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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: [Redacted] Office: TEXAS SERVICE CENTER

Date: FEB 06 2003

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)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Texas Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a Florida organization incorporated in October of 1996. It is engaged in the import and export business. It seeks to employ the beneficiary as its multinational manager. Accordingly, the petitioner seeks 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 determined that the petitioner had not established a qualifying relationship with a foreign entity and had not established that the petitioner was a multinational company. The director also determined that the petitioner had not established that the beneficiary had been employed as a manager for an organization operating outside the United States and affiliated with the petitioner. The director further determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity. The director also determined that the petitioner had not established it could pay the wage proffered to the beneficiary.

On appeal, the petitioner submits additional information for a better understanding of its petition.

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.

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 that 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 has established that a qualifying relationship exists between the petitioner and the claimed affiliated company.

8 C.F.R. 204.5(j)(2) states in pertinent part:

Affiliate means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner submitted evidence that it was incorporated in 1996. The petitioner also submitted information demonstrating that it was claiming sub-chapter S status with the Internal Revenue Service (IRS) and was owned by one individual. On appeal, the petitioner submitted a statement from the owner of a Venezuelan registered sole proprietorship. The statement indicated that the owner of the foreign enterprise had been doing business with the petitioner and that the beneficiary had been the account executive for the petitioner in Venezuela. The petitioner also submitted on appeal, evidence that the foreign enterprise had paid the beneficiary over a period of three months.

The petitioner's information on appeal does not establish a qualifying relationship with the beneficiary's foreign employer. Although, the petitioner may do business in more than one country, it has not presented evidence that it or its affiliate or

subsidiary employed the beneficiary overseas. The petitioner has not presented evidence that it has a branch office in a foreign country, it has not presented evidence that its shareholder(s) owns and controls a foreign enterprise, and it has not presented evidence that it owns and controls a foreign enterprise. The petitioner has not presented any evidence of a qualifying relationship with a foreign enterprise as defined in the Act. Moreover, even the claimed ownership of the petitioner is questionable as IRS regulations for S corporations do not allow foreign or corporate ownership. Internal Revenue Code § 1361 (a) and (b). The petitioner has not presented evidence to overcome the director's determination on this issue.

The second issue in this proceeding is whether the beneficiary performed managerial or executive duties for a qualifying entity for one of the three years prior to entering the United States as a non-immigrant. Even if the petitioner had established that the beneficiary had been employed by a qualifying entity, which it has not, the petitioner has not established that the beneficiary was employed by a foreign entity in a managerial or executive capacity. The statute specifically defines managerial and executive capacity as follows:

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.

A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if the beneficiary is representing he or she is both an executive and a manager. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Although it appears that the petitioner is claiming that the beneficiary had been engaged in managerial duties under section 101(a)(44)(A) of the Act, the petitioner does not actually describe the beneficiary's duties for the foreign entity. There is no evidence in the record that would establish that the beneficiary meets the four criteria set out in the definition of managerial capacity or executive capacity. Moreover, the owner of the foreign entity presents pay stubs showing that the foreign entity paid the beneficiary but then states that the beneficiary was an account representative for the petitioner. It is unclear from the record what entity actually employed the beneficiary overseas and in what capacity the beneficiary was employed overseas. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988). The petitioner has not established that the beneficiary was employed by a qualifying entity in a managerial or executive capacity in one of the three years prior to entering the United States as a non-immigrant.

The third issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States petitioner. In

examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). The petitioner provided the following job description for the beneficiary's position:

[The beneficiary] will be in charge of the new import and export business office. The company has grown and needs to setup a new department to separate service for the public and the service to Business. We expect to hire at least 6 new employees for these departments.

He will manage the employees and control imports and exports in the Company. He will control all pay records for the employees. He will be the person that will approve all the perspective [sic] employees and their duties.

The petitioner's indication that it plans to hire additional personnel for the beneficiary to manage is not relevant to the petition at hand. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner must demonstrate that at the time of filing the petition, February 13, 2001 in this case, that the beneficiary's proposed position is executive or managerial in nature. The petitioner's description of the beneficiary's proposed duties is not indicative of a managerial or executive position. The petitioner's description is more indicative of an individual that will be performing basic operational tasks for the petitioner. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988).

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties fail to adequately describe the actual day-to-day duties of the beneficiary. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been or will be employed in either a primarily managerial or executive capacity.

The last issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered wage of \$39,000 per year.

8 C.F.R 204.5(g) (2) states in pertinent part:

Ability of prospective employer to pay wage. 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, the Service will examine the net income figure reflected on the petitioner's 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's IRS Form 1120S for the year 2000 does not demonstrate that the petitioner has sufficient net income to pay the beneficiary the proffered wage.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.