U.S. Department of Homeland Security
U. S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: APR 2 6 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The director dismissed the petitioner's subsequent motion to reopen and reconsider the decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and entry of a new decision.

The petitioner is a Florida limited liability company that seeks to employ the beneficiary in the United States as its Regional Operations Manager. 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.

The director denied the petition on February 13, 2012 concluding that the petitioner failed to establish its ability to pay the beneficiary's proffered annual wage of $50,000.

On March 13, 2012 in a motion to reopen and reconsider the decision, the petitioner submitted a copy of its IRS Form 1065, U.S. Return of Partnership Income, for the 2011 tax year. The petitioner asserted that the document could not be prepared until the conclusion of the calendar year and was thus unavailable for submission at the time the petition was filed in August 2011, or at the time the petitioner responded to the director's request for additional evidence (RFE) in December 2011. The petitioner asserted that its 2011 corporate tax return establishes the company's ability to pay the beneficiary's proffered wage as of the date of filing.

On June 26, 2012, the director dismissed the motion finding that petitioner's filing failed to meet the requirements of a motion to reopen. Specifically, the director determined that consideration of the 2011 tax return was not required since the return for tax year 2010 had already been provided and considered in the director's decision.

On appeal, the petitioner asserts that the director erred by not considering the new evidence in analyzing whether the petitioner had the ability to pay the beneficiary's proffered wage. The petitioner does not dispute that the company's tax returns submitted for years 2009 and 2010 do not establish an ability to pay. However, the petitioner contends that it is capable of paying the proffered $50,000 annual wage as of the August 2011 filing date as evidenced by its newly submitted 2011 tax return.

Upon review, the petitioner's assertions are persuasive. While the director appropriately relied upon the petitioner's 2010 IRS Form 1065 in the absence of the company's 2011 tax return, the petitioner properly submitted the 2011 Form 1065 as new evidence on motion.

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.

Federal regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed or when the visa is issued by a United States consulate. 8 C.F.R. § 245.1(a), 22 C.F.R. § 42.41. The petitioner bears the ultimate burden of establishing eligibility for the benefit sought, and that burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

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 and paid the proffered wage.

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).

According to the newly submitted 2011 tax return, the petitioner had a net taxable income of $65,931.00 for the year in which the petition was filed. Therefore, based on this tax return the petitioner has established its ability to pay the beneficiary's $50,000 annual proffered wage. The AAO concurs with the petitioner's assertion that the director's failure to consider the petitioner's IRS Form 1065 U.S. Return of Partnership Income for tax year 2011was incorrect since the tax return reflects the company's income and financial data for the year during which the petition was filed. Since the ability to pay is established, the petitioner has successfully overcome the sole ground cited as the basis for denial and the director's decision is hereby withdrawn.

Notwithstanding the AAO's withdrawal of the director's adverse conclusion on a single issue, the AAO finds that the petition does not warrant approval on the basis of evidence that is currently on record. After a thorough review of the record, the AAO finds that the petitioner failed to establish:

(1) that the beneficiary had been employed by a qualifying foreign employer for at least one year within the three years preceding the filing of the petition; (2) that the foreign employer has a qualifying relationship with the petitioner; and (3) that the beneficiary's proposed position is in a qualifying managerial or executive capacity. Accordingly, the petition will be remanded to the director for further action and consideration pursuant to the discussion below.

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.

According to the record, specifically the beneficiary's Form G-325A, a biographic information document submitted concurrently with her application to adjust status (Form I-485), the beneficiary was employed with the relevant foreign employer from March 2009 until September 2009, and from April 2010 until August 2010, for a total of approximately 12 months. However, the payroll documents submitted by the foreign employer do not substantiate this claim. The record documents the beneficiary's seven months of employment with the foreign entity in 2009. However, the documents for 2010 reflect the beneficiary's employment with the foreign employer for only three months (April – June), two months short of the required total of 12 months employment. 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).

Further, neither the petitioner nor the foreign employer has provided the beneficiary's exact dates of employment abroad, such that it can be determined whether the beneficiary acquired one full year of employment. Based on the information provided on the beneficiary's Form G-325A, the petitioner would need to establish that foreign entity employer her from March 1, 2009 through September 30, 2009, and from April 1, 2010 until August 31, 2010 in order for her to meet the one year of employment abroad requirement. It appears based on the payroll documentation that the beneficiary initially commenced employment with the foreign entity on March 6, 2009 and may fall slightly short of having one year of employment abroad, even if the petitioner is able to provide evidence that the foreign entity paid her in July and August 2010.

In addition, the record as presently constituted fails to adequately document the qualifying relationship between the foreign employer and the petitioner. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The petitioner claims to be a majority-owned (51%) subsidiary of The petitioner submitted a copy of its membership certificate number 6 dated September 19, 2005 indicating the foreign employer's ownership of 51% of its membership units. However, the petitioner also submitted its partnership tax returns for 2009, 2010 and 2011 which identify as 51% owner of the petitioning company. 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. at 582.

Finally, in 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 has provided a vague description of the beneficiary's proposed position and it fails to adequately document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties including both managerial and administrative or operational tasks, but does not quantify the time the beneficiary spends on each type. This failure of documentation is important because the beneficiary is responsible for operational tasks such as contract negotiations. 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).

Accordingly, the case will be remanded for a new decision, which shall take proper notice of the beneficiary's proposed duties, the dates of the beneficiary's foreign employment and the qualifying relationship between the petitioner and the foreign company. The director may issue a notice requesting any additional evidence he deems necessary in order to determine the petitioner's eligibility for the benefit sought.

ORDER: The director's decisions dated February 13, 2012 and June 26, 2012 are withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision, which, if adverse to the petitioner, shall be certified to the AAO for review.