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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



B4

DATE:

APR 07 2011

OFFICE: TEXAS SERVICE CENTER

FILE:

SRC 08 124 50808

IN RE:

Petitioner:

Beneficiary:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 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 three 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 the beneficiary would be employed in the United States in a managerial or executive capacity; and 3) the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage.

On appeal, the petitioner disputes the director's conclusions and submits a brief addressing each of the grounds that served as a basis for denial.

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 two issues in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary was employed abroad and whether he 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 February 25, 2008 in which the petitioner stated that in his proposed position the beneficiary would establish company operations, organize and oversee administrative matters, address human resources concerns, including hiring, training, and firing employees, negotiate contracts for services, purchases, and sales, and he would implement policies and adopt strategies to improve business and increase profits. The petitioner also provided a brief list of responsibilities accompanied by percentage breakdowns. As the director included this portion of the job description in the denial, the AAO need not restate this information.

The petitioner provided a separate document, also dated February 25, 2008, in which the beneficiary's proposed position was said to include authority over the budget and capital expenditures, and negotiating freight fees. The beneficiary's employment abroad was described as managerial involving development of a system for importing and exporting the foreign entity's products, maintaining contact with Brazilian suppliers, and managing and directing the business.

On October 28, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide supplemental job descriptions of the beneficiary's foreign and proposed employment. Specifically, the petitioner was asked list all the specific job duties that the foreign position entailed and the duties that the proposed position would entail as well as the percentage of time that was and would be attributed to each of the listed tasks. The petitioner was asked to state the number of subordinate managers or supervisors that reported and would report to the beneficiary in his past and proposed positions including each subordinate's job title, job duties, and education level. Additionally, the petitioner was asked to provide each entity's organizational chart depicting the beneficiary's position and the given entity's hierarchical structure.

The petitioner's response included a letter dated November 25, 2008 in which the petitioner repeated the information provided earlier in support of the petition. With regard to the proposed employment, the petitioner reiterated that the beneficiary would maintain full authority over personnel matters, company policies, and strategies, all of which would be geared towards meeting the petitioner's profit goals. Once again, the petitioner stated that the beneficiary would be charged with negotiating contracts concerning prices for services, purchases, and sales, as well as bank insurance and credit terms. The beneficiary was described as functioning at the senior level of the organization. In discussing the idea of an organizational chart, the petitioner generally noted that large corporations may have many management levels, whereas in a smaller organization "all employees might have to take on a wider range of duties . . . because there are fewer employees." The petitioner did not identify itself as either a large or a small corporation and thus did not go on to discuss its organizational hierarchy or the beneficiary's placement therein.

Similarly, with regard to the beneficiary's employment abroad, the petitioner restated that the beneficiary assumed a managerial position and went on to repeat that the beneficiary has knowledge and experience in the field of importing and exporting auto parts, which entailed maintaining contacts with suppliers in Brazil. Although the petitioner stated that the foreign entity has over twenty employees, the organizational chart that was submitted previously to establish the hierarchical structure of the foreign entity shows that the foreign employer was comprised of nine employees at the time of the beneficiary's employment abroad. The chart also indicates that the beneficiary had three subordinates, including an administrative assistant, a driver, and an inventory coordinator. Thus, it would appear that the twenty plus employees that the petitioner referenced in its response to the RFE is in reference to the foreign entity's current organizational hierarchy and not the hierarchy that was in place during the beneficiary's employment abroad.

Lastly, the petitioner's letter included a subsection with the heading "Level of Authority" in which the petitioner summarized the role of managers and executives as one involving organization, direction, and control of the organization's major functions by working through other employees to achieve business objectives. With regard to the beneficiary in particular, the petitioner added that he "not only [has] the requisite authority but the majority of his previous experience relates to the company's operational policy and management carrying out its operations and policies (such as supervising lower level employees performing sales work, operating machines and supervising the lower level staff of four specifically selected for their positions in this field of import [and] export." [sic] The petitioner did not specify whether this statement was

meant to be applied to the beneficiary's foreign or proposed employment, nor did the petitioner explain whether supervising lower level employees, performing sales work, and operating machines were tasks that the beneficiary would perform. If these tasks were not meant to be attributed to the beneficiary's foreign or proposed position, the petitioner did not explain who did or would actually assume these tasks. The petitioner also failed to identify the positions of "the lower level staff of four" and did not indicate whether these employees work for the foreign or for the U.S. entity.

The petitioner did not provide its own organizational chart, nor did the petitioner list the beneficiary's job duties with time constraints to establish how much time the beneficiary spent on the duties he performed abroad or the job duties he would perform in his proposed position with the U.S. entity. It is noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In a decision dated June 25, 2009, the director denied the petition noting that the information provided by the petitioner with regard to the beneficiary's foreign and proposed employment was vague and failed to establish that the beneficiary was employed abroad and that he would be employed in the United States in a qualifying managerial or executive capacity. The director noted that the foreign entity's organizational chart, which showed three employees under the beneficiary's supervision, provided no information as to the duties or educational levels of the three subordinates. With regard to the beneficiary's proposed employment, the director questioned the petitioner's ability to relieve the beneficiary from having to primarily perform non-qualifying tasks given that the petitioner's staff was comprised of only three employees.

On appeal, the petitioner provided two separate statements addressing the director's adverse decision. In the first statement, which was dated August 5, 2009, the petitioner summarized the issues in contention, including the issue of a qualifying relationship. The AAO notes that a thorough review of the director's decision shows that the petitioner's summary of issues was incorrect, as the director did not make any adverse findings regarding the petitioner's qualifying relationship with the beneficiary's foreign employer. Although the RFE instructed the petitioner to provide additional information addressing this issue, there is no indication that the petitioner's response led to any adverse findings.

The initial appeal statement did not address the issue of the beneficiary's proposed employment with the U.S. entity. The petitioner did, however, address the beneficiary's employment abroad, contending that the 30-day extension period allowed by the Form I-290B for the submission of additional information was insufficient to provide foreign documents, which would require English language translations. The AAO notes, however, that the information regarding the beneficiary's employment with the foreign entity, including the beneficiary's job description and information regarding the beneficiary's support staff during his employment abroad, was originally requested in the RFE, which was issued on October 28, 2008. Having been informed of the requested evidence approximately eight months prior to the denial of the petition, the AAO finds that the petitioner had ample time in which to comply with the request and possibly to preclude adverse findings with regard to the beneficiary's employment abroad. The petitioner did not provide the requested evidence either in response to the RFE or on appeal, despite the significant lag time between the RFE and the denial. In light of this timeline, the AAO finds that the time constraints imposed by U.S. Citizenship and Immigration Services (USCIS) do not justify the petitioner's failure to submit requested information that was required for the purpose of determining the petitioner's eligibility.

On December 19, 2009, the AAO received the petitioner's second appeal brief, dated December 6, 2009, in which the petitioner addressed the beneficiary's foreign and proposed employment. The petitioner pointed out that the beneficiary is fluent in three languages and performed exceptionally during his employment with the foreign entity.

With regard to the employment abroad, the petitioner stated that the beneficiary performed in a managerial capacity and claimed that the beneficiary's duties abroad included "supervision of function managers in international shipments, inventory preparation, accuracy, language, responsibility, regulations equipment, inspections, weighing procedures, safety, and quality control, and authorized to represent the company as "speaker" in events with media, if it becomes necessary." Aside from the fact that the petitioner failed to specifically define the beneficiary's role with respect to these functions, the petitioner's current claim does not comport with the foreign entity's organizational chart, which the petitioner previously provided. More specifically, the foreign entity's organizational chart shows an administrative assistant, a driver, and an inventory coordinator as the beneficiary's subordinates during his employment abroad. Based on these individuals' job titles, it is unclear who was carrying out the international shipments, regulating the equipment, inspecting merchandise, and carrying out procedures for weighing, safety, and quality control. Furthermore, the petitioner's statements were confusing with no indication provided to establish what specific tasks were associated with "accuracy, language, [and] responsibility." The AAO also finds that further clarification is needed to establish what is meant by "supervision of function managers," as none of the beneficiary's subordinates appears to have served in a managerial position.

Additionally, the petitioner stated that the beneficiary's employment abroad involved developing and managing sales projects; developing a business plan to target identified sales targets; assuming a leadership role in revenue building activities with the sales team; managing relationships between the sales team and their respective customers; determining sales goals; and managing the preparation of proposals and contracts for services as needed with the sales team. This broad list of the beneficiary's responsibilities contradicts the foreign entity's organizational chart, which identified only one sales-related employee—a sales manager—and did not identify a sales staff to carry out the company's sales activities. Although the petitioner claimed that the foreign entity's organizational chart "shows" a description of the job duties of the beneficiary's subordinates and supervisors, the record does not support this claim. As indicated earlier, only employee names and job titles were provided in the foreign entity's organizational chart, which neither provides information regarding employee job duties nor shows that the beneficiary had a superior to whom he reported. 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)).

With regard to the beneficiary's proposed employment with the U.S. entity, the petitioner restated the previously provided job descriptions despite the fact that the director expressly deemed such information to be insufficient and generally lacking the requisite degree of detail about the beneficiary's specific daily job duties. The petitioner did not supplement the deficient job descriptions with additional information or clarify how its three-employee organization would support the employment of the beneficiary in a qualifying managerial or executive capacity. In other words, the AAO is confused as to how the petitioner's limited staffing composition was sufficient to relieve the beneficiary from having to primarily carry out the petitioner's daily operational tasks at the time of filing. Aside from repeatedly disputing the director's findings and reassuring the AAO that the beneficiary's proposed employment would consist of duties at a managerial level, as the petitioner had previously done in the response to the RFE, no new information was

provided to fully describe the beneficiary's actual daily tasks in his proposed position with the U.S. entity or to explain how the beneficiary's limited support staff would have enabled the beneficiary to primarily perform tasks in a qualifying managerial or executive capacity at the time of filing the petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). 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 and published case law reaffirms the role of a detailed description of job duties, holding that the actual duties themselves will 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). The AAO will then consider the information gained from the description of the proposed employment in light of the petitioner's organizational hierarchy and the beneficiary's position therein in order to gauge the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks.

As discussed above, neither the description of the beneficiary's employment abroad nor the description of the proposed employment provided sufficient information about the beneficiary's actual daily tasks to enable the AAO to gain a meaningful understanding of the beneficiary's employment capacity in either position. The record also lacks adequate information about the foreign entity's staffing to allow for a favorable conclusion. As indicated above, various unexplained anomalies come to light when the foreign entity's organizational chart and the beneficiary's job description are considered together. The AAO has no understanding of who within the foreign entity's organization was available to sell the products, nor does the organizational chart readily establish that the beneficiary's subordinates were managerial or professional employees.

With regard to the U.S. entity's organization, the petitioner failed to provide an organizational chart or to explain how the petitioner's limited support staff would have been sufficient to relieve the beneficiary from having to primarily perform its daily operational tasks. While the AAO acknowledges that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to his/her proposed position. 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).

In the present matter, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The record does not establish that a majority of the beneficiary's duties have or will consist primarily of tasks within a qualifying managerial or executive capacity. In fact, particularly with regard to the beneficiary's proposed position, the record indicates that a preponderance of the beneficiary's duties will most likely be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary has been primarily supervising or would primarily supervise a subordinate staff of professional, managerial, or supervisory personnel or that the beneficiary was and would be relieved from performing primarily nonqualifying duties. Based on the evidence furnished, the AAO cannot conclude that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. Based on these two independent findings, the instant petition may not be approved.

The remaining issue addressed in the director's decision is whether the petitioner established that it had the ability to pay the beneficiary's wage as of March 7, 2008, the date the Form I-140 was filed.

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 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.

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 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.

In the present matter, the petitioner's 2007 wage statements and the petitioner's quarterly and yearly tax returns for 2006 and 2007 clearly established that the petitioner employed the beneficiary prior to the date the Form I-140 was filed. However, none of the submitted documentation established that the beneficiary was paid a salary that was equal to or greater than the proffered wage of approximately \$40,000 per year. Although the petitioner has provided a copy of its 2008 corporate tax return in which the Schedule E portion of the return indicates that the beneficiary was compensated \$40,000 as an officer of the company, the document was neither dated nor signed either by the preparer of the document or by an officer representing the petitioning entity; nor was the document certified to establish that the information contained therein was a true representation of the petitioner's financial status at the time the Form I-140 was filed. As such, the probative value of this unsigned document is limited at best and does not establish that the petitioner paid the beneficiary the proffered wage at the time of filing. As the petitioner has not provided sufficient documentation of its ability to pay the beneficiary's proffered wage, the petition must be denied on the basis of this additional ground.

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.