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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 21 2006

SRC 05 011 52260

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 visa 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 Texas that is engaged in the sale of gifts, novelties, decorations, ornaments and glasswares. The petitioner seeks to employ the beneficiary as its business development manager.

The director denied the petition concluding that the petitioner had not demonstrated that it had the ability to pay the beneficiary her proffered annual salary of $25,000 at the time the priority date was established.

On appeal, counsel for the petitioner contends that the combination of the petitioner's approximately $20,000 bank account balance, as well as its approximately $232,000 in gross sales generated during 2004 demonstrates its ability to pay the beneficiary her proffered salary. Counsel submits a brief 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):
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> * * *
>
> (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 had the ability to pay the beneficiary's proffered annual salary of $25,000.

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 immigrant petition on October 15, 2004, thereby also establishing the relevant priority date. The petitioner represented on Form I-140 that the beneficiary would receive an annual salary of $25,000.

It is evident from the record that the director subsequently issued to the petitioner a request for evidence addressing the present issue. A copy of the director's request, however, has not been incorporated into the record. Counsel responded in a letter dated July 21, 2005, contending that the petitioner's 2004 corporate tax return, which reflects gross receipts of approximately $232,000, establishes the petitioner's ability to pay. As additional evidence, counsel referenced two bank letters and the petitioner's monthly bank statements. Counsel noted that the petitioner's bank statements represent an average amount of $20,971 in monthly liquid assets, a balance, which counsel claimed, is sufficient to pay the beneficiary's annual salary.

Counsel referenced a May 4, 2004 Citizenship and Immigration Services (CIS) memorandum addressing the proper analysis of a petitioner's ability to pay. Counsel stated that the memorandum, which provides three factors to be considered by CIS in its determination of a positive ability to pay, corroborates the use of a "totality" approach to determining an employer's ability to pay. Counsel stated that under the "totality" approach, an employer's entire resources should be reviewed and considered.

Counsel further contended that the "ability to pay" requirement bears a greater importance in immigrant petitions requiring a labor certification than in the instant first preference employment-based petition. Counsel claimed that in the instant petition the petitioner need only prove that it is a bona fide company.

Counsel submitted the petitioner's 2004 corporate tax return, as well as letters from two financial institutions confirming the balances held by the petitioner and an unidentified individual[1] in July 2005. Counsel also provided copies of the petitioner's bank statements from October 2003 through June 30, 2005.

In a decision dated August 26, 2005 the director concluded that the petitioner had not demonstrated its ability to pay the beneficiary her proffered salary at the time the priority date was established. The director, relying on the petitioner's 2004 corporate tax return, noted a loss in taxable net income of $27,062. The director challenged counsel's reliance on the petitioner's monthly bank statements, stating that bank statements are not identified in the regulations as an acceptable form of evidence of a petitioner's ability to pay. The director stated that the petitioner had not explained why CIS should consider the bank statements in place of the evidence required by the regulation, specifically, the petitioner's annual reports, federal tax returns, or audited financial statements. The director also noted that even if CIS were to consider the petitioner's bank

[1] The foreign entity's organizational chart identifies this individual, [redacted] the company's marketing director. It is unclear what role he has in the petitioning entity.

statements, there is no indication that the referenced funds "reflect additional available funds that were not reflected on [the petitioner's] tax return." Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on September 22, 2005. In a subsequently submitted appellate brief, counsel stresses the $232,323 in gross sales generated by the petitioner in 2004 as evidence of its ability to pay. Counsel notes the "high-end shopping centers" in which the petitioner's stores are located, which counsel claims allows the petitioner to implement a mark-up in the price of goods sold, and consequently recognize "hundreds of thousands in sales."

Counsel challenges the "mechanical tests" implemented by CIS in its analysis of the petitioner's ability to pay, stating that CIS should consider the petitioner's gross receipts and monthly account balances. Counsel further contends that "common sense" would dictate the petitioner's ability to pay the beneficiary's salary.

Counsel again stresses that a relaxed "ability to pay" standard should be applied to those immigrant petitions not requiring a labor certification, and claims that the petitioner need only demonstrate its status as a bona fide company.

Upon review, the petitioner has not demonstrated its ability to pay the beneficiary's proffered annual salary of $25,000 at the time the priority date was established.

In determining the petitioner's ability to pay, 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 at the proposed salary. In fact, while the petitioner's federal employer quarterly tax return for the quarter ending December 31, 2004 reflects compensation paid to an unidentified employee during this time, there is no indication in the petitioner's canceled checks and bank statements that the beneficiary had been receiving compensation from the petitioner during 2004.

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. Accordingly, despite counsel's argument otherwise, CIS is not required to consider the petitioner's gross receipts. 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 October 15, 2004, the AAO must examine the petitioner's tax return for 2004. The petitioner's IRS Form 1120 for calendar year 2004 presents a negative balance of $27,062 in net taxable income. The petitioner could not pay a proffered wage of $25,000 per year.

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. Schedule L of the petitioner's corporate tax return reflects a zero balance for net current assets. As a result, the petitioner has not demonstrated its financial ability to pay the beneficiary's proffered salary.

The AAO addresses counsel's reference to a "totality" approach in which the petitioner's "entire financial resources" are analyzed for evidence of its ability to pay. Counsel's reliance on *O'Connor v. Attorney General*, 1987 WL 18243 (D.Mass) in support of this proposition is misplaced. In *O'Connor v. Attorney General*, the court noted that as an "unincorporated sole proprietorship," the personal assets of the employer should be considered in the analysis of its ability to pay. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Neither a sole proprietorship nor a partnership is a legal entity apart from its owner or owners. *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm. 1984). The instant case is distinguishable, as the petitioner is an incorporated organization. As a corporation, the petitioner is a separate and distinct legal entity from its owners or stockholders. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Accordingly, CIS properly applied a narrow analysis of the petitioner's financial status.

Furthermore, the 2004 CIS memorandum referenced by counsel supports a more limited review of the petitioner's net income and net current assets. Memorandum from William R. Yates, Associate Director for Operations, *Determination of Ability to Pay under 8 C.F.R. § 204.5(g)(2)*, HQOPRD 90/16.45 (May 4, 2004). CIS' Associate Director of Operations further clarifies the regulation at 8 C.F.R. § 204.5(g)(2), stating that CIS has *discretionary authority* to accept and consider financial statements or evidence other than the petitioner's annual reports, federal tax returns, or audited financial statements in its analysis of the "ability to pay" requirement. In other words, CIS is not required to consider the average monthly balance of the petitioner's checking account.

The AAO further notes that the regulations clearly impose the "ability to pay" standard on all petitioners filing an employment-based immigrant petition. *See* 8 C.F.R. § 20435(g)(2). Despite counsel's claims otherwise, the regulations, which are considered CIS policy, should not be construed as applying a lesser standard of scrutiny on those petitions involving classification as a multinational manager or executive. The regulations do not provide for the application of varying "ability to pay" analyses according to the immigrant classification sought.

Based on the foregoing discussion, the petitioner has failed to demonstrate its ability to pay the beneficiary's proffered salary at the time the priority date was established. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, two additional issues not addressed is whether the beneficiary was employed abroad and would be employed in the United States in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner offered a limited description of the job duties performed by the beneficiary overseas. It is unclear what managerial or executive tasks were associated with the beneficiary's responsibilities of "[setting] strategic planning goals," "direct[ing] sales activities," and "direct[ing] expansion of business in Pakistan." 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, several of the beneficiary's responsibilities demonstrate that the beneficiary was likely personally performing non-managerial or non-executive functions of the foreign entity's business. Specifically, the beneficiary was responsible for the company's advertising and promotions, and for setting the sales quotas and determining expenses. Moreover, while the beneficiary purportedly oversaw marketing personnel, the petitioner has not identified on its organizational chart the employment of any subordinate marketing employees. 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 AAO also notes that in response to the director's request for evidence, counsel provided the same outline of the beneficiary's job duties as that provided at the initial filing. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The 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). Furthermore, the petitioner has not clarified the date on which the beneficiary began working in the foreign company. The petitioner's failure to specify the beneficiary's start date, which appears to be sometime in 1999, makes it impossible to determine whether she was employed with the foreign entity for a continuous year prior to her entry into the United States in July 2000. 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).

The beneficiary's job description for her proposed position as business development manager of the United States company is equally vague. The petitioner's claims that the beneficiary would be responsible for expanding the petitioner's business, developing investments in the United States, and "[setting] strategic planning goals" do not identify the specific managerial or executive job duties associated with each of these responsibilities. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Additionally, based on the beneficiary's responsibilities of paying company debts, salaries, and taxes, maintaining proper business licenses, and devising sales and marketing policies, the beneficiary would be personally performing administrative and operational functions of the petitioner's business. Moreover, the petitioner has not identified the employment of any workers at the time of filing that would work in the company's three mall shops selling its products. Absent additional evidence, it is reasonable to assume that as the sole employee, the beneficiary would be entirely responsible for the petitioner's sales. Again, 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. Counsel again failed to provide additional detail of the beneficiary's proposed position when requested by the director. The petitioner has failed to demonstrate that the beneficiary had been employed by the foreign entity and would be employed by the petitioner in a primarily managerial or executive capacity. For these additional reasons, the petition will be denied.

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.