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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **AUG 06 2008**
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IN RE: Petitioner: [REDACTED]
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:

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the petition for an immigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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, a Delaware corporation, states that it provides software sales and consulting services to the accounting sector. It seeks to employ the beneficiary as its president.

The director denied the petition, determining that the petitioner had not established: (1) that there is a qualifying relationship between the U.S. company and the beneficiary's foreign employer; or (2) that the petitioner had the ability to pay the beneficiary the proffered annual wage of \$49,400.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, counsel for the petitioner asserts that the director overlooked documentary evidence submitted to establish the beneficiary's eligibility for the requested immigrant visa classification. Counsel submits a brief and additional evidence 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):

* * *

- (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 that there is a qualifying relationship between the petitioner and the foreign entity. 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").

Specifically, 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 immigrant visa petition was filed on May 15, 2006. The petitioner did not submit evidence of a qualifying relationship with a foreign entity in support of the petition. The petitioner provided a copy of its certificate of incorporation indicating that the company is authorized to issue 1,500 shares of common stock, but provided no evidence regarding its ownership. Accordingly, on November 22, 2006, the director issued a request for evidence (RFE) requesting, *inter alia*, documentary evidence to establish the qualifying corporate interrelationship between the United States entity and the beneficiary's former foreign employer. The director advised that such evidence must establish common ownership and/or control between the foreign entity and the United States entity, and may include, but is not limited to, annual reports, articles of incorporation, financial statements, and/or evidence of ownership of all outstanding stock for both entities.

In response to the RFE, the petitioner submitted a copy of its stock certificate #20 issuing 100 shares of common stock to the beneficiary's previous foreign employer, Intelligent Financial Systems, Inc. (Canada), on March 1, 1998. The petitioner also submitted a shareholder register which lists Intelligent Financial Systems, Inc. (Canada) as the only shareholder of the company, and indicates that only 100 shares of the company's stock have been issued. The petitioner also submitted a copy of the foreign entity's articles of incorporation and articles of amendment to the articles of incorporation.

The director denied the petition on May 14, 2007, concluding that the petitioner had failed to establish that the petitioner and the foreign entity have a qualifying relationship. The director determined that the petitioner had not demonstrated that the U.S. and foreign entities are owned and controlled by the same parent or individual, or that the companies are controlled by the same group of individuals.

On appeal, counsel asserts that the petitioner is a wholly-owned subsidiary of Intelligent Financial Systems, Inc. (Canada). Counsel notes that although the company is authorized to issue 1,500 shares of stock, only 100 shares have been issued. The petitioner resubmits its stock certificate #20 issuing 100 shares of the U.S. company's stock to the foreign entity, a copy of its shareholder register, and copies of its stock certificates #1-19, all of which are blank.

Upon review, the petitioner has established that the foreign and U.S. entities have a qualifying parent-subsidiary relationship. The record shows that the foreign entity owns all of the shares issued to date by the U.S. company, and it appears that, in denying the petition, the director considered only whether the two companies have an affiliate relationship. Accordingly, the director's decision with respect to this issue will be withdrawn.

The remaining issue addressed by the director is whether the petitioner established that it has the ability to pay the beneficiary's proffered annual wage of \$49,400.

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. . . . In appropriate cases, additional evidence such as profit, bank account records, or personnel records may be submitted by the petitioner or requested by the Service.

At the time of filing, the petitioner indicated that the beneficiary's current earning are "in excess of \$60,000." The only financial documentation submitted was the petitioner's statement of earnings for 2005, which indicated that the company had a net income of \$501,891.

In the RFE issued on November 22, 2006, the director requested evidence to establish that the company has the financial ability to pay the offered wage as of May 15, 2006. The director advised that such evidence must include the company's latest annual report, latest U.S. tax return, or audited financial statements. The director also instructed the petitioner to submit a copy of the beneficiary's IRS Form W-2, Wage and Tax Statement, for 2005. Finally, the director requested a copy of the beneficiary's most recent pay voucher, identifying the beneficiary and the employer by name, the beneficiary's gross/net pay, income received year-to-date, income tax deductions withheld, and the length of the pay period.

In a response received on February 15, 2007, the petitioner submitted a copy of its IRS Form 1120, U.S. Corporation Income Tax Return for 2005. The Form 1120 shows total income of \$1,042,872, total deductions

of \$534,713, and a taxable income of \$0. The Form 1120 also indicates at Schedule E that \$89,478 in compensation to officers was paid to the beneficiary in 2005. The petitioner did not, however, submit the requested copy of the beneficiary's Form W-2.

In response to the director's request for a copy of the beneficiary's most recent pay voucher, the petitioner submitted a document entitled "2006 Year Remuneration Statement [REDACTED] IFS Inc. Canada." The document indicates that the beneficiary received \$72,452 in 2006, including bonus and stock options. The petitioner explained in a statement dated February 13, 2007 that the beneficiary is no longer providing services to the U.S. company due to the expiration of his L-1A status. The petitioner indicated that the beneficiary is currently being paid by the foreign entity.

The petitioner also submitted another statement of earnings for 2005 which indicates substantially different figures for revenue and expenses compared to the statement for the same year submitted in support of the initial petition. The petitioner provided no explanation for the existence of two different statements of earnings for the same year.

Finally, the petitioner submitted: (1) a letter dated February 12, 2007 from Citizens Bank indicating that the highest balance in the petitioner's account during the month of May 2006 was \$24,029.25; and (2) a letter dated February 12, 2007 from Bank of America which indicates that the petitioner has an account balance of \$124,543.82.

The director denied the petition, concluding that the petitioner had not established the ability to pay the beneficiary's proffered wage. In denying the petition, the director noted that the petitioner's 2005 corporate tax returns indicated that the company had net income and net current assets of \$0. The director acknowledged the petitioner's submission of the bank letters, but noted that pursuant to 8 C.F.R. § 204.5(g)(2), bank statements are not among the types of acceptable evidence of a petitioner's ability to pay a proffered wage. The director noted that bank statements show only the amount in an account on a given date, and no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional funds that were not reflected on its tax returns, such as cash on Schedule L of the petitioner's corporate tax return.

On appeal, counsel asserts that the director erred by relying on the petitioner's taxable income as reflected on its 2005 IRS Form 1120, rather than the petitioner's net income. Counsel emphasizes that the petitioner's 2005 Form 1120 shows gross profit of \$1,042,872 and total deductions of \$534,713, thereby, leaving the petitioner with a net income of \$508,159. Counsel explains that the petitioning company opted to use its 2004 Net Operating Loss, which exceeded its 2005 net income, to reduce its taxable income in 2005. Counsel argues that the beneficiary's proffered wage of \$49,400 could in fact be paid out of the amount of \$508,159, and that this money was available to the petitioner as net income, despite the company's election to carry over a prior year's loss and deduct it on its tax return. Counsel asserts that in 2005, the beneficiary was providing services to the petitioner, and was being compensated at the same rate as the proffered wage.

In support of the appeal, the petitioner re-submits an unsigned, un-dated, partial copy of its 2005 Form 1120. However, unlike the previously submitted 2005 tax return, the copy submitted on appeal does not reflect any wages paid to the beneficiary as "compensation of officers" at item 12 or at Schedule E. As noted above, the

tax return previously submitted indicated that the beneficiary received compensation in the amount of \$89,478 in 2005.

Upon review, the petitioner has not established its ability to pay the proffered wage of \$49,400. 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.

At the time the petition was filed, the beneficiary had been employed by the petitioner as an L-1A nonimmigrant for nearly seven years. However, the petitioner did not provide sufficient evidence to establish that it was paying or had previously paid the beneficiary the proffered salary. Although requested by the director, the petitioner failed to provide a copy of the beneficiary's 2005 Form W-2, which would have been acceptable evidence that it has the ability to pay the beneficiary's salary. On appeal, counsel again states that the petitioning company has been paying the beneficiary the proffered wage, but no documentary evidence, such as pay stubs, quarterly wage reports, a Form 1099, or other evidence is submitted to support this claim. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

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. 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 May 15, 2006, CIS should examine the petitioner's tax return for 2006. However, in this case, the director issued an RFE prior to the date on which the petitioner was required to file its 2006 tax return, and thus only the 2005 tax return was requested. Upon review of counsel's argument on appeal, the AAO agrees that, in a case where the petitioning company opts to deduct a net operating loss from a previous year on its corporate tax return, the proper figure to consider for purposes of determining the company's ability to pay the proffered wage is the net income, i.e., the difference between the company's total income (line 11) and total deductions (line 27), rather than the company's taxable income.

However, in this case, the AAO does not find the petitioner's 2005 Form 1120 to provide credible evidence of the company's financial status and its ability to pay the proffered wage. The petitioner has submitted two different versions of the same years' tax return, without evidence that it has filed an amended return. There is no evidence in the record to establish that either version of the tax return was actually filed with the Internal Revenue Service. Given that page 4 of the tax return, which includes the company's balance sheets, is completely blank, the AAO questions whether either of the submitted documents represents a true and complete copy of the tax return the company filed with the IRS. Furthermore, as noted, the petitioner has also submitted two different statements of earnings for the 2005 year, which only raises further questions regarding the credibility of the evidence submitted with respect to the company's financial status for that year. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591. Because of the discrepancies in the record, the AAO must conclude that the submitted tax returns are significantly lacking in probative value, and they will not be given evidentiary weight in support of the petitioner's claim that it has the ability to pay the proffered salary. Therefore, the petitioner has not established that it has the ability to pay the beneficiary's wage based upon its net income.

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.

In this case, the petitioner left item D, Total assets, blank on its Form 1120, and did not complete Schedule L, on which the petitioner's assets and liabilities should have been reflected. Since the petitioner's tax return reflects no net current assets, the petitioner has not established that its net current assets are sufficient to pay the proffered wage.

Based on the foregoing discussion, the petitioner has not established its ability to pay the proffered wage, and for this reason, the appeal will be dismissed.

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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.