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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAY 10 2005

SRC 03 201 53892

IN RE: Petitioner: [redacted]
Beneficiary:

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 Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a company organized in the State of Florida in December 2001. It imports and exports sporting goods. It seeks to employ the beneficiary as its marketing director. 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.

On June 3, 2004, the director determined that the petitioner had not established a qualifying relationship between the petitioner and the beneficiary's foreign employer. The director also determined that the petitioner had failed to establish its ability to pay the wage proffered in the Form I-140, Immigrant Petition for Alien Worker.

On appeal, counsel for the petitioner asserts that the petitioner has always had the ability to pay the beneficiary the proffered wage. Counsel submits an undated letter from the petitioner's accountant to explain the petitioner's ability to pay the proffered wage and to explain the petitioner's corporate structure. Counsel also re-submits the petitioner's 2002 and 2003 Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, and Florida Forms UCT-6, Employer's Quarterly Return for the last three quarters of 2002. Counsel also submits a copy of the petitioner's stock certificate allegedly issued to the beneficiary's foreign employer.

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 whether the petitioner has established its ability to pay the beneficiary the proffered annual wage of $40,000 or $54,216.[1]

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

When 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. The priority date is July 14, 2003. 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 employed the beneficiary in the year 2003 and according to the 2003 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, issued to the beneficiary, paid her $21,600 for the year. The petitioner did not pay her the proffered wage of $40,000.

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.

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[1] The petitioner's Form I-140, Immigrant Petition for Alien Worker states that the beneficiary's proffered wage is $40,000. In a June 10, 2003 letter submitted in support of the petition, the petitioner stated that the beneficiary's annual salary would be $54,216; the same amount listed as the petitioner's net annual income on the petitioner's Form I-140. In addition, in a January 9, 2004 letter in response to the director's request for evidence, the president of the petitioner changed the beneficiary's proffered salary to $21,600 per year. However, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Citizenship and Immigration Services requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

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.

The petitioner's IRS Form 1120 for calendar year 2003 presents a net taxable income of $2,367. The petitioner could not pay a proffered wage of $40,000 per year out of this income, even when this sum is added to the beneficiary's actual 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. Even when considering the petitioner's net current assets, the petitioner's ability to pay the beneficiary's proffered wage is marginal. The record is insufficient to overcome the director's decision on this issue.

The second issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act.

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

> *Affiliate* means:
>
> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half

> of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner initially submitted its 2002 IRS Form 1120, showing the beneficiary as the petitioner's 100 percent owner, on Schedule K, Line 5 and accompanying statement. In response to the director's request for evidence on this issue, the petitioner indicated in a January 12, 2004 letter, that the petitioner's president owned 75 percent of the petitioner and the beneficiary owned 25 percent of the petitioner. The petitioner indicated that the petitioner's president operated the foreign entity as a sole proprietorship and supplied a license confirming that the petitioner's president was the foreign entity's owner and legal representative. The petitioner also provided its 2003 IRS Form 1120, again showing on Schedule K, Line 5 and accompanying statement that the beneficiary owned 100 percent of the petitioner.

The director determined that the U.S. company is owned and controlled by an individual who does not own or control the foreign company.

On appeal, counsel submits an undated letter signed by the company's accountant. The accountant states that the foreign entity owns 100 percent of the petitioner. The petitioner also provides its stock certificate 01, dated December 12, 2001, issuing 100 shares to the foreign entity.

On review, the petitioner has not presented evidence clarifying the inconsistency between the petitioner's stock certificate and the petitioner's IRS Forms 1120 regarding the petitioner's ownership and control. 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). In addition, as general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Moreover, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

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 at 362; *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In 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.

Finally, the director requested evidence of the petitioner's ownership and control, including stock certificates, in her November 15, 2003 request for evidence. The petitioner failed to provide the requested evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

The petitioner has not submitted evidence establishing a qualifying relationship between the petitioner and the beneficiary's foreign employer. The director's decision on this issue is affirmed.

Beyond the decision of the director, the petitioner has not established that the beneficiary's position for the petitioner would be in a managerial or executive capacity. In its June 10, 2003 letter in support of the petition, the petitioner stated that the beneficiary's duties included developing and evaluating new products, seeking out new products, developing a new client base, recommending new products for distribution to the parent company, increasing awareness of unique service products, and developing consistent service standards worldwide. The petitioner's Florida UCT-6 Form, for the quarter in which the petition was filed, shows that the beneficiary was the petitioner's only employee. The petitioner's accountant on appeal states: "[t]his corporation functions as a purchasing agent for the parent company in Bolivia so [the beneficiary] operates out of an office in Miami, Fl and for the moment is solely operated by her."

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). In this matter, the beneficiary performs the petitioner's operational tasks associated with buying products for the claimed parent company. 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 not provided a definitive description of the beneficiary's duties for the petitioner and does not clarify who carries out the petitioner's operational and administrative tasks, if not the beneficiary.

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). For this additional reason, the petition will not be approved.

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.