



U.S. Citizenship
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FILE: [REDACTED]
EAC 04 080 52181

OFFICE: VERMONT SERVICE CENTER

Date: SEP 30 2005

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:

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

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, with offices in California and New York, is engaged in the sale of audio recording technology. It seeks to employ the beneficiary as director of customer support at its New York office. 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 determined that the petitioner failed to establish its ability to pay the beneficiary's proffered wage and denied the petition.

On appeal, counsel disputes the director's conclusion and submits a brief in support of her arguments.

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 are who 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 issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary's proffered wage.

The regulation at 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the petition, filed on January 26, 2004, the petitioner indicated that the beneficiary would receive a yearly salary of \$110,000. However, the petitioner submitted no documentary evidence to support this claim.

Accordingly, on July 13, 2004, the director issued a request for additional evidence (RFE) instructing the petitioner to submit its federal corporate tax return and any audited or reviewed financial statements for 2003.

The petitioner responded submitting its 2003 tax return, which covered the period of October 1, 2003 to September 30, 2004. According to the first page of the tax return, the petitioner had a negative net taxable income in the amount of \$509,331. Schedule L of the petitioner's tax return indicates that its total net assets did not exceed its liabilities. The petitioner also submitted an audited financial statement belonging to its foreign affiliate for the year ended March 31, 2003.

In a decision dated November 22, 2004, the director concluded that the petitioner failed to submit sufficient evidence to establish its ability to pay the beneficiary's proffered wage of \$110,000 per year.¹

On appeal, counsel cites the case of *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441, 449 (D.D.C. 1988), to support the assertion that the director failed to consider the assets of the petitioner's foreign affiliates prior to a determination regarding the petitioner's ability to pay the beneficiary's wage. However, a thorough reading of the cited case indicates that its facts are significantly distinct from those in the instant record of proceeding. Namely, the court in the cited case focused on the pledges of financial support made by the petitioner's national organization, which was able and willing to contribute to the petitioner's burden of paying the beneficiary's salary. *Id.* at 450. In the instant matter, there is no indication of any financial pledges of support from a U.S.-based organization that is somehow affiliated with the petitioner. Rather, the petitioner merely maintains the claim that its foreign affiliate has extended loans, which become part of the petitioner's liabilities, in order to enable the petitioner to pay the beneficiary's salary.

Furthermore, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, however the analysis does not have to be followed as a matter of law. *Id.* at 719.

Counsel also cites and provides a copy of the Interoffice Memorandum from William Yates, Associate Director of Operations, Citizenship and Immigration Services (CIS), "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)" HQOPRD-90/16.45 (May 4, 2004), which instructs CIS adjudicators to consider the petitioner's net income, net current assets, and, if the beneficiary is currently employed by the petitioner, evidence that the petitioner is currently paying the beneficiary's proffered wage. While the AAO

¹ On the first page of the denial, the director states that the beneficiary's proffered wage is \$11,000 annually. This typographical error is acknowledged by the AAO. However, it is noted that this error is not germane to a discussion of the petitioner's ability to pay and, therefore, will not alter the outcome of this proceeding.

acknowledges that the petitioner is not required to employ the beneficiary unless and until the Form I-140 is approved, the petitioner is not precluded from submitting evidence of the beneficiary's employment. 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 not establish that it had previously employed the beneficiary. In fact, counsel was aware that the petitioner had the opportunity to submit such *prima facie* evidence, as this option was clearly outlined in the William Yates memorandum submitted by counsel herself. Yet, despite the petitioner's claim that the beneficiary obtained a nonimmigrant visa and is currently employed at the petitioning entity, the record is void of any evidence of the beneficiary's present employment or the petitioner's ability to pay the beneficiary's proffered wage. 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 submitted the beneficiary's pay statements for August 2003 through November 2003. However, the few statements that were submitted indicate that the foreign entity, not the U.S. petitioner, was paying the beneficiary's wages.

Moreover, based on the year to date figures of the September 25, 2003 pay statement, the beneficiary had only been paid £29,250, the equivalent of \$53,676.83, for nine months with only three months remaining. Based on the October and November 2003 statements, which show that the beneficiary was compensated £4,875 for each of the two months, the beneficiary was likely to have been paid the same amount for the remaining month of December 2003. This would bring the yearly total to £43,875 for 2003, which is equivalent to \$79,009.55 based on today's dollar. Although it might appear that the monthly rate of £4,875 could amount to \$110,000 per year, 1) there is no evidence that this rate was consistently paid throughout 2003, and 2) even if that were the case, the fact remains that this salary was being paid by the foreign entity, not the petitioner itself.

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); *Ubada 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.

In the instant matter, the petitioner has not submitted evidence establishing its ability to pay the beneficiary's wage. Therefore, this petition cannot be approved.

Beyond the director's decision, the AAO wishes to address several additional factors that render the petitioner ineligible to classify the beneficiary as a multinational manager or executive.

The first such issue is the petitioner's failure to provide detailed descriptions of the beneficiary's duties, both abroad and with the petitioning U.S. entity. In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Although the petitioner indicated that the beneficiary supervised 25 professional employees during his employment abroad, the beneficiary's job also included preparing budgets and financial reports, communicating directly with customers in an effort to solve their problems, and actually creating internet tools to be used in the course of the company's business. 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). Without further detail explaining the actual duties performed by the beneficiary on a daily basis, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; 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). While the petitioner has submitted evidence indicating that the foreign entity is a multimillion dollar company, the AAO is not at liberty to render a decision favorable to the petitioner based on the size of the beneficiary's employer abroad. The actual duties themselves reveal the true nature of the employment. *Id.*

In regard to the beneficiary's proposed employment in the United States, the petitioner has stated that the beneficiary has and would continue to have decision making authority over various human resource issues as well as issues dealing with purchasing, upgrading, and implementing internet technology equipment. The petitioner further indicated that the beneficiary would have the responsibility of updating financial and commercial information as well as ensuring the continued function of the New York office's computer network and maintaining communication with the petitioner's foreign affiliates. Finally, the beneficiary would have responsibility for managing the petitioner's inventory. While this broad list of responsibilities suggests that the beneficiary has the discretionary authority of a manager or executive, the record lacks sufficient information to define these responsibilities in terms of actual day-to-day duties. As previously stated, the actual duties themselves reveal the true nature of the employment. *Id.* The petitioner has failed to answer a critical question in this case: What would the beneficiary primarily do on a daily basis? Without this critical information, the AAO cannot affirmatively conclude that the beneficiary would be relieved from performing nonqualifying operational tasks as part of his daily routine.

The second issue that was not previously addressed in the director's decision is the lack of evidence that the petitioner was doing business for one year prior to filing the petition as required by 8 C.F.R. § 204.5(j)(3)(i)(D). The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

In the instant matter, the petitioner indicates that it is a sales-oriented business. While it has submitted several of its income tax statements, such documents are not an accurate indicator of whether a company has been

selling its products and/or services on a regular, systematic, and continuous basis. The record lacks any sales invoices for goods and/or services the petitioner purportedly rendered for one year prior to having filed the instant petition.

Counsel indicates that the beneficiary currently has an approved nonimmigrant L-1 petition. However, the petitioner did not introduce copies of the previous nonimmigrant petition as evidence and that petition is not part of the beneficiary's A-file, the current record of proceeding. After approval, each individual L-1 nonimmigrant petition is stored at the CIS Remote Files Maintenance Facility in Harrisonburg, Virginia, and is not readily available for review in conjunction with a subsequently filed immigrant petition. Each L-1 nonimmigrant petition is a separate record of proceeding with its own separate burden of proof; each petition must stand on its own individual merits. *See generally* Section 291 of the Act, 8 U.S.C. § 1361; *also* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. Many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1 petitions. *See e.g. Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The final issue to be addressed beyond the director's decision is the petitioner's failure to submit sufficient evidence of a qualifying relationship with the beneficiary's foreign employer. *See* 8 C.F.R. § 204.5(j)(3)(C). In support of the petition, the petitioner submitted a legal document titled, "Agreement for the sale and purchase of the share capitals of Sierra Audio Video plc, [the petitioner] and Rupert Neve Canada Inc." The document indicates that the sales transaction was executed on January 16, 1996. Page one subsection (A)(ii) of the document indicates that the details of the distribution of the petitioner's shares would be discussed in part 2 of Schedule 1. While the petitioner submitted parts 1 and 4 of Schedule 1, part 2 was omitted.

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.

In the instant matter, the petitioner has failed to submit evidence documenting its ownership. As previously stated, 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)).

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 *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional deficiencies addressed above by the AAO this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. 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).

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.