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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: JUN 20 2012

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 Texas company that is engaged in retail sales of luxury accessories and it seeks to employ the beneficiary as its 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.

On June 30, 2010, the director denied the petition based on the determination that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity, and the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage.

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 this proceeding is whether the petitioner submitted sufficient evidence to establish that it would employ the beneficiary 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 a letter of support dated October 11, 2008, the petitioner stated that it wishes to expand in the U.S. and the beneficiary's responsibilities as "chief executive, includes retail, wholesale and strategic planning of the company as well as appointing and managing the company's management team." The petitioner submitted a 5 year business expansion plan for the petitioner, which would include new stores in the U.S. and wholesale expansion. The 5 year business plan includes goals and strategies the petitioner has for the next five years and does not clearly depict the current activities and business strategies for the petitioner. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa

petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

The petitioner also submitted a list of employees which includes a store manager, an administration manager and three sales associates. The petitioner also lists independent contractors that include "PR and communications, PC, Independent Modeling assignments, Web Designer, and Contractor."

In response to the director's request for additional evidence, the petitioner provided a list of "executive duties" performed by the beneficiary. The petitioner explained that the beneficiary "currently resides outside the state of Texas and does monthly visits to the store in Dallas," and "all purchasing and reordering inventory from new and existing vendors, paying vendors, and the general upkeep of the store is managed by [the beneficiary's] store manager whilst she concentrates on her executive duties." The petitioner also stated that the beneficiary "has autonomy over establishing all the goals and policies of the business," "exercises wide latitude in discretionary decision-making, which is evident in her being the sole decision maker," and the beneficiary "receives only general direction from higher the [*sic*] board of directors, or stockholders of the organization."

On appeal, the petitioner explains that the financial crisis in 2007 was very difficult for retail businesses and the beneficiary "had to guide the company to change course and take measures to ensure the survival of the company." The petitioner also states that the beneficiary has "full autonomy with regards to decision-making, and the majority of her duties relate to operational and policy management," as well as actual activities and executive accomplishments such as "lease negotiations, strategic marketing and repositioning of the company's image, products and pricing to adapt to the financial crisis that occurred."

On appeal, the petitioner states that it employs the beneficiary and a store manager, a senior sales associate, a sales associate, an events coordinator, and a merchandiser/custodian. The petitioner also provides a brief job description for each position.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity. 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. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

On review, the petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states vague duties such as the beneficiary has "autonomy over establishing all the goals and policies of the business," "responsible for setting all policies made with regards to customers, employees, and general rules of conduct," and is responsible for the "expansion into wholesaling the VIA Pelle private collections sold at the store." 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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The petitioner did not define the petitioner's goals and policies and the day-to-day activities performed by the

beneficiary in reaching the business goals of the store. 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. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her 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. The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description also includes several non-qualifying duties such as "visiting new sites for the next store," "the compilation of a yearly business plan, the financial goals and target setting of the business," "editing of designers and image creation of the store, and "directing media releases through the public relations company." It appears that the beneficiary will be developing and marketing the services of the business, and negotiating contracts, rather than directing such activities through subordinate employees. 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 Intn'l.*, 19 I&N Dec. at 604.

An analysis of the nature of the petitioner's business undermines the petitioner's assertion that the beneficiary is employed in a managerial or executive capacity. On the I-140, the petitioner stated that it employed five employees. The petitioner submitted a list of employees which included a store manager, an administration manager and three sales associates. The petitioner also lists the independent contractors as "PR and communications, PC, Independent Modeling assignments, Web Designer, and Contractor." On appeal, the petitioner states that it employs the beneficiary and a store manager, a senior sales associate, a sales associate, an events coordinator, and a merchandiser/custodian. The petitioner did not explain why the job titles changed on appeal. Moreover, the petitioner did not provide sufficient evidence to establish that these individuals are employed by the petitioner such as Form 941, Quarterly Wage Reports, paystubs, or Forms W-2 or 1099. In addition, the petitioner submitted Form 1120, U.S. Corporation Income Tax Return, for 2008 that indicated the petitioner paid \$58,880.00 in salaries and wages. According to the beneficiary's Form 1040, U.S. Individual Income Tax Return, for 2008, the beneficiary received a salary of \$43,653.00. Thus, the petitioner paid \$15,227.00 in salaries and wages in 2008 for the additional 4 employees. That salary amount reflects only part-time employment for the other four employees, if they are even employed by the petitioner. In addition, the petitioner claims that it employs several independent contractors but it failed to provide any evidence such as payments made to these individuals or Forms 1099.

In addition, the petitioner submitted a web page document for the store from www.yelp.com that states the store hours are Monday through Saturday from 10:00 a.m. until 7:00 p.m. and Sunday from 12:00 p.m. until 6:00 p.m. Given the minimal salaries paid for 2008, it is unclear who is working at the store for 60 hours a week. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of the organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

The beneficiary's job duties, as described by the petitioner, are not indicative of an employee who is primarily focused on the broad goals and policies of the organization. The fact that the beneficiary is a shareholder of the organization is insufficient to establish the beneficiary's employment in an executive capacity. 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). The petitioner has not established that the beneficiary is primarily engaged in directing and controlling a subordinate staff comprised of professional, managerial or supervisory employees, nor has it indicated that she is charged with managing an essential function of the petitioning organization. *See* section 101(a)(44)(A) of the Act. Therefore, the AAO is not persuaded that the beneficiary would be employed in a primarily managerial capacity.

The second issue in this proceeding is whether the petitioner has the ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states, 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

(Emphasis added.)

The petitioner did not indicate a salary on the Form I-140. Instead, the petitioner provided a letter from the parent company that stated that the beneficiary's "remuneration is in excess of \$100,000. A portion of her salary is transferred by means of bank transfer, and the rest is deposited in her Nedbank bank account in South Africa."

In the director's denial decision, he noted several discrepancies between the financial statement and the tax documents that were submitted by the petitioner. On appeal, the petitioner noted that the beneficiary

moved and broke her patella when the petitioner received the RFE and “there are therefore a number of corrections that need to be made in an audit.” The petitioner requested additional time to submit corrected audited financial statements, but never submitted these documents. The petitioner also states on appeal that “[the beneficiary] may have chosen not to always take the full income, preferring to reinvested [sic] it into the store to purchase inventory and working capital in difficult times.” The petitioner also states that the beneficiary is “paid and will be continued to be paid from the parent company in South Africa.” However, the petitioner did not provide any documentation to establish these claims.

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 case, the petitioner did not submit any documentation evidencing that it paid the beneficiary's proffered salary of \$100,000 per year. The petitioner did not provide paystubs or a Form W-2. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

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).

The petitioner provided Form 1120, U.S. Corporation Income Tax Return, for 2008 that indicated gross receipts of \$311,950.00, payment of salaries and wages of \$58,880.00, and a net income of \$14,755.00. According to the I-140, the petitioner employs five individuals. It is not clear how the petitioner can pay the beneficiary's salary of \$100,000 per year while also paying the salaries of four other employees when it had a net income of \$14,755.00 in 2008, after only paying \$58,880.00 in salaries and wages. Thus, the evidence is not sufficient to establish that the petitioner can pay the beneficiary's salary of \$100,000 per year and pay the salaries of all the listed employees. The petitioner did not provide any evidence on appeal to overcome the director's concerns. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

On appeal, the petitioner contends that the beneficiary is paid and will be continue to be paid from the parent company in South Africa. However, the petitioner did not submit any evidence that the foreign company has committed that money to the petitioner to pay the beneficiary's salary. Furthermore, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition

may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Beyond the decision of the director, the record lacks substantive job descriptions establishing what job duties the beneficiary performed during her employment abroad. 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 actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Beyond the decision of the director, the record lacks evidence to establish that the petitioner is actually doing business in the United States. 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." According to an internet search, the petitioner's retail store has closed. The petitioning corporation is "Not in Good Standing" according to the website of the Texas Comptroller of Public Accounts. The petitioner did not provide documents to show that it is currently doing business in the United States.

Beyond the decision of the director, the petitioner has submitted insufficient evidence regarding the ownership of the corporation. The petitioner submitted a document that states "Share Distribution: Minutes of Shareholders meeting held in Dallas," that states "1000 distributable shares were divided equally between [the foreign company] and [the beneficiary]." The document is not notarized and it is not clear who signed the document. As general evidence of a petitioner's claimed qualifying relationship, a copy of minutes of a shareholders meeting is not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The stock certificates, the corporate stock certificate ledger, stock certificate registry, and corporate bylaws must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control. In the absence of that information, the petitioner cannot show that it has a qualifying relationship with the beneficiary's former employer in South Africa.

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 *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional grounds of ineligibility discussed above, this petition cannot be approved.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of*

Transp., NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.