

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



BL

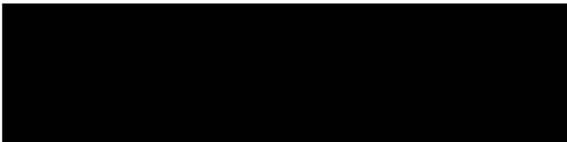
FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date:  
LIN 07 162 51293

JAN 07 2010

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a limited liability company organized in the State of Florida. It seeks to employ the beneficiary as its chief executive officer (CEO). 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 independent grounds of ineligibility: 1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and 2) the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage.

On appeal, counsel disputes the director's conclusions and submits a statement, explaining his opposition to the adverse decision.

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 the proceeding is whether the petitioner has established that the beneficiary would be employed in the United States in a qualifying 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 dated April 27, 2007, which included a brief list of the beneficiary's key responsibilities in his proposed position with the U.S. entity. The list is included in the director's adverse decision and need not be repeated in the present discussion. In the same letter, the petitioner provided a list of the names and position titles for the four employees, not including the beneficiary, whom the petitioner claimed to employ at the time of filing. The list included two business development

managers, an office and compliance manager, and a vice president/venture capital/special opportunities manager.<sup>1</sup>

On May 21, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a description of the beneficiary's proposed job duties in much greater detail than what was provided in the April 27, 2007 support letter. The petitioner was expressly instructed to list the specific daily tasks that were involved in the completion of the duties listed in the support letter, accompanied by an estimate of the percentage of time that would be dedicated to each enumerated task.

In response, counsel provided a letter dated August 5, 2008 in which she referenced (and provided a copy of) the petitioner's initial support letter, which contained the primary list of duties and responsibilities. Counsel's resubmission of this document is unclear, as the director had already determined that the information contained therein was insufficient, thereby explaining the basis for the issuance of an RFE. Additionally, counsel supplemented the initial list with three paragraphs further discussing the beneficiary's proposed employment. Although counsel assigned a percentage of time to each paragraph, the AAO notes that the director's express instruction was for the petitioner, rather than counsel,<sup>2</sup> to provide the supplemental job description and for that description to consist of a list of specific daily tasks with the percentage of time assigned to each task, not to a group of tasks or to a related group of job responsibilities. The petitioner also provided an updated list of employees, including those who were apparently hired after the filing of the Form I-140. While the updated staffing information appears to be in direct response for the director's request for a current organizational chart, precedent case law mandates that 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). As such, U.S. Citizenship and Immigration Services (USCIS) must consider the petitioner's organizational hierarchy as it existed at the time of filing in order to determine whether the petitioner was eligible to classify the beneficiary as a multinational manager or executive as of the priority date.

In a decision dated September 23, 2008, the director denied the petition, concluding that the petitioner failed to provide an adequate job description containing the requisite degree of detail. The director also found that the petitioner lacked the organizational complexity to warrant the employment of the beneficiary in a primarily executive capacity.

On appeal, counsel submits a brief, arguing that the beneficiary's proposed position fits under the statutory definitions for managerial and executive capacity. Counsel further contends that the director placed undue emphasis on the size of the petitioning entity's support staff without taking into account the reasonable needs of the organization. While counsel is correct in stating that the size of a company's personnel cannot be the sole consideration in determining the petitioner's eligibility, this factor is relevant and should be considered, as it allows USCIS to gauge the petitioner's ability to relieve the beneficiary from having to primarily engage in the daily operational tasks of an organization. When a petitioner fails to provide a detailed description of the beneficiary's proposed tasks within the context of the organizational hierarchy at the time of filing, USCIS

---

<sup>1</sup> As duly noted in the denial, the petitioner also provided a company brochure in which "vice president" was left out of the position title for the individual occupying the position of special opportunities manager. While the AAO takes note of this minor discrepancy, there is no evidence that this anomaly impacts the beneficiary's proposed position.

<sup>2</sup> See 8 C.F.R. § 204.5(j)(5).

can only conclude that the beneficiary would be required to assist with daily operational tasks and would not be able to focus on primarily qualifying managerial or executive tasks.

Moreover, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). Thus, while the AAO concedes the beneficiary's placement at the top level within the petitioner's organizational hierarchy, this single factor does not displace the significance of other factors, including a detailed description of the proposed tasks and evidence of adequate staffing enabling the petitioner to relieve the beneficiary from having to primarily perform non-qualifying operational job duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

As stated above, while the AAO takes note of the expansion in the petitioner's staff, the petitioner's eligibility must be established based on the facts that were in existence at the time the Form I-140 was filed. See *Matter of Katigbak*, 14 I&N Dec. at 49. In the present matter, the petitioner did not employ any marketing, graphic design, or administrative personnel at the time of filing. However, there is no explanation as to who, at the time of filing, was performing the tasks that are currently assigned to these additional employees.

Counsel stresses the beneficiary's discretionary authority in expanding the business by developing new markets. However, much like the single factor of the beneficiary's top placement within the petitioner's hierarchy, the beneficiary's discretionary authority is also not a determining factor. Rather, his authority must be considered within the context of the specific tasks the beneficiary would perform on a daily basis. At the time of filing, the petitioner was staffed with four employees in addition to the beneficiary. It is the petitioner's burden to specifically define what actual tasks the beneficiary was performing at the time of filing given its staffing structure. It is noted that 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). Thus, if counsel claims that approximately 40% of the beneficiary's time was spent making decisions about growth into different markets, evaluating the petitioner's potential competitors, deciding how the petitioner will distinguish itself, and forming partnerships with other entities, it is the petitioner's responsibility to establish what actual underlying tasks the beneficiary would perform to meet these business goals. Moreover, counsel indicated that part of that 40% would include hiring a team of employees to ensure that the petitioner attains its desired business goals. It is therefore unclear whether the staffing at the time of filing was sufficient to allow the beneficiary to carry out the four remaining responsibilities, as the petitioner was not yet fully staffed.

Counsel also claimed that another 30% of the beneficiary's time would be spent establishing and executing an operating plan, which would include assessing company expenditures and determining fund allocation. Again, while these statements generally convey the fact that the beneficiary would be charged with broad discretionary authority over all business matters, they fail to convey a meaningful understanding of the specific tasks the beneficiary would perform to ensure that these broad business objectives are met. Reciting

the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. *See* 8 C.F.R. § 204.5(j)(5).

In summary, the petitioner has failed to comply with the director's request for a detailed description of the beneficiary's proposed daily tasks. Thus, given this deficiency coupled with the petitioner's limited staffing, the AAO is unable to determine whether the petitioner was able to relieve the beneficiary from having to primarily perform non-qualifying tasks at the time of filing. On the basis of this initial determination, the AAO cannot approve the petition in the instant matter.

The other issue in this proceeding is whether the petitioner 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 appropriate cases, additional evidence, such as profit/loss statements, bank statements, or personnel records, may be submitted by the petitioner or requested by the Service.

As properly noted by the director, Part 6 of the Form I-140 indicates that the beneficiary will be remunerated at a rate of \$180,000 per year under an approved petition. While the petitioner is under no obligation to actually pay the proffered wage prior to the petition's approval, the petitioner must nevertheless establish that it was able to pay that wage at the time of filing. *See id.*

The petitioner was instructed in the RFE to provide documentation establishing that it meets the provisions contained within 8 C.F.R. § 204.5(g)(2). In counsel's August, 5, 2008 response letter, counsel stated that the petitioner's parent entity "continues to provide financial support to the company." Although counsel acknowledged that the \$717,021 the petitioner had received in loans is categorized as a liability, she argued that the petitioner has nearly three quarters of one million dollars in operating capital and that this amount is sufficient to establish the petitioner's ability to pay. Counsel also pointed out that the petitioner is still in its initial growth phase and that as a result, USCIS should consider other evidence, citing *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), in support of her argument.

In the denial, the director rejected counsel's prior arguments, focusing instead on the financial figures that represented the petitioner's net income and net assets at the time of filing. First, the director determined that, while the evidence on record established that the petitioner employed the beneficiary at the time of filing, it did not pay the beneficiary a salary that was equal to or greater than the proffered wage and that as a result, there was no *prima facie* proof of the petitioner's ability to pay the beneficiary's salary.

As an alternate means of determining the petitioner's ability to pay, the director examined 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 USCIS) 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. Accordingly, the director focused on Line 22 of the petitioner's 2007 tax return, which showed a negative business income in the amount of \$325,590.

Next, in light of the petitioner's negative business income, the director considered the petitioner's net current assets, explaining that the 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 director's calculation showed that the petitioner's net current assets in 2007 were negative \$375,032.

Additionally, although the director acknowledged the petitioner's submission of unaudited financial statements from December 2007 to April 2008 as well as bank statements from January 2007 to March 2008, he determined that none of these documents could be used to establish the petitioner's ability to pay. While acknowledging that additional evidence may be permitted in certain instances, the director explained that additional evidence need not be considered in the present matter, as there is no indication that the evidence expressly required by regulation was inapplicable, inaccurate, or unavailable in the present matter.

On appeal, counsel argues that USCIS must consider the "totality of the circumstances," again citing *Matter of Sonogawa* in support of her argument. 12 I&N Dec. 612. In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. *Id.* The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As indicated in *Matter of Sonogawa*, USCIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, or any other evidence that USCIS deems to be relevant to the petitioner's ability to pay the proffered wage.

In the instant matter, counsel urges the AAO to consider the petitioner's relatively early stage of development and to apply the reasoning employed by the Regional Commissioner in *Matter of Sonegawa*. *Id.* However, many of the relevant facts in *Matter of Sonegawa* are significantly different from those in the instant matter. More specifically, the petitioner in *Matter of Sonegawa* had been doing business for eleven years and also had a business reputation, clientele, and a history of paying wages, all of which could be used to estimate future earnings and the ability to pay the proffered wage. *See* 12 I&N Dec. 612. It is noted that none of these factors are true of the petitioner in the present matter. In fact, in the petitioner's April 27, 2007 initial support letter, the petitioner indicated that its business had been launched "less than one year ago." Although this factor may explain the petitioner's inability to pay the beneficiary's proffered wage, it does not excuse the petitioner from the burden of meeting the provisions of 8 C.F.R. § 204.5(g)(2). Thus, despite any evidence that the petitioner's foreign affiliate has supplied and would continue to supply all the funding necessary to financially support the petitioner's business operation, the fact remains that the petitioner must establish its own ability to pay the beneficiary's proffered wage, notwithstanding the ability of the foreign entity to meet that burden. *See id.* As discussed above, the petitioner has failed to establish its own ability to pay the beneficiary's proffered wage. Therefore, on the basis of this second adverse finding this petition cannot be approved.

Lastly, while not addressed in the director's decision, a thorough review of the statements made in the petitioner's initial support letter lead the AAO to believe that there is a third basis for denial. Specifically, the letter dated April 27, 2007 mentioned "launching [the petitioner] less than one year ago," which brings into question the actual date the petitioner started doing business. The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that 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."

Although the AAO recognizes that the Form I-140 was filed on May 11, 2007, which is approximately three weeks subsequent to the date on the support letter, the indication that the petitioner had not been doing business for one full year as of April 27, 2007 is sufficient to question whether the petitioner had been able to meet the regulatory 12-month time requirement when the petition was actually filed three weeks later. It is noted 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)). In the present matter, the petitioner claims to be a financial services provider. While the petitioner has provided bank records and financial documentation, these documents fail to establish that the petitioner was doing business in the manner and within the time prescribed by regulation.

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 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.