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U.S. Citizenship  
and Immigration  
Services



FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **OCT 25 2004**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

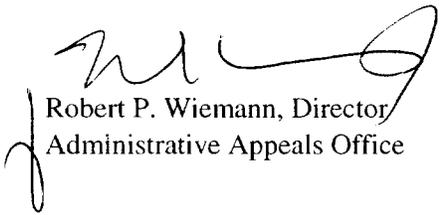
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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

  
Robert P. Wiemann, Director  
Administrative Appeals Office

identifying data deleted to  
prevent unwarranted  
invasion of personal privacy

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**DISCUSSION:** The director denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a Texas corporation that seeks to employ the beneficiary as its manager. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition concluding that neither the beneficiary's foreign employment nor his proposed U.S. employment fits the definition of managerial or executive capacity.

On appeal, the petitioner submits a brief statement on the Form I-290B and copies of documents already included in the record of proceeding.<sup>1</sup>

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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 an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is related to Development Tyre Service (DTS) of India; (2) operates a retail convenience store and retail cellular phone store; and (3) employs two persons, including the beneficiary, who is currently occupying the proffered position as an intracompany transferee (L-1A). The petitioner is seeking to employ the beneficiary permanently at a salary of \$48,000 per year.

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<sup>1</sup> The AAO notes that the record contains a Form G-28 signed by U.S. Immigration Counseling Services, Inc. of Texas. This organization, however, is not entitled to represent the petitioner in this proceeding pursuant to 8 C.F.R. § 292.1. Accordingly, the AAO considers the petitioner to be self-represented in this proceeding.

The issues to be discussed in this proceeding are whether the beneficiary's job with the DTS in India and his proposed U.S. position fit the definition of 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.

When filing the I-140 petition, the petitioner indicated that the beneficiary's foreign employment was as the president and managing director of DTS from 1988 until his transfer to the United States in 2000. The petitioner described the beneficiary's job as follows:

His primary function[s] are[:] (1) managing business organization[;] (2) supervising subordinates['] work performance and business activities[;] (3) Hire and Fire employees[;] (4) purchase of store merchandise for resale[; and] (5) established goals and policy of business management.

When describing the proffered position of manager, the petitioner presented a job description that was nearly identical to the beneficiary's foreign job description:

His primary function[s] are[:] (1) managing DBI business organization[;] (2) supervise DBI workforce and business activities[;] (3) Hire and Fire of DBI employees[;] (4) purchase of both store's merchandise of DBI for resale[; and] (5) setting financial and efficiency goals and implementation policies of DBI.

The director was not satisfied with the initial evidence presented. Therefore, in an April 11, 2003 request for evidence (RFE), the director asked the petitioner to submit evidence relating to the beneficiary's foreign and U.S. employment, including a description of his actual job responsibilities in each position, the percentage of time spent on each position's duties, and the beneficiary's subordinates' names, job titles and job descriptions. The director also requested copies of the petitioner's W-2 forms for the years 2000 and 2001.

In response, the petitioner stated that it was submitting detailed job descriptions for the beneficiary's foreign and U.S. positions along with job descriptions of the beneficiary's subordinate employees; however, this evidence was not included in the petitioner's submission. The petitioner did submit copies of its 2001 and 2002 W-2 forms. The 2002 W-2 forms, which are relevant to the petition's filing date of October 11, 2002, indicate that the petitioner paid wages to four persons: [REDACTED] \$9,000; [REDACTED] (the beneficiary's spouse), \$2,000; [REDACTED] \$1,400; and the beneficiary, \$33,000.

The director denied the petition because the beneficiary's foreign employment was not in a managerial or executive capacity, and because the proposed position in the United States is also not executive or managerial. The director noted that the petitioner's type of business and its small staffing level would require the beneficiary to be engaged in the day-to-day operations of running a business. Regarding the beneficiary's foreign employment, the director noted that the petitioner failed to present requested evidence regarding the beneficiary's duties overseas. The director also erroneously noted in one part of the decision that the foreign entity was in the United Kingdom rather than India, and that the title of the proffered position is "engineering director/manager."

On appeal, the petitioner points out the director's incorrect job title for the proffered position and her assertion in one part of the decision that the foreign entity is located in the United Kingdom. Regarding the director's comments on the size of the petitioner's staff, the petitioner states: "Petition (I-140) information about employees are full time, it does not include's [sic] one temporary contract work help, four family members['] help, so total are seven staff for 126 hours." In response to the director's findings about the beneficiary's foreign employment, the petitioner states, "[DTS] is a RETAIL store of vehicle tyres, staff level are 5 to 7,

with office manager, accountant, warehouse manager, delivery person and chief executive officer, two occasional [sic] helper.”

The AAO notes the petitioner’s correct assertions regarding the director’s erroneous identifications of the proffered position’s title and the foreign entity’s country of affiliation. Nevertheless, these errors are not material because the denial is not based on either of these issues. The director’s decision to deny the petition will not be overturned because of the petitioner’s failure to submit material evidence that the director clearly requested. The regulation at 8 C.F.R. § 103.2(b)(8) states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. In April 2003, the director requested specific evidence from the petitioner regarding the beneficiary’s foreign and U.S. employment. Although the petitioner stated that it was submitting the requested evidence, the evidence was not included in the petitioner’s packet of materials. The 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).

The petition must be denied because the record does not contain any evidence that the beneficiary’s foreign and U.S. employment fit the definition of managerial or executive capacity. There is no comprehensive description of the beneficiary’s specific responsibilities in each position. Without such information, Citizenship and Immigration Services (CIS) cannot determine the reasonable needs of each organization in light of its overall purpose and stage of development. Consequently, the appeal will be dismissed.

Beyond the decision of the director, there is insufficient evidence of: (1) the petitioner’s and DTS’s common relationship; and (2) the petitioner’s ability to pay the proffered wage.

Regarding the relationship between the petitioner and DTS of India, the record does not contain any evidence of the relationship between these two entities. In the RFE response, the petitioner stated that it was submitting a copy of a stock certificate and affidavits of ownership; however, these items were not included in the submitted packet of evidence. In addition, the petitioner’s corporate income tax returns do not state that the petitioner is owned by a corporation or a foreign entity. Consequently, CIS cannot find that there is a parent/subsidiary or affiliate relationship between the two entities.

Regarding the petitioner’s ability to pay the proffered wage, the job offer letter that was submitted in conjunction with I-140 petition stated that the proffered salary is \$48,000 per year. In determining the petitioner’s ability to pay the proffered wage, CIS 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 establish that it had previously employed the beneficiary; however, the beneficiary’s W-2 form for 2002, the year in which the petition was filed, indicates that the beneficiary was paid only \$33,000, not the \$48,000 that the petitioner is offering to pay. Thus, the fact that the petitioner employed the beneficiary at the time the priority date was established does not serve as evidence that it can pay the higher wage of \$48,000.

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 CIS) 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 October 11, 2002, the AAO must examine the petitioner's tax return for 2002. The petitioner's IRS Form 1120 for calendar year 2002 presents a net taxable income of \$-29,841. The petitioner could not make up the difference between the proffered wage of \$48,000 and the amount he was actually paid (\$33,000) out of a negative 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 the present matter, the petitioner's current assets, which consist of \$7,000 in cash, are not sufficient to pay the proffered wage.

Although the director did not raise either of these two issues in the denial letter, they are, nevertheless, additional reasons why the petition cannot be approved.

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 met that burden.

**ORDER:** The appeal is dismissed. The petition is denied.