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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: MAY 02 2006
SRC 05 800 35259

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter will be remanded to the director for further review and entry of a new decision.

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 Florida that is providing management services to laboratories. The petitioner seeks to employ the beneficiary as its manager – operations.

The director denied the petition concluding that the petitioner had not demonstrated that it had the ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, the petitioner submits Internal Revenue Service (IRS) Form 1120S for the year 2004 as evidence of its ability to pay the beneficiary's proposed salary. The petitioner also provides a letter in support of the appeal.

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 this proceeding is whether, at the time the priority date was established, the petitioner demonstrated its ability to pay the beneficiary's proffered annual salary.

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

Any petition filed by or for any 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 instant petition on September 27, 2005 noting the beneficiary's proposed annual salary of \$72,000. As the petitioner did not submit additional evidence at the time of filing, the director issued a notice of intent to deny, dated October 12, 2005, asking that the petitioner provide a "definitive statement" of its ability to pay the beneficiary. The director noted that such evidence should include the petitioner's annual reports, federal income tax returns, or audited financial statements.

The petitioner responded in a letter dated November 9, 2005. As evidence of its ability to pay, the petitioner submitted IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for the years 2002 and 2003. The petitioner also provided a copy of IRS Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return, reflecting an extension until September 15, 2005 to file the petitioner's 2004 income tax return.

In a decision dated December 1, 2005, the director concluded that the petitioner had not demonstrated its ability to pay the beneficiary his proffered annual salary at the time the priority date was established. The director acknowledged the petitioner's 2002 and 2003 federal tax returns, noting that each reflected a loss in income of approximately \$23,000 and \$15,000, respectively. The director also concluded that the petitioner did not maintain a sufficient amount in net current assets from which to pay the beneficiary's annual wages. The director further noted that the filing extension for the petitioner's 2004 tax return was until September 15, 2005, twelve days prior to the instant filing, and stated that the petitioner had not addressed the unavailability of the tax return. Consequently, the director denied the immigrant petition.

The petitioner filed a timely appeal on December 27, 2005. In support of the appeal, the petitioner provided its 2004 income tax return, which reflected net income in the amount of \$94,228. The petitioner noted that this figure in addition to its approximately \$109,000 growth in net income from 2003 to 2004 substantiates its ability to pay the beneficiary his salary of \$72,000. In an appended letter, dated December 22, 2005, the petitioner also highlighted the company's increase in income of 63 percent during 2003 and 2004, as well as its projected rate of growth of 20 to 30 percent in the future years. The petitioner also submitted a December 22, 2005 letter from the beneficiary's present United States employer, "Pagidipati Enterprises Inc. dba Suncoast Labs," in which the employer expressed its willingness to reimburse the petitioner the beneficiary's annual salary following his commencement with the company.

Upon review, the petitioner has demonstrated its ability to pay the beneficiary's proffered wage as of the priority date.

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 employ the beneficiary at the time the priority date was established.

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.

In the case of an S corporation, as in the instant matter, CIS considers net income to be the figure reflected on line 21, ordinary income, of the IRS Form 1120S, U.S. Income Tax Return for an S Corporation.

As the petition's priority date falls on September 27, 2005, the AAO must examine the petitioner's tax return for 2005. However, as the petition and instant appeal were filed in September and December 2005, respectively, it is reasonable that the petitioner's 2005 tax return would not yet be available for review. As a result, the AAO will consider the petitioner's 2004 income tax return.¹ The Form 1120S for calendar year 2004 presents a net taxable income of \$94,228. The petitioner could afford to pay the proffered wage of \$72,000 per year out of this income. The growth in the petitioner's sales and net income, while not conclusive of its ability to pay, strengthens the finding of the petitioner's ability to pay. Accordingly, the director's decision with regard to this issue will be withdrawn.

An issue not addressed by the director is whether, pursuant to the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B), the beneficiary had been employed overseas for one year in a three-year period preceding the beneficiary's entry into the United States as a nonimmigrant, in an executive or managerial capacity, by a qualifying organization.

The petitioner identified the beneficiary as the foreign company's project manager, a position which, according to "salary certificates" from the foreign entity, the beneficiary occupied as early as 2001. In an attached job description, the petitioner stated that the beneficiary had been responsible for the following functions of the company: (1) software development and support services; (2) corporate planning and control; (3) project management and quality control; (4) client relations and customer service; and (5) sales and

¹ The AAO acknowledges that the petitioner's 2004 income tax return was to be filed with the IRS by September 15, 2005, and, as a result, should have been available for review by CIS. The date on the petitioner's 2004 income tax return, however, suggests that it was not prepared until December 5, 2005. The circumstances indicate that the petitioner's 2004 tax return was not available at the time of filing. CIS is not responsible for addressing tax penalties to be imposed on the petitioner as a result of its late filing.

marketing support. The petitioner provided a brief description of each function, and submitted an outline of the beneficiary's managerial and supervisory tasks, as well as an allocation of the amount of time the beneficiary spent on each. The petitioner also submitted an organizational chart that identified seven workers subordinate to the beneficiary.

Despite the petitioner's claims that the beneficiary was primarily performing managerial and supervisory tasks for the foreign entity, the limited description offered by the petitioner fails to substantiate the beneficiary's prior overseas employment in a qualifying capacity. The petitioner represented that the beneficiary spent 25 percent of his time on "[q]uality [a]ssurance and [c]ontrol activities," as well as a cumulative 20 percent of his time planning business strategies with the company's management, meeting with the business development manager and sales and marketing teams, planning projects, and supervising detail and database design and source code development. The petitioner, however, did not describe or clarify the managerial or executive job duties performed by the beneficiary in relation to these functions; for example, the "activities" associated with the foreign company's quality assurance and control, or those involved with the design of the details and database or the development of the source code. Also, the petitioner has not explained why the beneficiary's responsibilities of maintaining client relations, offering customer support and status reports, and training lower-level employees should be considered managerial or executive in nature. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Additionally, while the beneficiary was represented as meeting and offering support services for the sales and marketing teams, neither was identified on the organizational chart as the beneficiary's subordinate department. Rather, the company's sales and client relations were identified as functions of the business development manager. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The record as presently constituted does not demonstrate the beneficiary's eligibility for the requested immigrant visa classification. The petition will therefore be remanded to the director for further action and consideration. The director is instructed to consider the issue of whether the beneficiary was employed abroad in a primarily managerial or executive capacity as well as the beneficiary's present employment with a third United States company, and, if necessary, request additional evidence related to the beneficiary's former employment capacity and his present employment in the United States. The director should enter a new decision based on her review of the record and any additional documentary evidence.

ORDER: The decision of the director dated December 1, 2005 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.