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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **MAR 22 2006**
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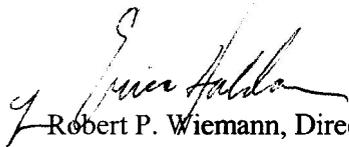
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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]

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 AAO on appeal. The director's decision will be withdrawn and the petition will be remanded to the Texas Service Center for further review and entry of a new decision.

The petitioner is a corporation organized in the State of Texas in September 2003. It develops and sells software solutions for the travel industry. It seeks to employ the beneficiary as its vice-president of operations. 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 had not established: (1) that it had the ability to pay the beneficiary the proffered annual wage of \$120,000; or, (2) that it had been doing business for one year prior to filing the petition on January 7, 2005.

On appeal, counsel for the petitioner asserts: (1) that the petitioner has employees, is capable of paying the salary offered to the beneficiary, and is currently paying him that salary; and (2) that the petitioner has been doing business in the United States since its incorporation in September 2003. Counsel submits Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, for 12 employees, references documents previously submitted, and notes that the director's request for further evidence failed to request specific information although the director's decision indicates the information was anticipated.

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 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. See 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is to determine whether the petitioner has established its ability to pay the beneficiary the proffered annual wage of \$120,000.

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.

When analyzing a petitioner's ability to pay the proffered wage, the fundamental focus is whether the employer is making a "realistic" or credible job offer and has the financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977).

The petitioner initially did not submit sufficient evidence that it had the ability to pay the beneficiary the proffered annual wage. On April 23, 2005, the director requested the beneficiary's IRS Form W-2 for the 2004 year. The director also asked for an explanation if the beneficiary did not already make the proffered wage and documentary evidence showing that the wage could have been paid. In addition, the director observed that in Part 5 of the Form I-140, Immigrant Petition for Alien Worker, the petitioner had provided the gross and net annual incomes of the parent company; the director requested that the petitioner submit answers for the petitioner.

In a July 18, 2005 response, counsel for the petitioner stated that the petitioner did not independently report its financial results but that the petitioner and the petitioner's immediate parent company, [redacted] Corporation (also known as [redacted]) reported financial information through Unit 4, [redacted] the petitioner's ultimate parent company. Counsel explained that the petitioner "is a separate entity from [redacted] but it is wholly owned by [redacted] (as also mentioned, [redacted] in [sic] ultimately wholly owned by Unit 4 [redacted]." Counsel provided the petitioner's balance sheet and result report as of December 31, 2004. Counsel also provided the beneficiary's 2004 IRS Form W-2, issued by [redacted] Corporation in the amount of \$112,051.51.

On August 9, 2005, the director denied the petition. The director observed that the beneficiary's 2004 IRS Form W-2 showed that the petitioner had not paid the beneficiary and that the petitioner admitted it did not

have financial records. Based on this information, the director determined that the petitioner had not established its ability to pay the beneficiary the proffered wage.

On appeal, counsel for the petitioner explains that the petitioner's payroll for all of its 12 employees was run through [REDACTED] for administrative convenience as calendar year 2004 started shortly after the petitioner was incorporated. Counsel indicates that for calendar year 2005, the petitioner paid all of its employees directly. Counsel submits the petitioner's most recent payroll report to substantiate his claim. Counsel asserts that the information submitted is sufficient to establish that the petitioner has the ability to pay the beneficiary the proffered wage as well as its entire staff.

Counsel's assertion is not adequately established by supporting evidence. The petitioner's payroll report for one pay period is insufficient to establish that the petitioner has the ability to pay the beneficiary the proffered wage. However, it is an indication that for the year in which the petition was filed, the petitioner, and not a separate entity, was paying the beneficiary his wage. The ambiguity in the record regarding the beneficiary's actual employer and its ability to pay the beneficiary the proffered wage could be rectified with certified copies of the petitioner's 2004 and 2005 IRS Forms 1120, U.S. Corporation Income Tax Return. 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 addition, the beneficiary's IRS Form W-2 for the 2005 tax year, the year in which the petition was filed, is now available. Documents such as these could readily establish whether the *petitioner* is making a realistic and credible job offer to the beneficiary.

The director's decision on this issue is withdrawn. The director should issue a request for evidence consistent with the above discussion, prior to entering a new decision.

The next issue in this proceeding is whether the petitioner has established that it had been doing business for one year prior to filing the petition. Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

* * *

- (D) The prospective United States employer has been doing business for at least one year.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*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."

The petitioner initially provided copies of promotional materials indicating that the petitioner supported the worldwide distribution of *Sabre® Central Command with Agresso* software related to the travel industry. The petitioner submitted the 2003 annual report for the petitioner's ultimate parent company, listing as one of its operating companies in the United States. The petitioner stated:

[the petitioner] is a subsidiary of the parent company for all U.S. and Canada companies, including Corporation (Canada) and (U.S.). was formed in 2003, to focus on and further develop software solutions for the travel industry. This business was previously contained within and but its importance within the

Group prompted its separation into a new subsidiary. has established its headquarters in Irving, Texas. To date, has established relationships with 21 major customers worldwide, and has created strategic partnerships with TROY Telgate, Microsoft Systems, and IBM.

The petitioner further explained:

Until recently, and its subsidiaries had served as independent suppliers of the software products to the Canadian and United States markets, with (Netherlands) holding a minority interest in . However, has increased its ownership interest in to 100 %. As a wholly-integrated part of the Unit 4 organization, and its subsidiaries will continue to serve the Canadian and United States markets.

On April 23, 2005, the director requested documentation showing that the petitioner had been spun-off or incorporated and an explanation if the information contained in Part 5 of the Form I-140 was for all offices or just the Dallas office.

In a July 18, 2005 response, counsel for the petitioner indicated that the petitioner is a separate entity from also known as Counsel submitted the petitioner's Certificate of Incorporation and share certificate substantiating that owned the petitioner's outstanding stock. Counsel again indicated that the petitioner did not independently report its financial results and provided: the petitioner's balance sheet and result report as of December 31, 2004; Uniform Reporting Results Report as of December 31, 2004; and 2004 annual report listing the petitioner as one of its operating companies in the United States.

On August 9, 2005, the director denied the petition, determining as the petitioner did not have independent financial reports, it could not file a tax return, thus would seem to have no employees or business to show that it had been doing business as required by the regulation. The director concluded that the evidence submitted did not demonstrate that the petitioner was acting in its own right.

On appeal, counsel for the petitioner asserts that the petitioner since its incorporation has continued, in conjunction with ██████████ to offer for sale the Central Command software system, as well as remote hosting, training, and consulting services structured around this product. Counsel submits copies of website and promotional materials currently available, to evidence that the petitioner continues to do business in the United States. Counsel also references the petitioner's calendar year 2004 results report showing that the petitioner had incurred business expenses and earned revenue throughout 2004.

Counsel's assertion is not persuasive. The petition was filed January 7, 2005; thus the petitioner must submit evidence showing that it was doing business from January 7, 2004. The record lacks the petitioner's IRS Form 1120 for the 2004-year. The petitioner has not explained how a separate corporate entity is relieved of filing IRS Forms 1120. Although the promotional materials provided and the contracts suggest that the petitioner is doing business in its own right, the petitioner has not explained its failure to provide its IRS Forms 1120. Again documentation such as the petitioner's IRS Forms 1120 for 2004 and 2005 should easily establish that the petitioner was doing business and continues to do business in its own right.

The AAO observes that the director did not issue a request for evidence on this issue or adequately advise the petitioner of the deficiencies in the record in her decision. The director's decision is withdrawn. The director should issue a request for evidence consistent with the above discussion, prior to entering a new decision.

Beyond the decision of the director, but as alluded to in her decision, the record raises questions regarding the beneficiary's managerial or executive capacity for both the foreign entity and the petitioner. The descriptions suggest that the beneficiary may perform certain functions rather than manage or direct them. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). Moreover it is not clear, whether the petitioner is claiming that the beneficiary will perform primarily in an executive capacity or in a managerial capacity or both. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. Further, although counsel contends that the petitioner paid 12 employees in 2005, the record lacks information regarding the beneficiary's direct reports sufficient to identify any of these individuals as primarily managers or supervisors rather than senior staff on a team. Likewise, the record lacks evidence of the beneficiary's management of managers, supervisors, or professionals for the foreign entity.

The director's request for further evidence in this matter was insufficient to put the petitioner on notice of the deficiencies in the record. Thus the matter must be remanded and the petitioner must be given adequate time to address the deficiencies in the record as discussed above.

ORDER: The director's August 9, 2005 decision is withdrawn. The petition is remanded to the director for further proceedings in accordance with this decision.