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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 04 2009
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IN RE: Petitioner:
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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 immigrant visa petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a company located in the State of California that claims to be engaged in the design and building business. The petitioner seeks to employ the beneficiary as its project manager/designer.

The director denied the petition on June 14, 2008, concluding that the petitioner had not established that there exists a qualifying relationship between the petitioner and the beneficiary's foreign employer.

On appeal, the petitioner asserts that the director's decision may have resulted from confusion created by evidence submitted relating to the relationship between the U.S. and foreign entities, and that a previously temporary contractual relationship between the two entities has since been made permanent. The petitioner submits further evidence in support of this assertion.

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. If the alien is already in the United States working for the petitioning

United States employer or its affiliate or subsidiary, the petitioner must demonstrate that, in the three years preceding entry into the United States as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity. 8 C.F.R. § 204.5(j)(3)(1)(B). 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. 8 C.F.R. § 204.5(j)(5).

At issue in this matter is whether the petitioner has established that a qualifying relationship exists between the U.S. company and 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 filed the Form I-140, Immigrant Petition for Alien Worker, on December 20, 2007. The petitioner did not submit any evidence or information relating to the corporate status or ownership of either the U.S. company or the foreign company, or to the relationship between the two entities.

On March 5, 2008, the director issued a request for further evidence (RFE). Among other things, the director requested documentary evidence to establish the qualifying corporate interrelationship between the U.S. company and the foreign employer of the beneficiary. The director noted that the

evidence submitted must establish common ownership and/or control between the two entities and may include, but is not limited to, annual reports, statements from the organization's president or corporate secretary, articles of incorporation, financial statements, and/or evidence of ownership of all outstanding stock for both entities.

In response, the petitioner submitted a letter dated April 7, 2008, signed by the beneficiary as the president of the foreign entity, a Mexican design firm named Arko Arquitectura+Diseno. The letter states that the U.S. company and the foreign entity have had an association since May 2006, where the foreign entity develops the projects of the U.S. company. The petitioner submitted a copy of a contract between the two entities, dated May 16, 2006, setting forth the terms of an association between the two entities whereby the foreign entity takes responsibility for the design development and creation of construction documentation of all of the U.S. company's projects for the duration of the contract. The stated term of the contract is from the date of signature through December 16, 2006. Although the beneficiary claimed in his letter that the contract is renewable every six months, the contract does not contain any provisions relating to renewal.

The petitioner provided no documentary evidence of the ownership and control of the foreign entity. The evidence submitted in response to the RFE was sufficient to establish that the petitioner is a sole proprietorship owned and operated by Juan Carlos Alcantar.

On June 14, 2008, the director denied the petition, determining that the petitioner has failed to establish that a qualifying relationship exists between the U.S. company and the beneficiary's foreign employer. The director found that the temporary legal association of the two companies does not qualify the two companies for the requested status, and no evidence was submitted establishing that a qualifying relationship between the two entities otherwise exists.

On appeal, the petitioner claims that the original six-month contract between the two entities was renewed continually for two years and has been renewed and altered into a permanent association as of May 15, 2008. The petitioner submitted (1) a copy of the contract, dated May 15, 2008, setting forth the term of the permanent association between the two entities; and (2) a letter dated July 1, 2008, signed by the beneficiary as the president of the foreign entity, confirming the petitioner's explanation regarding the contractual association between the two entities. The petitioner also stated, "Independently of this renewals [sic], [the U.S. company] has permanent control along with the president of the [foreign entity] over the company since the creation of the first contract." No other evidence was submitted on appeal.

Upon review, the AAO concurs with the director's conclusion that the petitioner has failed to establish that a qualifying relationship exists between the U.S. company and the beneficiary's foreign employer.

In this instance, based on the record as it is presently constituted, the claimed relationship between the U.S. company and the beneficiary's foreign employer is purely a contractual one. Whether it is based on a contract renewable every six month period or one that renders the association between the two entities permanent, it remains that a relationship based on a contractual arrangement in which

one entity provides certain services for the other, without more, does not meet the statutory requirement that the petitioning company be the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act; *see also Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970) (finding that no qualifying relationship exists where the association between two companies was based on a license and royalty agreement that was subject to termination since the relationship was "purely contractual").

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 U.S. 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 Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the 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.

Here, the petitioner has failed to provide any documentation that would shed light on the legal status or ownership of the beneficiary's foreign employer. Without such information, the AAO can not determine whether the U.S. and foreign entities may be considered "the same employer," or are affiliates or parent and subsidiary, as the regulations require. However, based on the petitioner's consistent statements, there is nothing in the record to suggest that the two entities share any common ownership and control.

As such, the evidence of record is insufficient to establish that there exists a qualifying relationship between the U.S. and foreign entities. For this reason, the petition will be denied.

In light of the above, the AAO finds that the petitioner has failed to establish that a qualifying relationship exists between the U.S. and foreign entities. For this reason, the petition will be denied.

Beyond the decision of the director, the AAO finds that the petitioner has failed to establish that the petitioner was doing business for at least one year prior to the filing of the petition.

The regulation at 8 C.F.R. § 204.5(j)(3)(i) states:

> *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 employer has been doing business for at least one year.

Further, the regulation at 8 C.F.R. § 204.5(j)(2) states:

> Doing business means the by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

Along with the Form I-140, the petitioner submitted an undated information sheet relating to the U.S. company, which states that the company was established in 2002, has 13 employees, and has a gross annual income of $1,200,000. The petitioner also provided the name of the owner/president (noting that he is a "sole proprietor") and the company's license number with an expiration date of December 31, 2007. The petitioner also submitted copies of an "active license" in the petitioner's name issued by the State of California Contractors State License Board, with an expiration date of June 30, 2009, and a business license in the petitioner's name issued by the City of Coronado, California, with a December 31, 2007 expiration date.

In the RFE, the director requested further evidence to establish that the petitioner has been doing business for at least one year prior to the filing of the petition, including documentation to establish that the entity has conducted a regular, systematic, and continuous provision of goods and/or services.

In response, the petitioner submitted additional business licenses in the petitioner's name issued by the City of Chula Vista, California, valid from October 10, 2005 through December 12, 2007, and by the City of Imperial Beach, California, valid from January 31, 2008 through January 31, 2009. The petitioner also referred to the May 16, 2006 contract between itself and the foreign entity.

The petitioner provided a copy of IRS Form 1040, U.S. Individual Income Tax Return, for the year 2006 in the name of [redacted] along with Schedule C, Profit or Loss from Business (Sole Proprietorship). The petitioner's Form 1040, Schedule C reflects that the company had gross receipts of $110,000 in 2006, and a net loss of $7,520. Finally, the petitioner submitted a copy of a single bank statement for a business checking account in the name of "[redacted], Contracting America," for the period February 9 through March 11, 2008, which shows an ending balance of $9,031.34.

Upon review, the evidence of record is insufficient to establish that the petitioner has been doing business for the year preceding the filing of the petition. First, the possession of valid business licenses at best indicates that the petitioner is licensed to conduct business, not that it has actually conducted a "regular, systematic, and continuous provision of goods and/or services" as required by the regulations. Similarly, the contract between the petitioner and the foreign entity only establishes that the two entities have formed a contractual association, and does not demonstrate that any business has actually been conducted by the entities, during the term of the contract. Further, while the petitioner claimed that it has a gross annual income of $1,200,000 (for an unspecified period of time) there is no documentation in the record to support this claim. The petitioner's 2006 tax return reflects considerably less income, and is insufficient to establish that the petitioning entity was in fact doing business in 2007. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22

I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Absent more recent evidence of business activities, such as the petitioner's 2007 income tax return, invoices, receipts, payroll records, etc., the AAO finds the evidence of record insufficient to establish that the petitioner was doing business during the year preceding the filing the petition. For this additional reason, the petition will be denied.

In addition, the AAO finds that the petitioner has failed to establish that it has the ability to pay the beneficiary the proffered wages for his position in the United States as required by the regulations.

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.

The petitioner stated on Form I-140 that it will employ the beneficiary full-time at a wage of $800 per week, or $41,600 annually.

In determining the petitioner's ability to pay the proffered wage, USCIS 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.

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 USCIS) 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. As the petition's priority date falls on December 20, 2007, the AAO must examine the petitioner's tax return for 2007, which has not been provided for review. The petitioner's Form 1040, Schedule C for calendar year 2006 presents a net loss of $7,520. Therefore, the evidence of record does not establish that the petitioner has sufficient net income to pay the proffered 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. The petitioner's net current assets are not reflected in the Form 1040, Schedule C, and the AAO cannot determine whether the petitioner has sufficient net current assets to pay the proffered wages.

Therefore, the evidence submitted is insufficient to establish that petitioner's ability to pay the proffered wage, and the petition will be denied for this additional reason.

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). When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.