



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: WAC 01 294 55864 Office: CALIFORNIA SERVICE CENTER Date: SEP 29 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:

[Redacted]

PUBLIC COPY

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

Administrative Appeals Office
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, N.W.
Washington, DC 20529

DISCUSSION: The director denied the employment-based preference visa petition and affirmed his decision in a subsequent motion to reconsider. 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 California corporation that seeks to employ the beneficiary as its president and chief executive officer (CEO). 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 the petitioner has not established the ability to pay the proffered wage of \$72,000 per year.

On appeal, counsel submits a brief statement.

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 a subsidiary of KME Co., Ltd. of Korea; (2) develops and implements conveyor and manufacturing line systems; and (3) employs approximately eight persons, including the beneficiary, who is currently occupying the proffered position as a nonimmigrant intracompany transferee (L-1A). The petitioner seeks to employ the beneficiary permanently at an annual salary of \$72,000. The issue to be discussed in this proceeding is whether the petitioner has the ability to pay this salary to the beneficiary.

Pursuant to 8 C.F.R. § 204.5(g)(2):

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. . . .

When filing the I-140 petition, the petitioner submitted a copy of its financial statements as of December 31, 2000 along with an independent accountant's compilation report. In a January 28, 2002 request for evidence, (RFE), the director informed the petitioner that it was required to show that it had the ability to pay the proffered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." The director stated further that the petitioner must, therefore, submit copies of annual reports, federal tax returns, or audited financial statements. In a separate part of the RFE, the director also asked the petitioner to submit signed and certified copies of the petitioner's income taxes from the date the petitioner was established to the present time. In response, the petitioner submitted an unsigned and uncertified copy of its 2000 federal income tax return (Form 1120). The petitioner also resubmitted a copy of financial statements as of December 31, 2000.

On April 15, 2003, the director denied the petition because the evidence failed to establish that the petitioner has the ability to pay the proffered wage. The director noted that the petitioner failed to submit a signed and certified copy of its 2000 income tax return. The director also noted that the petitioner did not explain why it failed to submit a copy of its 2001 income tax return when such a return would have been readily available. The director did not give any weight to the petitioner's financial statement or the accountant's compilation report because such evidence was not an audited financial statement.

The director reviewed the copy of the 2000 income tax return and noted that the return did not comport to the petitioner's DE-6 forms. According to the director, the DE-6 forms showed substantial payroll expenses, but the income tax returns showed only \$27,300 paid in salaries and wages, and no monies paid to compensation of officers or cost of labor. The director noted further that the petitioner incurred a net loss of \$35,533 and that its liabilities far outweighed its assets. The director concluded from this evidence that the petitioner is receiving funds from an outside source, such as the parent company, to meet its payroll obligations. The director stated that the petitioner must establish that it has the ability to pay the proffered wage, and that it cannot rely on financial support from the parent company to meet its obligations.

Counsel filed a motion to reconsider the director's decision. To show that the petitioner has the ability to pay the beneficiary's salary, counsel submitted financial statements for the 2002 year, copies of the beneficiary's W-2 forms for 2001 and 2002, and a letter from the petitioner's accounting firm. Counsel stated that the director should not have relied upon the 2000 income tax return because the petitioner filed the I-140 petition in 2001. Counsel also stated that many companies incur losses, but are still able to meet their payroll

obligations. Counsel stated that the beneficiary's W-2 forms show that the petitioner was able to meet its payroll obligations without assistance from the parent company. Finally, counsel stated that the petitioner was not legally required to complete audited financial statements, and that most accountants provide their clients with only unsigned copies of tax returns.

In an August 19, 2003 decision, the director affirmed his conclusion that the petitioner has not established the ability to pay the proffered wage. The director reiterated that, like the 2000 financial statements, the 2002 financial statements are unaudited and, therefore, do not carry any evidentiary weight. The director noted that, although he asked for copies of the petitioner's 2001 tax returns and annual reports, the petitioner declined to present this evidence or explain why it was not available.

On appeal, counsel states that many corporations do not receive or possess a signed copy of their federal tax returns. Counsel states that, as explained in the motion, only domestic funds were used to pay the beneficiary's salary. Counsel believes that the director's focus on the petitioner's negative income as an indicator of its ability to pay is misguided because many companies suffer losses but are still able to meet their payroll obligations.

As stated previously, the petitioner indicated on the I-140 petition that it intends to pay the beneficiary a salary of \$72,000 per year.¹ In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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 employ the beneficiary when the petition was filed. However, according to the W-2 forms for the 2001 and 2002 years, the petitioner paid the beneficiary only \$60,000 each year, not the proffered salary of \$72,000 per year. The petitioner also failed to present any evidence to show that it paid the beneficiary the remaining \$12,000 as part of her salary package. 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 \$72,000.

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.

¹ The AAO notes that in the letter of support that was filed with the I-140 petition, the petitioner indicated that the beneficiary "receives a U.S. salary of approximately \$82,000 per year" The petitioner has not explained the discrepancy between the salary of \$72,000 that was listed on the petition and the salary listed in the support letter. Nevertheless, the AAO will not discuss this issue further because the petitioner has not established that it can pay the lesser of the two listed salaries.

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).

As the petition's priority date falls on September 22, 2001, the AAO must examine the petitioner's tax return for 2001. However, although the director asked the petitioner to submit its 2001 income tax return, the petitioner has repeatedly declined to submit it, and relies only on copies of its financial statements and a letter from its accountant who states "we believe that all their employees' wages for the years 2001 and 2002 have been paid." The regulations clearly establish that a petitioner's 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). Here, the petitioner's 2001 income tax returns are material because that is the year in which the petition's priority date was established. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Without the petitioner's 2001 tax return, CIS is unable to determine whether the petitioner had the ability to pay the proffered wage at the time the petition was filed. Accordingly, the director's decision to deny the petition will not be disturbed.

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.