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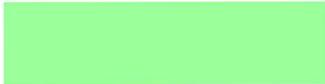
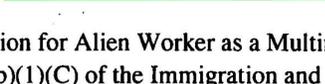
U.S. Citizenship  
and Immigration  
Services



DATE: JAN 24 2013

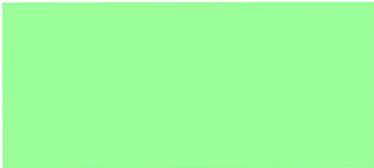
OFFICE: TEXAS SERVICE CENTER

FILE: 

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)

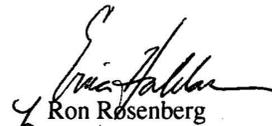
ON BEHALF OF PETITIONER:



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,

  
Ron Rosenberg

Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center. The petitioner filed an appeal. 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 president. 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 January 26, 2012 the director denied the petition concluding that the petitioner failed to establish that it would employ the beneficiary in a primarily managerial or executive capacity.

On appeal, counsel disputes the director's finding that the beneficiary would serve as a first-line supervisor managing only low-level employees. Specifically, counsel asserts that the beneficiary will supervise two "office administrators" who work in "managerial positions." Counsel indicates that a brief and/or evidence is attached to his appeal (Form I-290B) but no legal brief or additional evidence is in the file or referenced in the cover letter provided by counsel.

### I. The Law

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 or managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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.

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.

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.

## II. Proposed Employment in a Managerial or Executive Capacity

The sole issue addressed by the director is whether the petitioner established that it would employ the beneficiary in a qualifying managerial or executive capacity, consistent with the statutory definitions at section 101(a)(44)(A) or (B) of the Act.

The petitioner filed the immigrant visa petition (Form I-140) on January 26, 2011. The petitioner asserted that the beneficiary would be serving in a managerial or executive capacity as president of the company, a wood and glass furniture manufacturer with ten claimed employees and gross annual income of \$397,010.00. In a letter submitted in support of the petition, the petitioner described the beneficiary's duties as follows:

- Managing authority of the entire U.S. company.
- Developing and managing the company's activities and operations to include development of the U.S. investment and executive managerial actions.
- Directing and managing the company and all of its components and functions.
- Planning, developing and establishing company policies and objectives.
- Conferring with legal consultants and the Certified Public Accountant to plan business objectives, develop organizational policies, coordinate functions and operations and establish responsibilities and procedures for attaining objectives.
- Reviewing activity reports and financial statements to determine progress and status in attaining the company's objectives while revising these plans and objectives in accordance with current conditions.
- Directing and coordinating the formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments and to increase productivity.
- Planning and developing public relations designed to improve the company's image and relations.
- Evaluating the performance of the company for compliance with established policies.
- Preparation of annual budget to ensure that the company's revenues and expenditures fall within budgeted amounts.

The director subsequently issued a request for additional evidence (RFE) instructing the petitioner to provide, *inter alia*, the following: (1) a comprehensive description of the beneficiary's specific, daily duties, including the percentage of time spent on each duty; (2) an organizational chart showing the number of employees reporting directly to the beneficiary; (3) job titles, job duties, educational level and full- or part-time status for all U.S. employees; (4) if applicable, evidence to document the number and type of contractors who provide services for the petitioning company and the duties they perform; and (5) copies of IRS Forms W-2, Wage

and Tax Statement, for 2010, as well as comparable evidence of payments to any contract workers.

In a letter provided in response to the RFE, the petitioner listed the beneficiary's daily responsibilities as follows:

- Daily management of the business (20%)
- Daily employee meetings to organize the daily jobs and demands (20%)
- Meet with vendors (10%)
- Organize and prioritize the activities of the factory (10%)
- Visit clients to establish needs (10%)
- Design and planning of the projects (10%)
- Develop products, markets and review competitors (10%)
- Overview bank and legal matters. (10%)

The petitioner also included an organizational chart for the U.S. company. The chart depicted the beneficiary as the general director overseeing the production and office administration department. The office administration department includes an office administrator who reports directly to the beneficiary, as well as another office administrator and a sales employee. On the production side, the beneficiary was identified as head of production with two carpenters reporting directly to him. The chart depicts a "carpenter helper" reporting to each carpenter, and a total of three installation employees subordinate to the helpers. Thus, according to the submitted organizational chart, the beneficiary directly supervises an office administrator and two carpenters.

The petitioner's response to the RFE did not include the requested job descriptions or educational level for the beneficiary's subordinates, identify any contractors working for the company, or indicate whether the employees listed on the organizational chart are working on a full-time or part-time basis.

The petitioner provided IRS Forms W-2, Wage and Tax Statement, for ten U.S. employees for the 2010 calendar year. The organizational chart depicted 11 named individuals but the petitioner provided copies of IRS Forms W-2 for only seven of the employees named on the chart. Three IRS Forms W-2 were included for individuals who were not included on the organizational chart, and four individuals identified on the chart did not receive salaries or wages from the petitioner in 2010.

The petitioner also submitted copies of its IRS Form 941, Employer's Quarterly Federal Tax Return, and Florida Form UCT-6, Employer's Quarterly Report, for the second quarter of 2011. These documents confirm the employment of all 11 employees named in the organizational chart for the months of April through June 2011.

Counsel also provided a written response to the RFE asserting that the beneficiary would be supervising professional employees and that his duties would be primarily operational and managerial, leaving little time to devote to the day-to-day running of a company. He noted that the professional employees would free the beneficiary to devote over 60% of his time to operational objectives to ensure company growth. Counsel further asserted that the beneficiary would be managing an essential function.

The director denied the petition on January 26, 2012. The director determined that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. In the decision, the director determined that the beneficiary would not be overseeing supervisory or professional employees and further found that it appeared the beneficiary would serve as a first-line supervisor overseeing the work of low-level employees.

On appeal, counsel asserts that the director's decision was erroneous because it failed to recognize the administrator positions as managers subordinate to the beneficiary.

Upon review, counsel's assertions are not persuasive. Counsel asserts that the administrators employed with the U.S. company are "managerial positions" and establish the beneficiary's position in a managerial capacity. In support of his assertion, counsel offers a dictionary definition of the word "administrator." Counsel did not provide an actual duty description for the administrators employed by the petitioning company. Further, although requested by the director, the petitioner did not provide the job duties or level of education required to perform the duties for any position subordinate to the beneficiary. Any 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). Thus, the petitioner has not established that any of these employees possess or require a bachelor's degree, such that they could be classified as professionals. Moreover, absent the requested job descriptions for the beneficiary's subordinates, the petitioner has not established that any of the beneficiary's subordinate employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

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). The petitioner initially provided a very general description of the beneficiary's duties and followed that with a letter containing a completely different description including allocated percentages of time for each duty. Many of the duties in the second letter appeared to involve non-qualifying tasks such as meeting with vendors and clients and designing, planning, developing and marketing products. Based on the time allocated to those duties, at least 40% of the beneficiary's time was to be spent actively engaged in the day-to-day operations of the business itself. It is unclear what portion of the remaining 60% of the beneficiary's time would be spent similarly engaged but it

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cannot be ruled out given the broad and vague nature of the descriptions contained in the letter, and the petitioner's failure to provide any information regarding the duties performed by the beneficiary's subordinates

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. 593, 604 (Comm'r 1988). While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act.

Additionally, the petitioner's assertion in his letter that the beneficiary would conduct daily employee meetings to organize the daily jobs and demands (20%) and provide daily management of the company (20%) are too broadly defined to establish whether they qualify as managerial or executive duties or whether they involve non-qualifying tasks. Notably, the beneficiary's management of supervisory personnel is not specifically mentioned in either of his job duty descriptions. 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 his daily routine. 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).

Notwithstanding petitioner's duty descriptions, in the RFE response, counsel claims on appeal that the breakdown of job duties showed the beneficiary would be "involved in decision making processes in each aspect of the corporation, but will rely on her [*sic*] subordinates to handle the day-to-day details of the business." Counsel asserts that 60% of the beneficiary's time would be devoted to operational objectives to ensure the company's continued growth. The petitioner's own description does not support this assertion by counsel and it appears to be inconsistent. 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).

Overall, the petitioner's claims fail on an evidentiary basis, as it has not provided the requested detailed description of the beneficiary's actual duties and the duties performed by his subordinates. Accordingly, the petitioner has not established that the beneficiary will be employed primarily in an executive or managerial capacity and the appeal will be dismissed.

### III. Qualifying Relationship

Beyond the director's decision, the petitioner has not established that it has a qualifying relationship with the beneficiary's overseas employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." See generally § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); see also 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings 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 this matter, the petitioner asserts that since the beneficiary owns 100% of both the U.S. company and the foreign company they are affiliates and have a qualifying relationship. If the evidence established that the beneficiary wholly owned both companies, this assertion would be correct. However, the evidence submitted is insufficient to establish the beneficiary's claimed ownership in both companies. The director issued an RFE for documentation establishing the qualifying relationship between the foreign and U.S. entities in this matter. Notwithstanding the director's request, the petitioner resubmitted two previously submitted documents and provided none of the additional evidence requested. Any 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 order to establish the beneficiary's ownership of the U.S. company, the petitioner provided articles of incorporation, annual report for years 2007 and 2010, one stock certificate, and a corporate tax return. According to the U.S. company's articles of incorporation filed June 25, 2001, the maximum number of shares the company is authorized to have outstanding is 500 common shares valued at \$1.00 per share. The articles reflect the issuance of 48 shares in consideration of \$240.00 to the beneficiary; another 48 shares in consideration of \$240.00 to another individual identified as a Director; and four shares in consideration of \$20.00 to a third individual identified as a Director. Notably, the distribution indicates a value of \$5.00 per share rather than \$1.00 per share.

As evidence of the beneficiary's claimed sole ownership, the petitioner submitted a share certificate No. 5 indicating the transfer of 500 shares at a \$1.00 par value to the beneficiary on June 5, 2004 and the self-prepared 2010 IRS Form 1120, U.S. Corporation Income Tax Return, Schedule G, part II indicating the beneficiary as the 100% owner of voting stock. Notably, the Schedule G was not included in the tax filing for tax year 2009. The petitioner failed to include sufficient documentation to demonstrate the transfer of any of the original shares such as a stock ledger or stock certificate registry, meeting minutes or annual reports. Furthermore, the petitioner did not resolve inconsistencies such as accounting for the first four stock certificates and explaining the value of the cost per share of stock.

Regarding the foreign company, the petitioner submitted a copy of the foreign articles of incorporation and a purported translation of those articles. A comparison of the translated document and the original clearly suggests errors in the translation on its face. Numerals were incorrect, and several paragraphs, including nine, ten, eleven, twelve and thirteen were omitted. Together with the incomplete translator certification, the credibility of the document cannot be relied upon. Other translation errors clearly exist in this file such as the lease which, on its face, can only be viewed as a summary of the document. Many of the translated payroll documents have numerical errors in the dates. These mistakes raise questions regarding the veracity of all the translated documents in this file. Furthermore the offered translations have not been signed or certified as true and accurate by the translator. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

Assuming the translated articles of incorporation were true and correct, however, there are still inconsistencies in the record that have not been resolved by the petitioner. If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. In this matter, at least one of the two organizational charts submitted for the foreign company suggests that the beneficiary is 70% owner and three other individuals each own 10% of the company. This is not clear, but if it were true it would be inconsistent with the petitioner's assertions and the articles of incorporation, as translated. 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).

Based on the foregoing, the record does not support the petitioner's claim that the foreign company and the U.S. company are affiliates or otherwise have a qualifying relationship. For this additional reason, the petition cannot be approved.

#### IV. Ability to Pay Proffered Wage

The remaining issue to be addressed is whether the petitioner established that it has the ability to pay the beneficiary's proffered salary of \$50,000 per year. *See* 8 C.F.R. § 204.5(g)(2).

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 did not establish that it had previously employed the beneficiary at a salary equal to the proffered wage.

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.

As the petition's priority date falls on the date of filing, January 26, 2011, the AAO must examine the petitioner's tax return for 2010. The petitioner's IRS Form 1120 for calendar year 2010 presents a net taxable income of \$9,540.00. Although the petitioner had paid the

beneficiary \$25,000 for the year, it could not have paid a proffered wage of \$50,000, or an additional \$25,000 per year out of this income.

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 matter, the petitioner reported \$11,904 in net current assets. The petitioner must have Net Current Assets greater than the proffered salary to establish the ability to pay. The petitioner has not established the ability to pay the proffered salary. For this additional reason the petition may not be approved.

#### V. Conclusion

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).

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