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**U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JAN 24 2006
SRC 04 034 50406

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

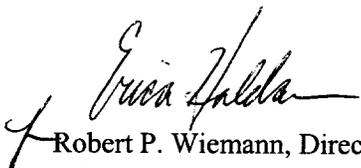
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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

DISCUSSION: The Director, Texas Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Georgia that is operating as a distributor of motors and products. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not demonstrated that at the time the priority date was established it had the ability to pay the beneficiary's proffered annual salary of \$100,000.

On appeal, the petitioner states that its net income was equal to or greater than the beneficiary's proposed annual salary, thereby demonstrating its ability to pay. The petitioner submits its 2004 corporate income tax return as evidence of its ability to pay the beneficiary his annual salary of \$100,000.

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 or 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, 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 the instant proceeding is whether at the time the priority date was established the petitioner had the ability to pay the beneficiary his proffered salary.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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.

The petitioner filed the immigrant petition on November 17, 2003, thereby establishing the same priority date. See 8 C.F.R. § 204.5(d). On the petition and in its November 3, 2003 letter, the petitioner indicated that the beneficiary would receive an annual salary of \$100,000. As evidence of its financial status, the petitioner submitted its Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation, for the year 2002.

On February 4, 2005, the director issued a request for evidence asking that the petitioner submit its 2003 federal income tax return and the beneficiary's IRS Form W-2, Wage and Tax Statement, for the years 2003 and 2004.

The petitioner responded in a letter dated June 10, 2005 and submitted its federal tax return and the beneficiary's Form W-2 for the year 2003. The petitioner's tax return reflected compensation paid to officers in the amount of \$18,846. An accompanying Schedule K-1, Shareholder's Share of Income, Credits, Deductions, etc., identified the beneficiary as the sole shareholder of the corporation who received income in the amount of approximately \$70,000. The "Wages, Salaries, & Tips Worksheet" accompanying the beneficiary's IRS Form 1040, U.S. Individual Income Tax Return, also identified \$18,846 in wages received by the beneficiary during the year 2003 and \$70,119 received in income from an S corporation.

In a decision dated June 21, 2005, the director concluded that the petitioner had not demonstrated its ability to pay the beneficiary his proffered salary of \$100,000. The director stated that "no evidence [had been] provided to show the beneficiary has been paid a salary equal to or greater than the proffered wage; and net income and net current assets are below the \$100k/year proffered wage to make the difference lacking of the beneficiary's current wage and the proffered wage." Consequently, the director denied the petition.

The petitioner filed an appeal on July 22, 2005, claiming that its "net income was equal to or greater than the proffered wage in all years under consideration." In an attached letter dated July 21, 2005, the petitioner references the amount of ordinary business income reflected on its 2004 income tax return, stating that the approximately \$118,000 is paid to the beneficiary as a shareholder. The petitioner states that "[this] information clearly demonstrates that the petitioner had the ability to pay the beneficiary a salary greater than the proffered wage of \$100,000 in all years since the priority date of November 2003."

Upon review, the petitioner has not demonstrated its ability to pay the beneficiary's proffered annual salary at the time the priority date was established.

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 not establish that it

had previously employed the beneficiary for an annual salary of \$100,000. The petitioner's 2002 corporate tax return indicates that the beneficiary was compensated \$67,308 for his position as an officer. The beneficiary received an additional \$9,585 in income as the corporation's shareholder. Based on the petitioner's claim on appeal, the petitioner considers the amount of ordinary income paid to the beneficiary as a shareholder to be a portion of his salary. According to the financial documentation provided, the beneficiary received compensation in the amount of \$76,893 from the petitioner in 2002, or approximately \$23,000 less than the salary proffered on the petitioner's priority date.

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 November 17, 2003, the AAO must examine the petitioner's tax return for 2003. The petitioner's IRS Form 1120 for calendar year 2003 presents ordinary income in the amount of \$70,119. The beneficiary's Form 1040 indicates that the beneficiary received this amount as income. However, even if considered in addition to his salary of \$18,846, the beneficiary's compensation in year 2003 is approximately \$11,035 less than the proposed salary.

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. Here, the petitioner's net current assets are deficient by approximately \$24,000. The petitioner has not demonstrated its ability to pay the beneficiary his proffered salary at the time the priority date was established. Accordingly, the appeal will be dismissed.

The AAO notes that the petitioner's 2004 income tax return submitted on appeal will not be considered herein. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Beyond the decision of the director, an additional issue is whether the beneficiary was employed by the foreign entity or would be employed by the United States entity in a primarily managerial or executive capacity. The vague job duties offered for the beneficiary's role as president of the foreign company are not sufficient to demonstrate the beneficiary's prior employment in a primarily managerial or executive capacity. For instance, the beneficiary's responsibilities of planning the company's policies and objectives, "coordinat[ing] functions and operations," and "attaining objectives," merely restate the statutory criteria for "managerial capacity" and "executive capacity" and do not identify the specific managerial or executive tasks associated with his job responsibilities. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). In addition, it would seem from the beneficiary's responsibilities of developing marketing strategies and public relations policies that the beneficiary is responsible for performing the non-managerial and non-executive tasks associated with each. While the petitioner identified a vice-president of sales and marketing and an office manager-controller as employees of the foreign entity, the workers named are the same as those identified on the petitioner's organizational chart. The petitioner has not offered a description of the tasks performed by either employee or explained how the beneficiary was relieved from the non-qualifying tasks of marketing and public relations. 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 petitioner has failed to demonstrate that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity as specifically required in the regulation at second 204.5(j)(3)(i)(B). Accordingly, the petition will be denied for this additional reason.

With regard to the beneficiary's proposed employment, the petitioner's limited statement that the beneficiary, as president, "plans and directs the acquisition of the new manufacturing plant," develops new business objectives and procedures, reviews activity reports and financial statements, and "manages the company's relationships with our representative" does not sufficiently identify the specific managerial or executive job duties to be performed by the beneficiary on a daily basis. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Additionally, according to the petitioner's organizational chart, which identifies the beneficiary, as well as a vice-president of sales and marketing and an office manager-controller, the company does not employ any lower-level workers who would perform the day-to-day functions of the company. As noted previously, the petitioner has failed to clarify the inconsistency in the workers named as employees of both the petitioning entity and foreign entity. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, while the petitioner has identified the areas of "sales, marketing & technical," "accounting & legal services," and "outside distributors," it has not accounted for the employment of any additional workers, nor does the petitioner's 2003 income tax return reflect compensation paid for labor. The petitioner's income tax return presents a deduction for "outside services," however the record does not identify who received the compensation. 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. at 604. Absent additional documentation describing the beneficiary's daily job duties and the employees supervised by the beneficiary, the AAO cannot conclude that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Therefore, the petition will be denied for this additional reason.

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).

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.