

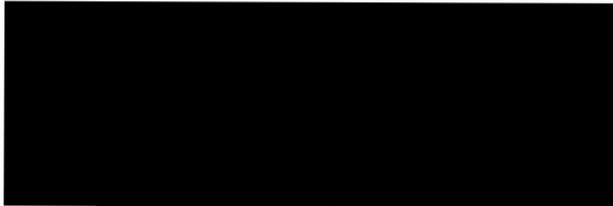
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U.S. Citizenship  
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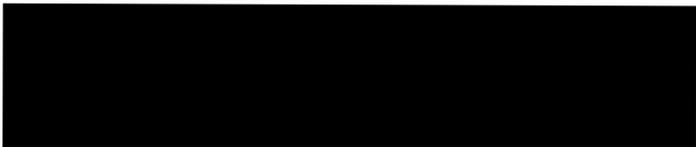
Office: TEXAS SERVICE CENTER Date:

DEC 01 2008

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)

IN 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.

  
John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** On August 16, 2002, the Director, Texas Service Center, initially approved the petition under 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. Upon further review, the director determined that the beneficiary was not eligible for the benefit sought. Accordingly, on October 24, 2007, the director ordered that the approval be revoked. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected pursuant to 8 C.F.R. §§ 103.3(a)(2)(v)(B)(1) and 205.2(d).

The petitioner, a Florida corporation, claimed to be in the import, export, and land development business and to have a qualifying relationship with the beneficiary's foreign employer located in Kazakhstan. Accordingly, the petitioner endeavored 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 revoked the approval of the petition concluding that the petitioner failed to establish that it had the ability to pay the proffered wage in 2005 or 2006.

The regulation at 8 C.F.R. § 205.2(d) requires an affected party to file the complete appeal within 15 days after service of the notice of revocation, or, in accordance with 8 C.F.R. § 103.5a(b), within 18 days if the notice was served by mail. The record indicates that the notice of revocation was sent to the petitioner on October 24, 2007. Counsel to the petitioner filed an appeal with the Texas Service Center on November 23, 2007, 30 days after the decision was served. Thus, the appeal was not timely filed and must be rejected on these grounds pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1).<sup>1</sup>

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. § 103.5(a)(2) or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3), the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii).

In this matter, it is noted that the appeal meets the applicable requirements of a motion to reopen. 8 C.F.R. § 103.5(a). This regulation states in pertinent part that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." *Id.* In this matter, the petitioner offers a copy of its 2005 and 2006 tax returns and the beneficiary's corresponding Forms W-2 and 1099 for consideration. The director specifically noted his willingness to consider this evidence if submitted on motion, and it appears that the 2006 documents were not available at the time the Notice of Revocation was issued.

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<sup>1</sup>It is noted that the director, in his cover sheet to the Notice of Revocation dated October 24, 2007, indicates that the petitioner had 30 days to appeal the revocation of the petition to the AAO. However, this timeframe does not apply to an appeal of a notice of revocation, which is limited to 15 days in 8 C.F.R. § 205.2(d). While it is unfortunate that the director noted the incorrect appeal period in the Notice of Revocation, the instant appeal is nevertheless untimely and the AAO must reject it under the regulations. 8 C.F.R. § 103.3(a)(2)(v)(B)(1). The AAO does not have the authority to waive set appeal periods nor does it have jurisdiction to consider untimely appeals.

However, the AAO notes that, upon review, it does not appear that this additional evidence will be sufficient to overcome the director's determination of ineligibility. Although the petitioner claims that the beneficiary was paid the proffered wage of at least \$50,000.00 in both 2005 and 2006, the evidence submitted contains serious inconsistencies which undermine the credibility of this claim. The petitioner submits 2005 Forms W-2 and 1099 which indicate that the beneficiary was paid W-2 wages of \$44,000.00 and received a 1099 "gross distribution" of \$8,341.00. However, the corresponding Form 1120 indicates that the beneficiary was paid \$48,000.00 in "officer compensation" in 2005, and the \$8,341.00 distribution has not been accounted for anywhere on the Form 1120 as salary, cost of labor, non-employee compensation, or other form of wages. Similarly, the beneficiary's 2006 Forms W-2 and 1099 indicate that the beneficiary was paid W-2 wages of \$44,000.00 and received a 1099 "gross distribution" of \$8,540.00. However, the petitioner's Form 1120 also fails to account for the \$8,341.00 "distribution" to the beneficiary under any of the categories which could apply to officer compensation. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Furthermore, as an alternate means of determining the petitioner's ability to pay, U.S. Citizenship and Immigration Services (USCIS) should next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. As correctly noted by the director, 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 legacy Immigration and Naturalization Service (INS) 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.

The petitioner's IRS Form 1120 for calendar year 2005 presents a net taxable income of -\$199,692.00. Furthermore, the petitioner's Form 1120 for 2006 presents a net taxable income of -\$182,276.00. Accordingly, even if the credibility issues were resolved with regard to the submitted tax documents, the petitioner's 2005 and 2006 tax returns would not establish that it had the ability to pay the beneficiary's proffered wage.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, USCIS should 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 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 USCIS 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. Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets during 2005 were \$5,766.00. The petitioner's net current assets as shown on the petitioner's 2006 Form 1120 were \$19,292.00.

Accordingly, while the sum of the petitioner's 2006 assets and the \$44,000.00 in W-2 income paid to the beneficiary exceeds the \$50,000.00 proffered wage, this is not the case for calendar year 2005. As noted above, the beneficiary's 2005 Form W-2 shows \$44,000.00 in wages paid to the beneficiary, but the petitioner's Form 1120 only shows \$5,766.00 in assets, for a sum of \$49,766.00. As the petitioner fails to credibly account for the purported "distribution" represented by the 2006 Form 1099 or the discrepancy on Schedule E to the petitioner's 2005 Form 1120, the evidence to be considered by the director on motion appears insufficient to establish eligibility for the benefit sought.

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 rejected, and the matter is returned to the director for treatment as a motion and the issuance of a new decision.