufficient to demonstrate the petitioner's ability to pay as of April of 2004. While the petitioner's 2005 tax return, which counsel has provided in support of the motion, is relevant to the petitioner's ability to pay, it is not sufficient for the purpose of establishing the petitioner's ability to pay as of the date the Form I-140 was filed.

Furthermore, the documentation submitted on motion to reconsider cannot be considered, as the relevant regulations at 8 C.F.R. § 103.5(a)(3) state that a motion to reconsider must include "pertinent precedent

decisions to establish that the decision was based on an incorrect application of law or CIS policy." While a motion to reopen, whose provisions are cited in 8 C.F.R. § 103.5(a)(2), allows for the submission of documentary evidence, counsel requested only a motion to reconsider. Therefore, the provisions for a motion to reopen would not apply in the present matter. Regardless, even if previously submitted for earlier consideration, neither the petitioner's 2003 nor its 2005 tax return attests to the petitioner's ability to pay during the relevant time period in 2004. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

With regard to the AAO's dismissing the petitioner's appeal on an additional ground that was not previously cited by the director, counsel's contention is without basis. First, the petitioner did not overcome the initial ground for denial cited by the director. As such, the supplemental ground cited in the AAO's decision on appeal was not the sole, or even the primary, basis for the dismissal of the appeal. Second, counsel's argument that the AAO erroneously interpreted *Spencer Enterprises, Inc. v. United States* is in itself erroneous and lacks any legal basis. 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003). Contrary to counsel's assertions, *Spencer Enterprises, Inc. v. United States* implicitly vests the AAO with the right to base its adverse findings on any failure, on the petitioner's part, to comply with technical requirements of the law, unless the petitioner submits evidence of legal authority that dictates otherwise. Furthermore, counsel introduces *Matter of Cuello*, 20 I&N Dec. 94 (BIA 1989), a decision that predates *Spencer Enterprises, Inc. v. United States* by more than 11 years and addresses a subject matter that is entirely separate and distinct from the one addressed in the present matter. Specifically, in *Matter of Cuello*, the BIA's findings pertained specifically to a petitioner who sought the right to accord the beneficiaries of the petition immediate relative status as his adopted children under section 201(b) of the Act. *Id.* In remanding the case to an officer who issued the initial decision, the BIA found additional issues, which, if resolved may lead to an approval of the petition. In the present matter, as stated above, the AAO's basis for dismissing the appeal was first and foremost the issue of the beneficiary's proposed employment in the United States. As the petitioner failed to overcome this primary ground for ineligibility, there would be no reason to remand the case of a petition that was not found to be otherwise approvable.

That being said, the other issue discussed in counsel's brief is the AAO's primary basis for dismissing the petitioner's appeal, i.e., the determination that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity.

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.

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.

With regard to the issue of the beneficiary's proposed employment, counsel asserts that CIS, and the AAO in particular, have deviated from the preponderance of the evidence standard of proof that is discussed in *Matter of E- M-*, 20 I&N Dec. 77 (Comm. 1989). Based on this line of reasoning, counsel supplements the record with an additional discussion of the beneficiary's proposed duties without properly addressing the AAO's concerns about the lack of documentation establishing who within the petitioning organization would carry out the daily operational tasks associated with the essential function the beneficiary would purportedly manage. Counsel relies on the statements of others within the petitioning organization as evidence that the beneficiary would be relieved from having to primarily focus on performing the petitioner's daily operational tasks. Based on counsel's faulty reasoning, there would be no need for the submission of actual documentary evidence, as the petitioner's mere claim and the supporting statements of others would generally be sufficient to establish that the duties to be performed by a beneficiary would be primarily within a qualifying capacity. However, counsel's reasoning is directly contradicted by precedent case law, which specifically states that 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)). Counsel disputes the AAO's reliance on this underlying case in which the need for documentary evidence was first established, claiming that the cited case requires documentary

evidence only in cases where a petitioner's statements are contradicted by other evidence of record. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Counsel's interpretation of the holding in *Matter of Treasure Craft of California* is incorrect. Contrary to counsel's interpretation, the BIA did not relieve the petitioner from having to submit documentary evidence to support its claims. Rather, it emphasized the need for documentation "particularly when [a petitioner's claim] is contradicted by other evidence of record." *Id.* In the present matter, while there is no evidence on record that contradicts the petitioner's claim regarding the beneficiary's duties, neither is there any corroborating evidence to support such a claim. In asserting that the beneficiary would assume the role of a function manager where she would oversee an essential function of the petitioning entity, the petitioner must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In the present matter, the petitioner provided no documentation to establish who would perform the duties associated with the essential function purportedly managed by the beneficiary. Furthermore, the case law and arguments presented by counsel on motion fail to establish that the AAO's prior decision was based on an incorrect application of law or CIS policy and that the decision was incorrect based on the evidence of record at the time of the initial decision. Therefore, counsel has failed to establish a basis for withdrawal of the AAO's conclusions.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The motion is dismissed. The AAO's prior decision is affirmed.