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



U.S. Citizenship
and Immigration
Services

B4

DATE: FEB 07 2012 OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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)

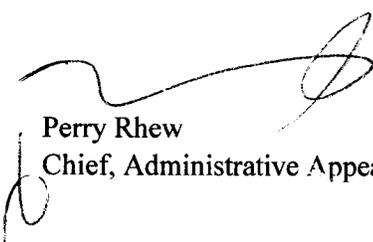
ON BEHALF OF PETITIONER:

[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 \$630. 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 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 United States branch office of a [REDACTED]. The petitioner seeks to employ the beneficiary as its president. 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 that it has the ability to pay the beneficiary's proffered wage and denied the petition on that basis. On appeal, counsel disputes the director's conclusions and submits a supporting statement along with supplemental documents in an effort to overcome the basis for denial.

I. The Law

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.

II. Ability to Pay the Proffered Wage

The primary 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:

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.)

The petitioner indicates on the Form I-140, at Part 6, that it will pay the beneficiary \$1,442.30 per week, or approximately \$69,230 per year. In a letter accompanying the petition, counsel for the petitioner indicates that the foreign company "has sufficient profits to pay [the beneficiary] an annual salary of at least \$75,000."

In support of the Form I-140, counsel for the petitioner submitted a statement dated [REDACTED] in which he indicated that the petitioner submitted the foreign entity's income statements from [REDACTED] establish the petitioner's ability to pay. Counsel also referred to [REDACTED] statement from the [REDACTED] finance manager, who stated that the [REDACTED] has over 200 employees and netted a profit of \$2 million [REDACTED] such that enables it to pay the beneficiary's proffered wage of \$75,000 per year. Counsel also provided information about [REDACTED] to have acquired a controlling interest, thus making the [REDACTED] subsidiary. See 8 C.F.R. § 204.5(j)(2) (defining "subsidiary"). Finally, counsel stated that the U.S. subsidiary had been doing business for the requisite one-year minimum and provided supporting evidence in support of his assertions with regard thereto.

As a preliminary matter, the AAO notes that [REDACTED] is not the petitioning entity in this proceeding. The petitioner completed Part 1 of the I-140 petition to clearly indicate that the intended employer is the "[REDACTED] Regardless of any ownership interest in [REDACTED] USCIS must examine whether the prospective United States employer, i.e., the U.S. branch office of the beneficiary's foreign employer, maintains the ability to pay the proffered wage. Accordingly, any supporting documentation that addresses the U.S. subsidiary's ownership or business transactions will not be addressed in this proceeding. Only those documents that pertain specifically to the beneficiary's [REDACTED] and the [REDACTED] U.S. branch office will be addressed. As the petitioner's original supporting documentation pertained primarily to matters concerning the U.S. subsidiary rather than those concerning the U.S. branch office, the director determined that the petitioner did not submit sufficient evidence to warrant approval of the petition.

The record shows that on [REDACTED] the director issued a request for additional evidence (RFE) instructing the petitioner to provide, in part, evidence of its ability to pay the beneficiary's [REDACTED] Specifically, the director asked the petitioner to submit any one of the following documents: a copy of its annual federal corporate tax return with all schedules attached, a copy of its annual report, a copy of an audited or reviewed financial statement, or, if the petitioning corporation employs 100 or more workers, a written statement from a financial officer of the organization which establishes the prospective employer's ability to pay the beneficiary's proffered wage. The director acknowledged the petitioner's submission of financial documents regarding the foreign component of the petitioning entity. However, he explained that

pursuant to regulatory provisions, evidence of the petitioner's ability to pay must pertain to the U.S. branch where the beneficiary would be employed.

In response, counsel provided a statement [REDACTED] contending that the petitioner is a branch of the [REDACTED] and therefore is not a separate entity whose finances have to be reviewed separately from those of [REDACTED]. Counsel submitted an excerpt from an unidentified and unpublished AAO decision to support his reliance on the foreign entity's finances as sufficient evidence of the ability to pay. Counsel has not provided sufficient information to allow the AAO to identify the unpublished decision. Nor has counsel established that the facts of the instant petition are analogous to those in the unpublished decision. The AAO will not give this unpublished decision any weight. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

As additional supporting evidence of the ability to pay, the petitioner submitted a [REDACTED] statement from the financial manager, who again stated that [REDACTED] has over 200 employees and further indicated that in the [REDACTED] fiscal year the company had gross earnings of \$3.5 million. The petitioner also provided an unaudited income statement and balance sheet for [REDACTED] well as [REDACTED] accompanied by uncertified translations of what the petitioner held out to be the beneficiary's pay stubs from [REDACTED]

Lastly, the petitioner provided a [REDACTED], which identified the petitioner as [REDACTED] corporation involved in investment management. It is noted that the petitioner indicated "zero" as the total gross sales or amount of business transacted in [REDACTED]

After reviewing the submitted documentation, the director determined that the petitioner failed to establish that it had the ability to pay the beneficiary's proffered wage at the time of filing and therefore denied the petition in a decision dated [REDACTED]. The director based his determination on the lack of evidence establishing that the U.S. organization, rather [REDACTED] component, had the ability to pay. Specifically, the director focused on the fact that the petitioner's primary evidence consisted of an income statement and balance sheet, both of which were prepared [REDACTED]

On appeal, counsel challenges the basis for the director's finding, pointing out that by virtue of being the U.S. branch of [REDACTED] rather than a separately incorporated U.S. entity, the petitioner can introduce the finances of the entire foreign organization as evidence of its ability to pay.

Upon review, the petitioner has not established that it has the ability to pay the proffered wage of either \$69,230 or \$75,000.

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary.

In the present matter, evidence of the beneficiary's employment with the foreign branch office consists of [REDACTED] which, according to the accompanying translations, represent the beneficiary's pay stubs. Contrary to 8 C.F.R. § 103.2(b)(3), however, the submitted translations are not certified as complete and accurate, nor does the translator certify that he or she is competent to translate the documents to the English language. Indeed, upon review, it appears that a significant amount of text is left untranslated, giving the appearance that the translations are incomplete. Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

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).

The petitioner in the present matter, however, has not provided any federal tax returns to allow the AAO to conduct an analysis of its net income. The record contains no annual reports or audited financial statements to show the petitioning branch office's earnings. The AAO notes that [REDACTED] Property Return, Form 1, indicates that the petitioner reported "zero" as the total gross sales or amount of business transacted [REDACTED].

Lastly, the AAO acknowledges the numerous statements from [REDACTED] financial manager, who attested to the petitioner's ability to pay the beneficiary's proffered wage. However, the regulations at 8 C.F.R. § 204.5(g)(2) clearly state that evidence in this form can only be considered for companies employing 100 or more workers. Although the financial manager claims that the foreign entity employs in excess of 200 workers, no evidence has been provided to corroborate this claim. As the record does not contain evidence establishing that the foreign entity has at least 100 employees, as claimed, the statement from [REDACTED] entity's financial manager cannot be deemed as sufficient proof of the petitioner's ability to pay.

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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Furthermore, the statements from the foreign entity's financial manager relate to the [REDACTED] and [REDACTED]. The AAO again emphasizes that it is the *prospective United States employer* that must establish its ability to pay the proffered wage. In analyzing a petitioner's ability to pay the proffered wage, the fundamental focus is whether the prospective employer is making a "realistic" or credible job offer and has the financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm'r 1977).

In the present matter, the petitioner has submitted no evidence to establish that the prospective [REDACTED] – the branch office – has the realistic financial ability to directly remunerate the beneficiary. Normally, as required by regulation, this evidence would be in the form of annual reports, federal tax returns, or audited financial statements. In the case of a branch office, the AAO would accept additional types of evidence such

as bank statements; state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies of IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in [REDACTED] and finally, any state tax forms that demonstrate that the petitioner is a branch office of a [REDACTED] entity. The petitioner submitted scant – if any – evidence of the branch office's ability to pay the proffered wage. Instead, the one state tax form indicates that the petitioner had “zero” sales [REDACTED]

Accordingly, in light of the lack of sufficient corroborating evidence submitted to establish that the petitioner meets the provisions of 8 C.F.R. § 204.5(g)(2), the AAO cannot approve the instant petition.

III. Beyond the Decision of the Director

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, the record lacks substantive job descriptions establishing what job duties the beneficiary performed during his employment abroad and the job duties he would perform in his proposed position with the U.S. branch office. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Second, the record lacks evidence to establish that the petitioner is actually doing business in the United States. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means “the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.” In the present matter, the petitioner submitted [REDACTED] Personal Property Return, Form 1, indicating that the petitioner had “zero” [REDACTED]. The petitioner did provide documents pertaining to its claimed U.S. subsidiary—Pacific Cuisine, Inc.—to show that it is doing business in the United States. However, as previously pointed out, [REDACTED] is not the beneficiary's prospective U.S. employer. In order to qualify for the immigration benefit sought herein, the petitioner must establish that it is doing business in the United States. Here, the record contains no evidence to establish that the U.S. branch office of the beneficiary's foreign employer is providing goods and/or services on a regular, systematic, and continuous basis. At most, the petitioner's operation appears to be “the mere presence of an agent or office.” *Id.*

Third, even if the AAO were to consider the business activities of [REDACTED] the petitioner has submitted insufficient and conflicting information regarding its ownership of that corporation. As evidence of the ownership of [REDACTED] the petitioner submitted stock certificates numbered one, two, and three. Stock certificates numbered two and three are endorsed on the back, without a date, representing that the share certificates were transferred to [REDACTED]

As evidence of the petitioner's ownership, however, the petitioner submitted a letter from [REDACTED] of [REDACTED] stating that:

[REDACTED] which held and owned 65% of the outstanding shares of stock in [REDACTED] transferred all of its shares of stock in [REDACTED] effective [REDACTED] I [REDACTED] presently own 35% of all issued shares in [REDACTED] and as President certify to these facts.

The petitioner submitted no evidence to support the claim that [REDACTED] transferred all of its shares in [REDACTED]. Again, 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. at 165.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (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.

IV. Conclusion

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.