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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**

B4

[REDACTED]

FILE:

[REDACTED]

OFFICE: TEXAS SERVICE CENTER

Date **AUG 02 2010**

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:

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was approved on June 26, 2003. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice of his intention to revoke the approval of the preference visa petition, and his reasons therefore. The director ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a limited liability company organized in the State of Texas. It seeks to employ the beneficiary as its chief executive officer (CEO) and managing director. 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 ultimately revoked approval of the petition based on the following independent grounds of ineligibility: 1) the petitioner failed to establish that it was a multinational entity at the time the Form I-140 was filed; 2) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer; 3) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; 4) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and 5) the petitioner failed to establish that it has maintained its ability to pay the beneficiary's proffered wage.

On appeal, counsel submits a brief disputing the five findings that served as the grounds for revocation of the approval. After a comprehensive review of the record, the AAO finds that the director failed to take proper notice of the foreign entity's name change, which resulted in two erroneous findings. Specifically, the director erred in concluding that the petitioner was not a multinational entity at the time of filing and that it failed to establish a qualifying relationship with the beneficiary's foreign employer. To the extent that the record indicates that the petitioner was a multinational entity and did establish a qualifying relationship with the beneficiary's foreign employer at the time of filing, the AAO hereby withdraws the first two grounds for the revocation.

## **I. The Law**

Regardless of these two errors, counsel's assertions make it necessary to point out that the petitioner's burden of proving eligibility is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1308 (9th Cir. 1984). Federal regulations affirmatively require an alien to establish eligibility for an immigrant visa up to and including 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.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary of Homeland Security may, *at any time*, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." (Emphasis added.)

Regarding revocation on notice, the Board of Immigration Appeals (the Board) has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

*Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

Therefore, counsel's contention that the foreign entity's current business operation "is legally irrelevant and an unlawful ground for petition [approval] revocation" is erroneous.<sup>1</sup> An approval may be revoked when a petitioner fails to maintain eligibility, even if eligibility was established at the time of filing, as long as the director has "good and sufficient cause." As will be discussed, the director had good and sufficient cause to both issue the notice and ultimately revoke the approval of the visa petition.

Accordingly, the AAO will consider the remaining issues that served as grounds for revocation. Where applicable, the AAO will examine certain relevant factors not only to determine whether eligibility was established at the time of filing, but also to determine whether the petitioner continued to maintain eligibility after approval of the instant petition.

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.

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<sup>1</sup> See appellate brief, p. 13, no. 24.

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.

## **II. Managerial or Executive Capacity**

First, the AAO will examine the record to determine whether the beneficiary was employed abroad in a qualifying managerial or executive capacity and whether the petitioner provided sufficient evidence to establish that it was ready to employ the beneficiary in the United States in a qualifying managerial or executive capacity at the time of filing.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;

- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the Form I-140, the petitioner submitted a document titled "Addendum," in which the beneficiary's position as the foreign entity's director of marketing and sales was described as being at the senior level within the organizational hierarchy. The petitioner stated that the beneficiary "had full managerial control and full decision making responsibilities for [the foreign entity]'s marketing and sales division." The petitioner also provided the foreign entity's organizational chart to further illustrate the beneficiary's position with respect to others in the organization. While the Addendum referred to a separate letter describing the beneficiary's foreign employment, a review of the record shows that the supplemental document was a photocopy of a previously submitted letter from the beneficiary's nonimmigrant visa petition. It is noted that the date on the letter was clearly altered and no information was submitted to establish who altered the date or the reason for the alteration. The AAO further notes that the letters provide no new evidence about the beneficiary's employment abroad. Rather, the letter merely reiterated that the beneficiary was employed abroad as the director of marketing and sales and that the beneficiary had managerial control and decision-making responsibility in his senior-level position.

With regard to the beneficiary's proposed position with the U.S. entity, the petitioner stated in the Addendum that the beneficiary "directs and coordinate[s] marketing and customer needs for our expansion into U.S. markets." The petitioner further stated that the beneficiary supervises and controls subordinate employees, which includes hiring and firing, and manages an essential function within the organization. The petitioner indicated that the beneficiary would have the discretionary authority to take any actions necessary to ensure the successful development of the U.S. entity. Again, although the petitioner indicated that additional information was included in a separate letter, the petitioner only submitted the previously referenced photocopy of the L-1 support letter with the altered date. It is noted that the photocopied letter merely stated the same information as that provided in the more recent support letter. No new information was provided.

Accordingly, the director issued a notice of intent to revoke (NOIR), dated April 14, 2009, instructing the petitioner to provide its state quarterly tax returns for all four quarters during the year prior to the filing of the petition up through the date of the NOIR and to supplement the record with descriptions of the beneficiary's specific job duties with the foreign and U.S. entities. The director also instructed the petitioner to list each of the beneficiary's job duties and to assign the percentage of time he allocated to the tasks within his prior position with the foreign entity and the time he would allocate to the tasks in his proposed position with the U.S. entity.

The petitioner responded in the form of a letter that restated each item in the NOIR. Although the petitioner restated the portion of the NOIR that requested information about the beneficiary's employment with the foreign entity, the petitioner did not actually provide the requested information and instead only included information about the beneficiary's position as CEO, which is the position title he has assumed within the U.S.

entity. It is noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

With regard to the beneficiary's position with the U.S. entity, the petitioner provided the following list of duties and responsibilities: supervise and direct the sales staff, call customers and suppliers, manage the office and warehouse employees, manage cash flow, coordinate business with the South African counterpart, and manage orders and purchases. The petitioner also provided the following general percentage breakdown:

10% is spent on supervision and direction of sales staff, 15% is spent on calls to customers and suppliers, 15% is spent on managing the warehouse staff and coordinating with management in South Africa, and 35% is spent on managing cash flow, orders, and purchases.

In discussing the employees who report directly to the beneficiary, the petitioner listed an internet sales and marketing employee, an employee in charge of office work and inventory control, two salesmen, and two warehouse employees for a total of six employees. The chart also shows that, with the exception of one sales and two warehouse employees, the remaining positions were directly subordinate to and under the supervision of the beneficiary.

However, there is conflicting and inconsistent evidence that seriously undermines the credibility of the petitioner's claimed organizational structure. The petitioner provided several of the requested quarterly wage reports, including the one that accounted for the quarter during which the petitioner filed its Form I-140. It is noted that the relevant wage report for the fourth quarter shows that the petitioner had a total of two employees, including the beneficiary, at the time the petition was filed. The petitioner also provided the 2007 employer quarterly reports (IRS Form 941) for the second, third, and fourth quarters. All three reports indicate that the petitioner paid wages to two employees during each quarter. Although the petitioner provided IRS Forms W-2 for 2007 showing that it paid wages to four employees throughout the year, the petitioner's internally generated state tax report that accounts for the same three quarters of 2007 corroborates the information that was provided in the IRS Forms 941, indicating that the petitioner paid wages to no more than two employees at any time during that quarter.

The petitioner also supplemented the record with an IRS Form 941 for the 2006 fourth quarter, which showed that the petitioner paid wages in the amount of \$12,161.59 to a single employee. This amount matches the amounts shown in the beneficiary's 2006 Form W-2 and the petitioner's 2006 Form W-3, thereby indicating that the petitioner paid wages to only a single employee and only during the final quarter of the 2006 tax year. It is unclear who was operating the petitioning entity during the three remaining quarters of 2006.

With regard to the 2005 tax year, the petitioner provided an internally generated payroll summary and employee tax report for the third quarter, showing that four employees received wages during that time period and that the total amount of wages paid to all four employees was \$1,958.23. This information is reiterated in copies of the petitioner's quarterly wage report and IRS Form 941 for the third quarter of 2005. As the petitioner did not provide any documents accounting for any quarters within the 2005 tax year or any annual tax documents, such as an IRS Form W-3 or IRS Forms W-2, the AAO is unable to determine whether the petitioner paid wages to any employees during the remaining three quarters of 2005. Furthermore, in light of

the limited amount paid in wages during this single quarter, it does not appear that the petitioner employed anyone on a full-time basis, as none of the employees received wages that would be commensurate with those of full-time employees.

In an effort to account for wages paid during 2004, the petitioner provided copies of five different Forms W-2 issued to [REDACTED] in the amount of \$6,435.40; [REDACTED] in the amount of \$2,814.67; [REDACTED] in the amount of \$250.50; [REDACTED] in the amount of \$7,338.75; and the beneficiary in the amount of \$24,000. With the exception of the beneficiary, these salaries fail to suggest that anyone other than the beneficiary was employed for the entire year, or, in the alternative, that any employee was employed on a full-time basis. The petitioner also provided an IRS Form 941 for the 2004 fourth quarter showing that a total of \$24,440 in wages had been paid. The petitioner's IRS Form 941 for the second quarter shows that two employees were paid wages and the petitioner's first quarterly wage report for 2004 identifies three employees, one of whom was paid only \$250.

Lastly, the petitioner's tax documentation for 2003 includes five IRS Forms W-2 showing that [REDACTED] was paid \$2,107.50; [REDACTED] was paid \$16,530; [REDACTED] was paid \$2,547; [REDACTED] was paid \$10,000; and the beneficiary was paid \$20,000. The petitioner also provided its 2003 fourth quarterly wage report, which identifies a total of three employees, but indicates that only two employees were paid wages during each of the three months that comprise the fourth quarter.

After a comprehensive review of the petitioner's documents, the director issued a decision dated June 5, 2009 revoking the approval of the petitioner's Form I-140. The director summarized the organizational hierarchy that was depicted in the petitioner's organizational chart and repeated the percentage breakdown that the petitioner used to describe the beneficiary's employment with the U.S. entity. Despite the beneficiary's placement within the petitioner's organization, the director concluded that the job duties listed under the beneficiary's position with the U.S. entity do not fit the criteria that are included in the statutory definitions for either managerial or executive capacity. The director further pointed out that none of the submitted tax documents corroborate the organizational hierarchy that was illustrated in the organizational chart, which was submitted in response to the NOIR.

On appeal, counsel submits a detailed brief in which she objects to U.S. Citizenship and Immigration Services' (USCIS) decision to revoke the approval. Counsel first points to USCIS's two prior approvals of nonimmigrant petitions that sought L-1 employment of the beneficiary. The AAO notes, however, that each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. USCIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. The prior nonimmigrant approvals do not preclude USCIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

The approval of a nonimmigrant visa petition in no way guarantees that USCIS will approve an immigrant visa petition filed on behalf of the same beneficiary. In fact, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve

applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Finally, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Second, counsel asserts that, despite the petitioner's compliance with the director's request for additional evidence via the NOIR, such a comprehensive request was unlawful. Counsel's assertions—one arguing that the director's request was unlawful and the other claiming that the petitioner fully complied with the director's request—are without merit. First, once again, section 205 of the Act states: "The Secretary of Homeland Security may, *at any time*, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." (Emphasis added.)

With respect to the propriety of the director's request, 8 C.F.R. § 103.2(b)(8) clearly establishes that the director has the discretionary authority to request both missing initial evidence and any other evidence deemed necessary to establish eligibility. Moreover, the petitioner has the choice not to submit any evidence thought to be irrelevant and await a final decision based on the evidence of record. In the present matter, the evidence thus far discussed has been found to be highly relevant with regard to several eligibility factors. The petitioner's failure to submit certain requested documentation, as will be addressed below, precludes the AAO from examining all relevant factors. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Additionally, with regard to counsel's assertion that the petitioner complied with all of the director's requests, this claim is not corroborated by the evidence of record. Namely, the petitioner provided no further information about the beneficiary's overseas employment, preventing USCIS from determining whether the beneficiary was employed abroad in a qualifying managerial or executive capacity. Additionally, the petitioner failed to provide the requested annual and quarterly tax information which would have corroborated the organizational hierarchy represented in the organizational chart that was submitted in response to the NOIR. Thus, the record lacks the evidence needed to examine whether the petitioner's organization required the beneficiary's services in a primarily managerial or executive capacity or that the petitioner was able relieve the beneficiary from having to primarily perform non-qualifying tasks given the petitioner's staffing structure at the time of filing.

The petitioner has provided no legal authority to dispute the relevance of the petitioner's staffing both at the time of filing and in the years following the approval of the petition.<sup>2</sup> The AAO notes that while due

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<sup>2</sup> A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the

consideration is given to a variety of factors, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003).

The failure to submit the requested tax and quarterly wage information further raises doubts as to whether the beneficiary allocated the primary portion of his time to the performance of qualifying managerial or executive tasks. Specifically, the petitioner stated that 15% of the beneficiary's time has been allocated to calling customers and suppliers, both of which are daily operational tasks and therefore non-qualifying. The petitioner also stated that 10% of the beneficiary's time has been spent supervising and directing a sales staff and 15% has been spent managing warehouse staff. Thus, while the petitioner attributed 25% of the beneficiary's to overseeing sales and warehouse staff, it has failed to provide sufficient evidence to establish that such a staff existed at the time of filing and subsequent to the petition's approval. Similarly, the petitioner's claim that 25% of the beneficiary's time has been spent managing office staff and coordinating with employees in South Africa requires evidence of an office staff. Although the petitioner indicated that an undefined portion of the beneficiary's time would be attributed to "coordinating management in South Africa," no explanation was provided to establish what specific tasks are involved in such coordinating or that such tasks would fall within a managerial or executive capacity.

Moreover, even if the petitioner has employed some sales, warehouse, and office staff, there is no evidence that such employees can be deemed as supervisory, professional, or managerial personnel. Although the beneficiary is not required to supervise personnel, if it is claimed that the managerial duties involve the supervision of employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* section 101(a)(44)(A) of the Act.

Given the above discussion of the numerous inconsistencies and deficiencies, the AAO finds that the petitioner has failed to establish that it had at the time of filing and currently has the capability to relieve the beneficiary from having to primarily perform non-qualifying tasks or that it had and currently has a need for the beneficiary's services within a qualifying managerial or executive capacity. Rather, the inconsistent evidence and deficiencies indicate, at best, that the petitioner has been inconsistent in its hiring practices and personnel needs and that such inconsistency has resulted in the petitioner's continued need to use the beneficiary's services in a non-qualifying capacity. In the worst light, the inconsistencies lead the AAO to conclude that the asserted facts regarding the petitioner's organizational structure are not true. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. The AAO will not give any weight to the inconsistent evidence. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. INS*,

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Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. If an organization with limited staffing can justify its need for an employee who will perform primarily managerial or executive level job duties, then that I-140 visa petition is more likely to be approved.

876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Upon review, the record shows that the director properly considered the beneficiary's proposed job description, an analysis that is required by regulation and supported by published case law. See 8 C.F.R. § 204.5(j)(5); see also *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Considering the submitted evidence, the record does not establish that the petitioner had sufficient support personnel, either at the time of filing or after the petition was approved, to ensure that the primary portion of the beneficiary's time would be allocated to performing tasks within a qualifying managerial or executive capacity. 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).

In the instant case, neither the current record nor the record at the time the Form I-140 was filed establishes the petitioner's ability to employ the beneficiary within a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

With regard to the beneficiary's employment abroad, as previously stated, the petitioner failed to provide requested information about the beneficiary's job duties during his position abroad. As such, the AAO finds that the petitioner has failed to overcome the director's finding that the beneficiary was not employed abroad in a qualifying managerial or executive capacity. For this additional reason, the petition may not be approved.

### III. Ability to Pay

The remaining issue in this proceeding is whether the petitioner established that it maintained its ability to pay the beneficiary's proffered wage after the petition was approved.

The regulation at 8 C.F.R. § 204.5(g)(2) states the following, in pertinent part:

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.

It is noted that 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 legacy 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.

In the present matter, the NOIR dated April 14, 2009 instructed the petitioner to provide additional evidence, including federal tax returns, audited financial statements, and/or evidence establishing that the beneficiary was actually paid the proffered wage from 2002 through 2008. After reviewing the documents submitted in response to the NOIR, the director determined, based on the beneficiary's 2002 IRS Form W-2 and the combined information in the beneficiary's 2004 IRS Form W-2 and the petitioner's 2004 federal tax return, that the petitioner provided sufficient evidence of its ability to pay the proffered wage for 2002 and 2004. The director determined that the tax documents that were submitted for 2003 and for 2005-2008 failed to establish the petitioner's ability to pay during the specified five-year period.

The record shows that while the petitioner provided its federal tax returns for 2007, no other tax returns were provided for the remaining four years of the relevant five-year time period. This factor, coupled with the fact that there is no evidence to establish that the beneficiary was in fact paid the proffered wage during the relevant time period, led the director to conclude that the petitioner did not meet the criteria set forth in 8 C.F.R. § 204.5(g)(2) in that the petitioner did not consistently maintain its ability to pay in the years following the approval of the petition.

On appeal, counsel asserts that USCIS does not have the legal authority to revoke a petition based on the petitioner's failure to establish eligibility to pay. In support of this argument, counsel invokes protection under the American Competitiveness in the Twenty-First Century Act (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000). Section 106(c) of AC21 amended section 204 of the Act. The "portability provision" at section 204(j) of the Act provides that "an individual whose application for adjustment of status pursuant to section 245 has been filed and remained adjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed."

Counsel's argument, however, is without merit, as there is no indication that the provisions of section 204(j) of the Act apply to the matter at hand. First, counsel has presented no evidence to establish that the beneficiary has changed jobs or employers, either one of which is an event that must have occurred in order to apply the benefits of section 204(j) of the Act. Second, the statutory benefits of section 106(c) of AC21 apply only in the event that the petitioner can establish that the Form I-140 was valid at the time of approval, as it must first be valid in order to "remain valid." Counsel's interpretation of the provisions inherently implies that USCIS would be unable to revoke approval of a Form I-140 petition under certain circumstances, even where the petition had been erroneously approved. Such an interpretation is incorrect according to the holding in *Jugendstil, Inc. v. USCIS*, 571 F.3d 881, 889 (9<sup>th</sup> Cir. 2009), where the court established that "the Portability Provision does not

affect the agency's revocation authority, which permits revocation 'at any time' for 'good and sufficient cause.'"

Additionally, counsel's reliance on the beneficiary's personal loans to the company, demonstrated by the petitioner's bank records, is misplaced. While 8 C.F.R. § 204.5(g)(2) allows additional material to be presented "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or would, if presented, paint an inaccurate financial picture of the petitioner. Nor has the petitioner articulated a basis for considering elements that fall outside of a petitioner's net income and net current assets, such as a documented potential for greater revenues, as allowed by *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Finally, USCIS may not consider the assets of the beneficiary when reviewing the petitioning entity's ability to pay the proffered wage. The point of the ability to pay analysis is to ensure that the job offer is real and that the employer has an actual ability to employ the beneficiary. The beneficiary has no legal obligation to pay his own salary. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Upon review, the petitioner has not established that the petitioner maintained the ability to pay the proffered wage of \$48,000 per year. As it relates to the issue of ability to pay, the AAO affirms the analysis conducted by the Director, Texas Service Center. See Director's Decision, dated June 5, 2009, pages 6-7.

Upon review, the director had good and sufficient cause to revoke the approval of this petition. The petition will remain revoked 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.