U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: WAC 02 289 50434 OFFICE: CALIFORNIA SERVICE CENTER Date: JUN 29 2005

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:

[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 preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation that claims to manufacture, import, export, and distribute electronic products. It seeks to employ the beneficiary as its vice president/financial controller. 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 determined that the petitioner failed to establish its ability to pay the beneficiary's proffered wage and denied the petition.

On appeal, counsel disputes the director's conclusion and submits a brief in support of his arguments.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 the petitioner has the ability to pay the beneficiary's proffered wage.

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

In the petition, filed on September 27, 2002, the petitioner indicated that the beneficiary would receive a monthly salary of $2,000 per month, which is equivalent to $24,000 per year.[1] The petitioner also submitted its income tax returns for the years 2000 and 2001, both of which showed net operating losses.

On March 25, 2003, the director issued a notice requesting that the petitioner submit additional evidence establishing its ability to pay the beneficiary's proffered wage. The petitioner was informed that its most recent tax records would serve as an appropriate indicator of its ability to pay the beneficiary's salary.

The petitioner responded with a letter dated June 5, 2003, which contained a description of all of the documents that were included in its response to the director's request. The submitted documents included the petitioner's income tax returns from 1998 through 2002. According to the petitioner's tax return for 2002, the petitioner had a net operating loss of $48,629. Schedule L of the same tax return shows that the petitioner's total assets equaled the amount of its total liabilities. Therefore, the petitioner did not have a surplus of assets that would have accounted for the beneficiary's salary.

On appeal, counsel asserts that the director failed to consider the petitioner's "cash on hand," which was the result of various money transfers from the petitioner's parent company to the petitioner. However, counsel's reliance on the additional money provided by the parent company is misplaced. First, bank fund transfers are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this matter has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, fund transfers reflect and amount(s) transferred on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, the fund transfers referenced by counsel were completed in August of 2001, more than one year prior to the date the petition was filed, and are therefore not relevant in the instant matter. Similarly, the petitioner's bank account balances as of September 2003 are also irrelevant, as they do not address the time period in question. It is noted that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In the instant case, the beneficiary had not been employed by the petitioner in the United States at the time the petition had been filed and consequently cannot establish that it paid the beneficiary an amount at least equal to the proffered wage during that period. Therefore, CIS will next examine the net income figure reflected on the petitioner's 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).

---

[1] In the second page of the denial the director indicated that the beneficiary's yearly salary would be $52,000. Based on the suggested monthly salary of $2,000, the director's calculation was inaccurate.

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that 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 the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. In the matter at hand, the petitioner's tax return for the relevant time period shows that the petitioner experienced a net operating loss in excess of $40,000 and did not have assets in an amount that was greater than its liabilities. None of the documentation submitted on appeal overcomes this insufficiency. Therefore, based on the petitioner's inability to pay the beneficiary's proffered wage this petition cannot 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.