



U.S. Citizenship  
and Immigration  
Services

B4

FILE: [REDACTED]  
SRC 08 073 50476

OFFICE: TEXAS SERVICE CENTER

Date: DEC 01 2009

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.

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).

  
Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner is a Texas corporation that seeks to employ the beneficiary as its chief financial officer. 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 the ability to pay the beneficiary's proffered wage in 2008 and denied the petition on that basis. On appeal, counsel disputes the director's decision and asserts that even if the petitioner cannot demonstrate the ability to pay the proffered wage, the petitioner, with the assistance of the foreign entity, does have that ability. Additional documentation is submitted in support of counsel's contentions.

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 primary issue in this proceeding is whether the petitioner established its ability to pay the beneficiary's proffered wage in 2008. 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.

(Emphasis added.)

At Part 6, Item 9 of the Form I-140, where the petitioner was asked to provide the beneficiary's weekly wages, the petitioner indicated that the beneficiary would be compensated approximately \$89,900 annually. In support of the Form I-140, the petitioner provided a letter dated December 26, 2007 in which it explained that while the beneficiary's total annual compensation for his work in the United States would amount to \$89,000, the petitioning entity would pay the beneficiary \$29,900 with the foreign entity supplying the remaining \$60,000. In light of the petitioner's explanation, it therefore appears that the proffered wage, i.e., the salary that the petitioner intended to pay the beneficiary upon approval of the petition, is \$29,900 annually. Although the petitioner provided supporting evidence, including foreign bank receipts, representing the foreign entity's payment of the beneficiary's wages, as well as several of the foreign entity's bank statements, the director determined that additional documentation was needed to establish the petitioner's ability to pay the beneficiary's proffered wage.

Accordingly, on April 21, 2008, the director issued a request for additional evidence (RFE), instructing the petitioner to submit evidence of its financial ability to pay the beneficiary's proffered wage.<sup>1</sup> More specifically, the petitioner was asked to provide either a copy of its federal tax return, audited statement, or annual report for 2007 and 2008 as well as the beneficiary's pay stubs for wages received in 2007 and 2008.

In response, the petitioner provided a copy of the beneficiary's Form W-2 for 2007 showing that the beneficiary was compensated \$30,503.09 in 2007; the beneficiary's 2007 pay stubs as well as 2008 pay stubs through May 5, 2008, which showed that the beneficiary received weekly compensation of \$575.83 in 2007 and \$368.45 in 2008; untranslated payroll receipts in Spanish for 2007 and a portion of 2008, with no clear indication as to the company that issued the payments; the petitioner's first quarterly wage report for 2008 showing the beneficiary's quarterly compensation of \$4,789.85; and an unaudited balance sheet accompanied by an income statement for the first quarter of 2008.

After reviewing the petitioner's supporting evidence, the director determined that the petitioner failed to establish that it had the ability to pay the beneficiary's proffered wage in 2008.

In making his determination, the director first examined whether the petitioner employed the beneficiary at the time in question. The director noted that 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 director reviewed the documents submitted in response to the RFE and properly determined that, while the

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<sup>1</sup> It is noted that the director erroneously referred to the beneficiary's annual wage as \$1,711.53. Per the explanation provided by the petitioner in the initial support letter as discussed above, \$1,711.53 represents the weekly salary that the petitioner and the foreign entity, together, would pay the beneficiary. As discussed above, the U.S. entity would be responsible for approximately one third of total weekly compensation making its portion of the proffered wage approximately \$585 weekly.

petitioner adequately demonstrated its ability to pay the proffered wage in 2007, the petitioner did not similarly demonstrate its ability to pay the proffered wage in 2008.

As an alternate means of determining the petitioner's ability to pay, the director examined 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 year in question is subsequent to the petition's priority of December 31, 2007, the director requested that the petitioner provide its 2008 financial documents, including a 2008 federal tax return, a 2008 audited financial statement, or a 2008 annual report. In reviewing the submitted documents, the director noted that the petitioner provided an unaudited financial statement, which was not in compliance with the regulations or the RFE request. In the present matter, as the petitioner failed to submit the requested documents pertaining to 2008, neither its net income nor its net current assets for that year can be considered in determining the petitioner's ability to pay the beneficiary's proffered wage in 2008.

On appeal, counsel for the petitioner provides a description of the three exhibits being submitted in support of his opposition of the denial. The AAO notes that the first two exhibits—an unaudited financial statement for the six-month period ending on June 30, 2008 and a 2007 tax return—both pertain to the foreign entity. Thus, in addition to the fact that the financial statement is inadequate, as it is unaudited, and in light of the fact that information regarding finances in 2007 is irrelevant, both documents pertain to the foreign entity and for that additional reason are irrelevant in the instant proceeding. Counsel's reference to regulations pertaining to the filing of an L-1A nonimmigrant visa are immaterial in the present matter, where the petitioner has filed an immigrant petition that is subject to a separate set of regulatory provisions, one of which requires that the petitioner, rather than a foreign affiliate, demonstrate its ability to pay the beneficiary's proffered wage commencing with the priority date and continuing until the beneficiary has adjusted his/her status to that of a permanent resident. See 8 C.F.R. § 204.5(g)(2). In light of this provision, the petitioner's third submission—a letter from the president of the foreign entity assuring the AAO that the foreign entity has been paying the balance of the beneficiary's proffered wage—is also inadequate as a means of demonstrating the petitioner's ability to pay. Although the foreign entity's president also indicates that he is willing to make any necessary changes in assuring that the U.S. petitioner would pay the full amount of the proffered wage, 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)).

In light of the above analysis, the petitioner has failed to overcome the basis for denial. Therefore, the AAO cannot approve this petition.

Furthermore, while not specifically addressed in the director's decision, the AAO finds that the petitioner has failed to meet the requirement specified in 8 C.F.R. § 204.5(j)(3)(i)(C), which states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer.

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;

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*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.

In the present matter, the petitioner provided the minutes of an organization meeting that took place on April 28, 2005 during which the petitioner's board of directors resolved that [REDACTED] and [REDACTED] would each received 33.3 shares of the petitioner's shares valued at \$333.33. The petitioner also provided stock certificate nos. 1-3, all dated April 25, 2005, where certificate no. one issued 52 shares to [REDACTED] certificate no. 2 issued 24 shares to [REDACTED] and certificate no. 3 issued 24 shares to [REDACTED]. A comparison of the two documents clearly shows two different schemes for the distribution of the petitioner's shares where one scheme allots the same number of shares to each of three stockholders with no one stockholder owning a majority of shares, while the other clearly makes one individual the majority shareholder. 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 regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States 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. As the record lacks documentation resolving the inconsistency discussed above with regards to the petitioner's ownership, it cannot be concluded that the petitioner and the foreign entity, regardless of the foreign entity's ownership and control, are similarly owned and controlled such as to form a qualifying relationship according to the definitions provided above.

Lastly, the record does not support the conclusion that the beneficiary was employed abroad or that he would be employed by the U.S. entity in a qualifying managerial or executive capacity. The regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer. With regard to the beneficiary's employment in the United States, 8 C.F.R. § 204.5(j)(5) requires that the petitioner provide a detailed description of the job duties to be performed by the beneficiary in his proposed position with the U.S. entity. It is noted that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

With respect to the beneficiary's foreign employment, the petitioner stated in its initial support letter that the beneficiary's responsibilities included supervising five supervisory and managerial employees. However, the record is not clear as to whether these subordinates were actually managerial or supervisory, as position titles alone are insufficient. Additionally, the petitioner claimed that the beneficiary directed several essential functions including preparing the budget, overseeing general accounting, and managing fixed assets and inventory. It is noted that in claiming that the beneficiary was a function manager, the description of job duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. Here, the beneficiary's duties with regard to budget preparation included developing overhead department information, preparing monthly reports, calculating currency impact, and giving quarterly presentations regarding the above. With regard to general accounting, the beneficiary's duties included analyzing and reconciling the general ledger, solving problems concerning financial reporting, and conducting analysis of the fiscal climate in the market. Lastly, with regard to managing the foreign entity's fixed assets and inventory, the beneficiary maintained valuation and depreciation schedules and conducted audits. These job duties indicate that the beneficiary performed the underlying duties related to the function. The petitioner has failed to establish how these duties can be deemed managerial or executive.

Similarly, the petitioner's description of the beneficiary's proposed employment also consists of various non-qualifying operational tasks, including preparation of financials statements, conducting analysis to determine and help resolve various problems, maintaining a cost accounting system and ledger, analyzing and reconciling the general ledger, and analyzing and solving problems with regard to financial reporting, budgets, and cost accounting issues. The petitioner also indicated that the beneficiary would be responsible for conducting business audits, doing cost accounting, and developing information needed for proper budget preparation. As with the beneficiary's position abroad, this description of duties is not indicative of a function manager. Rather, it is indicative of a professional who performs the duties associated with a key function. It appears that the beneficiary's primary concern is to meet the petitioner's financial services needs. While the tasks the beneficiary performs and would perform may be essential, they are merely tasks that are necessary to provide services and cannot be deemed as qualifying within a managerial or executive capacity.

Additionally, the petitioner claims that the beneficiary manages an accountant, a purchase manager, and five cashiers. However, the five cashiers do not fall within the category of supervisory, professional, or managerial personnel. While the purchase manager has a managerial title, the organizational chart on record does not show this individual to be managing others. Therefore, it is unclear how the purchasing manager can be deemed a manager or a supervisor other than in position title. In light of the above, the AAO cannot conclude that the beneficiary would be employed by the U.S. entity in a qualifying managerial or executive capacity.

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). Therefore, based on the additional grounds of ineligibility discussed above, this petition cannot be approved.

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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.