

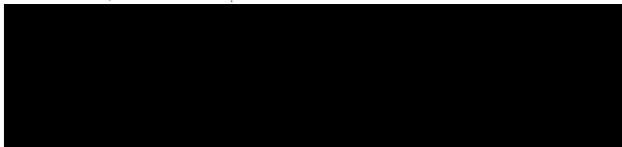


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U.S. Department of Justice  
Immigration and Naturalization Service

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



File: WAC 99 116 52628

Office: CALIFORNIA SERVICE CENTER

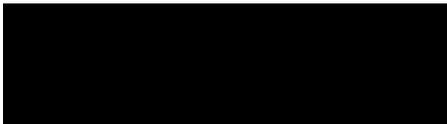
Date: **NOV 13 2002**

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)

IN BEHALF OF PETITIONER:



**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, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the state of California in October of 1994. The corporation claims to be engaged in the business of recruiting dentists, acquiring dental supplies, and subcontracting dental work and preparation of crowns. It seeks classification of 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 its ability to pay the proffered wage to the beneficiary. The director also determined that the petitioner had not established that it was doing business in the United States and was not merely an agent or office. The director also noted that independent contractors are not considered employees of the firm where they work in the context of 8 C.F.R. 204.5(g)(2).

On appeal, counsel for the petitioner asserts the Service decision is erroneous and not supported by the record. Counsel also submits a letter from the petitioner and its accountant stating that the petitioner has the ability to pay the beneficiary the 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 the 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 that indicates 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 the ability to pay the proffered wage.

Title 8, Code of Federal Regulations, section 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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petitioner's filing date. Matter of Wing's Tea House, 16 I&N Dec.158 (Act. Reg. Comm. 1977). Here the petition's filing date is March 18, 1999. The beneficiary's salary, as stated in the petitioner's job offer letter, is \$36,000 annually.

The petitioner initially submitted its financial statement for three months ending in March 31, 1996 and its 1996 and 1997 Internal Revenue Service Form 1120s, U.S. Corporation Income Tax Return.

The director requested evidence of the petitioner's ability to pay the proffered wage, including the petitioner's IRS Form 1120s for the years 1998 and 1999 and copies of the last three California State DE3 Forms, Quarterly Contribution Reports.

The petitioner, through its counsel supplied the 1998 and 1999 IRS Forms 1120. The 1999 Form 1120 reveals that the petitioner's gross income for 1999 was \$673,862, the petitioner's taxable income for 1999 was (\$59,740) and the depreciation recorded for 1999 was \$6,330. The petitioner noted cash of \$13,912 and

\$125,003 invested in its Russian branch office as current assets. The petitioner included over \$500,000 in current liabilities (not taking into account retained earnings). The petitioner also provided IRS Forms 1099 depicting payment in various amounts to nine independent contractors for the year of 1999. The petitioner noted that payment was made to the beneficiary as an independent contractor. The IRS Form 1099 to the beneficiary for the year 1999 showed compensation to the beneficiary in the amount of \$16,929.18.

In her decision, the director states that the petitioner's 1999 Form 1120 revealed the petitioner had a negative taxable income of (\$59,740). The director concluded that the petitioner had not established its ability to pay the proffered wage as of the petition's filing date.

On appeal, counsel submits a letter signed by the petitioner's general manager that states the petitioner has been paying the beneficiary as an independent contractor (in the year 1999) and that once the beneficiary's lawful permanent residence is approved will pay him as an employee. Counsel also submits a letter from the petitioner's accounting firm, that stresses the significant gross revenues for the petitioner in 1999 and also notes the payment of the beneficiary as an independent contractor in the year 1999. Counsel also states that the claimed foreign entity in this case also contributed to the payment of the beneficiary in the year 1999 and prior years.

Upon review, the information submitted by petitioner is unpersuasive in establishing its ability to pay the beneficiary the proffered wage. The petitioner paid the beneficiary \$16,929.18 for the year 1999. The proffered wage is \$36,000, more than double the previous compensation paid to the beneficiary. Payment from sources other than the petitioner does not establish the ability of the petitioner to pay the beneficiary. The petitioner has not established that it can pay the beneficiary the proffered wage based on its previous compensation of the beneficiary.

In addition, the petitioner's emphasis on its gross income before expenses as an indication of its ability to pay is not persuasive. 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). In K.C.P.

Food Co., Inc. v. Sava, the court held the Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than 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.

The petitioner's records do not establish its ability to pay the beneficiary the proffered wage of \$36,000.

The second issue in this proceeding is whether the petitioner has been doing business in a regular, systematic, and continuous manner.

8 C.F.R. 214.2(1)(1)(ii)(H) states:

*Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner initially submitted a letter signed by its general manager stating that its mission was to establish multiple dental clinics and a dental laboratory in Moscow. To that end the petitioner indicates that Russian dentists are brought temporarily into the United States for training and the petitioner contracts with American dentists to train the Russian dentists. The petitioner also submitted its organizational chart depicting the beneficiary as the director of professional operations and showing a director in charge of recruiting and staffing as well as other duties. The chart also showed an individual in charge of a dental laboratory apparently located in the United States.

The director apparently concluded that because the petitioner lacked employees and as the petitioner had not submitted evidence of services rendered or goods provided, the petitioner was not doing business.

On appeal, the petitioner refers to a letter submitted from its accountant that states:

The corporation is actually doing business in the United States. [The petitioner] recruits the dentists for its Russian subsidiary, acquires dental supplies to provide to its subsidiary, and subcontracts the laboratory dental work and preparation of crowns. These business activities are entirely performed in the

United States.

The petitioner also provided numerous copies of invoices for dental equipment and supplies sold to the petitioner as well as to two shareholders of the company. We also take note of over \$300,000 paid by the petitioner to independent contractors.

The petitioner has provided sufficient evidence to overcome the director's conclusion that the petitioner is not currently doing business. The director's decision on this issue will be withdrawn.

The last issue in this proceeding is the director's determination that the petitioner as of the date of filing the petition was not employing the beneficiary as the beneficiary was working as an independent contractor. The director concludes from this information that the "petitioner" is not eligible for the benefit sought. The petitioner asserts on appeal that the beneficiary is not required to be an employee of the petitioner as he has L-1 status as an officer and director and that once the beneficiary is approved for "permanent resident status" the beneficiary will become a regular employee of the petitioner. The director's determination on this issue will be withdrawn. As long as the beneficiary and employer maintain a bona fide intent that the beneficiary will be employed in the job upon which the employment based visa is based, and that job offer remains outstanding, the petitioner may petition for and the beneficiary remains eligible for the section 203(b)(1)(C) multinational manager/executive visa. The employment of the beneficiary as an independent contractor has no bearing on the eligibility of the beneficiary for the benefit sought under this petition.

Beyond the decision of the director, the petitioner has not provided a detailed description of the beneficiary's proposed duties for the petitioner. The petitioner merely paraphrases certain elements of the statutory definition of manager and executive. Accordingly the petitioner has not established that the beneficiary will be primarily employed in a managerial or executive capacity as required by section 203(b)(1)(C) of the Act. As the appeal will be dismissed for the reasons cited above, this issue is not examined further.

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.