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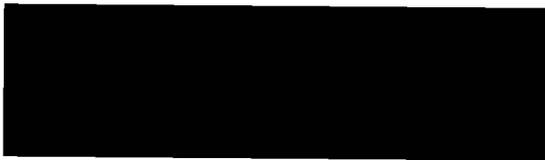


FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: SEP 06 2007  
EAC 06 030 52536

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 Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

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, a New York corporation, describes itself as an import/export company. The petitioner seeks to employ the beneficiary as its general manager.

The director denied the petition on August 16, 2006, concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal on September 14, 2006. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On the Form I-290B, Notice of Appeal, counsel for the petitioner states the following:

The Center Director decision does not take into consideration the practicalities of organizing and operating a business. It also ignores the evidence pertinent to a favorable decision, and sets standards in isolation of the business model. Evidence already presented if viewed objectively will result into a favourable [sic] decision. Therefore, the decision is arbitrary and is not supported by facts and evidence presented in the matter.

Counsel indicated that he would forward a brief and/or additional evidence to the AAO within 30 days. As no additional evidence has been incorporated into the record, the AAO contacted counsel by facsimile on July 25, 2007 to request that he acknowledge whether the brief and/or evidence were timely submitted, and, if applicable, to afford the petitioner an opportunity to re-submit the documents within five business days. The AAO has not received a response to its request. Accordingly, the record will be considered complete.

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.

Regulations at 8 C.F.R. § 103.3(a)(1)(v) state, in pertinent part:

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

Upon review, the AAO concurs with the director's decision and affirms the denial of the petition. Counsel's general objections to the denial of the petition, without specifically identifying any errors on the part of the director, are simply insufficient to overcome the conclusions the director reached based on the evidence submitted by the petitioner. Counsel's arguments that the director failed to consider the "practicalities of organizing and operating a business," overlooked pertinent evidence, and applied an inappropriate standard are not clearly explained and are unsupported by evidence. 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).

Although the director's decision will be affirmed, the AAO notes that the director appears to have misinterpreted the petitioner's evidence regarding the number of full-time employees employed by the company. Specifically, the director reviewed the petitioner's 2005 Forms W-2 and concluded that the beneficiary was the only employee employed by the petitioner on a full-time basis. The petitioner was incorporated in July 2005 and only paid wages to the beneficiary and his four claimed subordinates during the last four months of the 2005, thus accounting for the low wages earned by the beneficiary's subordinates. However, as noted by the director the photographs provided of the petitioner's office show no more than two workstations for a claimed staff of five employees.

Upon review of the totality of the evidence, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive position. The petitioner has provided a vague, non-specific description of the beneficiary's position that conveys little understanding of what he does on a day-to-day basis. For example, the petitioner states that the beneficiary formulates long and short-term business goals, provides direction to the company, formulates policy decisions, and makes "independent decisions." These statements merely paraphrase the statutory definition of "executive capacity." *See* section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). The regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Several of the beneficiary's stated responsibilities do not fall clearly under the statutory definitions of managerial or executive capacity. For example, the petitioner indicates that the beneficiary's duties include: "negotiations with customer, clients, suppliers and other entities," negotiating contracts with dealers and

clients and conducting follow up with clients, "researching the international market," and determining customer requirements. Without further explanation, these duties suggest that the beneficiary is directly involved in non-qualifying duties such as market research, purchasing and sales tasks. Although the petitioner states that the beneficiary conducts some duties "through representatives," the petitioner does not claim to employ representatives and it is unclear to whom the petitioner is referring.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While the beneficiary in the instant matter may exercise authority over the petitioning company, the record falls significantly short of establishing that his actual duties are primarily managerial or executive in nature. The petitioner has not submitted evidence on appeal to overcome the director's determination on this issue.

Beyond the decision of the director, the record does not clearly establish that the prospective United States employer has been doing business for at least one year, as required by 8 C.F.R. § 204.5(j)(3)(i)(D). The immigrant petition was filed on October 31, 2005. The petitioner, [REDACTED] was incorporated in New York on July 12, 2005. In a letter dated October 25, 2005, the petitioner stated: "The US [REDACTED] was incorporated in 2003."

In a request for evidence dated December 19, 2005, the director noted that the petitioner was incorporated only months prior to the filing of the petition and requested evidence that the company has engaged in the regular, systematic and continuous provision of goods or services for at least one year as of the date of filing.

In response, the petitioner indicated: "The USA company was incorporated in 10/22/2003 in State of Texas ...and New York company was incorporated in July 2005. . . . We filed merger of both USA companies." The documentation provided showed that [REDACTED] was incorporated in Texas on October 22, 2003. The petitioner provided an undated "Assumed Name Certificate for Filing with the Secretary of State" showing that [REDACTED] intends to assume the name [REDACTED]. The petitioner also included a document entitled "Articles of Merger Combination of Multiple Entities." According to the merger document, [REDACTED] and not [REDACTED] would be the surviving corporation. The document was signed on November 16, 2005, and, according to the articles, would become effective upon the issuance of the certificate of merger by the Texas Secretary of State. No certificate of merger was submitted.

The petitioner submitted a copy of [REDACTED] 2005 IRS Form 1120-A, U.S. Corporation Short Form Income Tax Return, which identifies the company's employer identification number as [REDACTED]. The petitioner also submitted a copy of [REDACTED] 2005 IRS Form 1120-A and 2004, IRS Form 1120, U.S. Corporation Income Tax Return, which identify that company's employer identification number as 20-1094281, which is the same number utilized on the Form I-129 and on [REDACTED] state and federal quarterly wage reports.

Based on the evidence submitted, the petitioning company, [REDACTED] was clearly not doing business for a full-year prior to the filing of the petition as it was incorporated in July 2005. Although the petitioner has attempted to establish that [REDACTED] should be regarded as a predecessor company

and its business activities in 2004 taken into account, the evidence submitted is confusing, incomplete, and fails to support the petitioner's claims. To the contrary, the articles of merger, assuming that they were actually filed with the Texas Secretary of State, would suggest that the U.S. company that filed this petition ceased to exist shortly after the petition was filed, since they identify the Texas corporation, [REDACTED] Inc., as the surviving company. According to publicly available records held by the New York and Texas Secretaries of State, [REDACTED], the New York corporation is currently active, while [REDACTED] Inc., the Texas corporation, also continues to exist but is "not in good standing." This information raises doubts as to whether the merger ever took place. Regardless, because the articles of merger were executed subsequent to the filing of the petition, the document is of limited probative value in establishing a connection between the two companies.

Further, the record contains minimal supporting evidence of business transactions undertaken by either company, no evidence dating back a full year prior to the filing of the petition, and no evidence that any employees were hired by either company prior to September 2005, one month before the instant petition was filed. While the 2004 income tax return for [REDACTED] does indicate gross receipts in the amount of \$171,239, the AAO cannot accept this document alone as evidence that [REDACTED] has been doing business for more than one year. For this additional reason, the petition cannot be approved.

Finally, although not addressed by the director, the evidence submitted does not establish the petitioner's ability to pay the beneficiary's proffered wage of \$52,000 per year, as required in the regulation at section 204.5(g)(2). 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 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, USCIS 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 employed the beneficiary at a weekly wage of \$576.92 at the time of filing and there is no evidence that he ever received the proffered wage of \$1,000 per week either from the petitioner or from Duben Motors, Inc.

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 October 31, 2005, the AAO must examine the petitioner's tax return for 2005. The petitioner's IRS Form 1120-A for calendar year 2005 presents a net taxable income of \$3,976. The petitioner could not pay a proffered wage of \$52,000 from this income, nor would this amount be sufficient to make up the difference between the beneficiary's wage at the time of filing and the proffered wage.

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.

In this case, the petitioner's net current assets are valued at \$4,335, which is also insufficient to pay the beneficiary's proffered salary. The petitioner has not established its ability to pay the proffered wage of \$52,000. For this additional reason, the petition cannot be approved.

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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows 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.

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. Inasmuch as the petitioner has failed to identify specifically an erroneous conclusion of law or a statement of fact in support of the appeal, the petitioner has not sustained that burden.

**ORDER:** The appeal is summarily dismissed.