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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

B4

FILE: [REDACTED] OFFICE: TEXAS SERVICE CENTER

Date:

DEC 13 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:

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. The fee for filing a Form I-290B is \$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 California corporation engaged in the import, distribution, wholesale, and retail of various household products. The petitioner seeks to employ the beneficiary as its general 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 the following 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 brief statement addressing both grounds 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 issue in this proceeding is whether the petitioner 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 support of the Form I-140, the petitioner submitted a letter dated July 2, 2008, which includes the following list of the beneficiary's duties and responsibilities in his proposed position with the U.S. entity:

- Established [sic] and direct company goals and policies, including design;
- Negotiate contracts;
- Liaise with supplie[r]s, designers, contractors, and customers;
- Personnel responsibilities[;]

- Supervised all financial and legal transactions.

The petitioner's supporting evidence included a list of seventeen individuals who were classified as active drivers for the petitioner in 2006 as well as an organizational chart that listed a total of ten position titles as part of the petitioner's staffing hierarchy. The beneficiary's proposed position of president is shown as the head of the organization with an executive secretary and a dispatcher as his two direct subordinates. The lowest tier of the chart shows seven drivers overseen by the dispatcher.

On January 13, 2009, the director issued a request for evidence (RFE), instructing the petitioner to provide further documentation in order to establish the petitioner's eligibility. The petitioner provided a timely response, which included a letter from counsel, dated February 6, 2009, and additional supporting documents.

In a decision dated March 19, 2009, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. The director specifically noted that eight of the petitioner's employees are non-professional.¹ The director also found that the petitioner offered a deficient description of the beneficiary's proposed employment, noting that the petitioner failed to further an understanding of the beneficiary's specific daily duties or the amount of time the beneficiary would attribute to qualifying tasks, thus failing to establish that the beneficiary's time would be primarily allocated to tasks within a managerial or executive capacity.

On appeal, counsel asserts that the beneficiary has been and would be relieved from daily operational tasks by the executive secretary and the dispatcher. Counsel stated that the beneficiary would allocate his time to marketing and sales, determining when to place bids and which business equipment and services to invest in, and making other discretionary business decisions, such as determining the type of merchandise to transfer, setting sales and share plans as well as determining the drivers' wages, hiring and reviewing drivers, and finding customers.

Counsel's statement does not establish that the beneficiary would primarily perform tasks within a qualifying managerial or executive capacity. Rather, counsel's statement indicates that the beneficiary would allocate some unidentified portion of his time to non-qualifying tasks, including marketing and sales and hiring and reviewing the work of non-professional and non-supervisory employees. The AAO recognizes that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks. However, the burden is on the petitioner to establish that the non-qualifying tasks the beneficiary would perform do not constitute the majority of the duties of his 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).

¹ The director noted, based on his review of the petitioner's organizational chart, that the petitioner has nine employees. The AAO points out that the organizational chart identified a total of ten positions, thus indicating that the director's observation regarding the number of employees was inaccurate. The AAO notes, however, that this minor oversight is not germane to the overall basis for denial and, therefore, need not be further addressed.

While the AAO acknowledges the beneficiary's role as the foremost authority within the petitioning organization, this factor, along with the beneficiary's placement within the petitioner's organizational hierarchy, must be considered in light of the beneficiary's proposed job duties. In the matter at hand, the job description includes a considerable number of non-qualifying tasks from which the beneficiary would not be relieved by the individuals listed in the petitioner's organizational chart. Moreover, in reviewing the job description submitted in the initial support letter, the petitioner stated that the beneficiary would be directly involved in negotiating contracts and communicating with suppliers, designers, and contractors, which are also non-qualifying job duties.

Other items included in the petitioner's initial description of the proposed employment include establishing the company's goals and policies and supervising financial and legal matters. However, the petitioner did not list the actual underlying tasks that are associated with these overly vague and ambiguous job responsibilities. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, as the actual job duties themselves reveal the true nature of the proposed employment; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In summary, the information the petitioner provided does not establish that the beneficiary would primarily perform tasks within a qualifying managerial or executive capacity. Neither the petitioner's job description, which is vague in some respects while simultaneously inclusive of non-qualifying tasks, nor the petitioner's organizational hierarchy, which includes no marketing, sales, or customer service personnel, adequately establishes that the petitioner, at the time of filing, was able to relieve the beneficiary from having to devote the majority of his time to the performance of non-qualifying tasks. As such, the evidence of record does not establish that the beneficiary would be employed within a qualifying managerial or executive capacity and on the basis of this initial conclusion the instant petition cannot be approved.

The AAO now turns to the second issue in this proceeding—the evidence regarding the petitioner's 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.

The documentation submitted in support of the petition to establish the petitioner's ability to pay includes a photocopied 2007 IRS Form 1099 issued by the petitioner to the beneficiary in the amount of \$39,826 and photocopies of two checks issued to the beneficiary in 2008 by Tower Transport, Inc.

The director determined that these documents were not sufficient to establish the petitioner's ability to pay the proffered wage and therefore addressed this issue specifically in the January 13, 2009 RFE in which the petitioner was instructed to provide any IRS Form W-2s that were issued to the beneficiary or available payroll documents.

In response, the petitioner provided a letter dated February 6, 2009 from counsel in which counsel indicated that the petitioner's response included a 2008 corporate tax return and a Form 1099 issued to the beneficiary by the

petitioner in the amount of \$31,232. Counsel indicated that these documents would be dispositive of the issue of ability to pay.

After reviewing the submitted documentation, the director denied the petition, concluding that the petitioner failed to establish its ability to pay the beneficiary's proffered wage. The petitioner's net loss income as shown in the 2008 tax return contributed to the director's conclusion. Although the AAO acknowledges the director's observation with regard to the petitioner's 2007 tax return, the regulation pertaining to the ability to pay expressly requires that the ability to pay be established as of the priority date, i.e., the date the petition is filed. As the instant petition was filed in 2008, not in 2007, the petitioner's financial ability or inability in 2007 would be irrelevant in this matter.

Accordingly, the AAO will review documents pertaining to the petitioner's ability to pay the wage offered at the time of filing the petition. In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (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, while the AAO acknowledges the petitioner's submission of a 2009 IRS Form 1099 in response to the RFE, such document shows that the beneficiary was paid \$31,232, which is approximately \$3,800 less than the proffered wage. Thus, even if the 2009 document were sufficient to establish the petitioner's ability to pay, which it is not, it does not show that the beneficiary was paid the proffered wage. That being said, the record contains a copy of the beneficiary's 2008 personal tax return, which shows that the beneficiary's total income for that year was declared as \$16,982, an amount that is significantly lower than the proffered wage. Thus, the record lacks *prima facie* proof of the petitioner's ability to pay.

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.

Accordingly, the AAO now turns to the petitioner's photocopied 2008 federal tax return, which was submitted in response to the RFE. First, the AAO observes that the document appears to have been altered, as a number of the lines that are part of the document's original formatting appear to have been covered in the photocopy process. Second, the AAO notes that the dollar amount that was placed on line 28 of the first page of the return appears to be inaccurate when considering the dollar amounts that appear in lines 11 and 27. More specifically, line 28 instructs the filing entity to subtract the figure in line 27 from the dollar amount in line 11 to get the taxable

income before taking into account the net operating loss and special deductions. In the present matter, the petitioner should have subtracted \$266,303, which is shown in line 27, from \$321,742, which is shown in line 11, to get a taxable income of \$55,439. However, the dollar amount shown in line 28 of the petitioner's tax return is \$113,671. Thus, the figure representing the petitioner's taxable income is inconsistent and unreliable. 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).

Additionally, at line 29 of the petitioner's 2008 tax return, it appears that the petitioner erroneously included its operating loss for 2007. Notwithstanding this considerable oversight, it is unclear how the petitioner obtained \$31,073 as its taxable income when the dollar amount of its net income pre-operating loss was incorrect. Moreover, even if the AAO were to assume that \$113,671 was the correct pre-operating loss taxable income and that \$24,366 was the correct net operating loss deduction, after subtracting the latter amount from the amount representing the pre-operating loss income, the petitioner should have shown \$89,305 as its total taxable income. Instead, the petitioner showed \$31,073 as its total taxable income, thus showing that yet another dollar amount in the same tax return was inconsistent with the other amounts shown and therefore unreliable in establishing the amount of funds the petitioner had available to remunerate the beneficiary his proffered wage at the time of filing.

Although the record contains a second 2008 federal tax return, which the petitioner submitted in a subsequently filed Form I-140 with receipt number [REDACTED] the two tax returns are very different. Despite the fact that both tax returns purportedly represent the 2008 tax year, the tax return that was submitted in response to the RFE was handwritten and dated January 28, 2009 while the information provided in the more recently submitted tax return appears to have been input using a computer and was dated March 15, 2009. Additionally, a number of the key figures in the two tax returns are also different, most notably the figures in lines 26-30, which represent the petitioner's other deductions, total deductions, taxable income pre-operating loss, net operating loss deduction, and the petitioner's taxable income post deductions, respectively. These five figures in the two 2008 tax returns do not match. As there is no evidence that either document is a certified tax return, the AAO has no way of determining which, if either, is an accurate depiction of the petitioner's financial status in 2008.

In light of the above, the AAO finds that the petitioner has failed to provide consistent and reliable documentation to establish its ability to pay the beneficiary's proffered wage commencing with the year during which the Form I-140 was filed. As such, the petition cannot be approved on the basis of this additional finding.

Furthermore, while not addressed in the director's decision, the AAO finds that the record does not establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer, a filing requirement that is discussed at 8 C.F.R. § 204.5(j)(3)(i)(C).

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 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 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.

In the present matter, the petitioner provided a photocopied stock certificate dated August 2, 2002 showing that 50 shares of its stock were issued to the beneficiary. However, the petitioner provided no documentation showing how much total stock it authorized to be issued, thus precluding the AAO from being able to determine whether other stock was issued to shareholders other than the beneficiary. 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)).

Furthermore, the petitioner's claim at no. 7, Schedule K of both of its 2008 tax returns indicates that no one foreign person owned more than 25% of the petitioner's stock during that filing year. This indicates that either the petitioner's stock formation had been altered since 2002 when the original stock certificate was issued, or that the petitioner has other undisclosed stockholders. Regardless, the AAO cannot determine who owns and controls the petitioning entity. The record is also devoid of evidence establishing who owns and controls the foreign entity. Counsel's claim that the beneficiary has 50% ownership of that entity is not persuasive. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the AAO cannot conclude that the petitioner had a qualifying relationship with the beneficiary's foreign employer at the time of filing the petition.

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 ground of ineligibility discussed above, this petition cannot be approved.

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.