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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

[redacted]

DATE: FEB 2 1 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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 Venezuelan entity that previously employed the beneficiary abroad. Although the foreign entity filed the immigrant visa petition, it appears to have filed the petition on behalf of its Florida subsidiary so that it might employ the beneficiary in the position of executive vice 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.

In support of the Form I-140 the petitioner, the beneficiary's foreign employer, submitted a statement along with the U.S. entity's corporate and tax documents.

After reviewing the record, the director determined that the petition did not warrant approval. Accordingly, the director issued a request for additional evidence (RFE) dated November 10, 2009, instructing the petitioner to provide evidence establishing that the prospective U.S. employer has the ability to pay the beneficiary's proffered wage as of the date the petition was filed. The director stated that showing that the beneficiary has been paid the proffered wage could serve as evidence of the U.S. entity's ability to pay. In the alternate, the petitioner was instructed to submit the U.S. entity's annual reports, federal tax returns, or audited financial statements.

The response consisted of evidence establishing that the petitioner, i.e., the foreign entity, has the ability to pay the beneficiary's proffered wage.

After reviewing the evidence on record, the director determined that the petitioner failed to establish that the prospective U.S. employer has the ability to pay the beneficiary's proffered wage. The director therefore issued a decision dated March 4, 2010 denying the petition.

On appeal, counsel disputes the director's decision and submits a supporting statement along with supplemental documents in an effort to overcome the basis for denial.

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 the present matter is whether the petitioner has provided sufficient evidence to establish that the beneficiary's prospective U.S. employer has the ability to pay the 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).

In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (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.

The petitioner indicated at Part 6, Item 9 of the Form I-140 that the beneficiary will be paid a yearly salary of $60,000. The petitioner provided no evidence to establish that the beneficiary has been compensated the proffered wage. The U.S. entity's 2008 tax return, even if it contained sufficient evidence of the prospective U.S. employer's ability to pay, is irrelevant in the present matter because 8 C.F.R. § 204.5(g)(2) requires that the ability to pay be established at the time the priority date is established, i.e., as of the date the Form I-140 is filed. The petition was filed in 2009. Therefore, any document pertaining to the U.S. company's finances prior to the date the Form I-140 was filed would not establish that company's ability to pay.

Although the AAO may examine the prospective employer's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses, as an alternate means of determining the petitioner's ability to pay, the record in the present matter does not contain the U.S. employer's 2009 tax return, which would determine how much net income the U.S. entity had at the time the Form I-140 was filed.

Additionally, while the record shows that the petitioner has provided the U.S. entity's financial statement as of December 31, 2009, the April 19, 2010 statement from a certified accountant indicates that the financial statement was not reviewed or audited and therefore does not meet the regulatory provisions specified above.

On appeal, counsel contends that U.S. Citizenship and Immigration Services (USCIS) must follow the precedent holding in *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967), where the Regional Commissioner considered the "totality of the circumstances," in determining that the petitioner had established its ability to pay. Specifically, the Regional Commissioner considered an immigrant visa petition which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. *Id.* The district director denied the petition after determining that the beneficiary's annual wage of $6,240 was considerably in excess of the employer's net profit of $280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As indicated in *Matter of Sonegawa*, USCIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, or any other evidence that USCIS deems to be relevant to the petitioner's ability to pay the proffered wage.

Counsel urges the AAO to consider the petitioner's relatively early stage of development and to apply the reasoning employed by the Regional Commissioner in *Matter of Sonegawa. Id.* However, many of the relevant facts in *Matter of Sonegawa* are significantly different from those in the instant matter. More specifically, the petitioner in *Matter of Sonegawa* had been doing business for eleven years and also had a business reputation, clientele, and a history of paying wages, all of which could be used to estimate future earnings and the ability to pay the proffered wage. *See* 12 I&N Dec. 612. It is noted that none of these factors are true of the U.S. employer in the present matter. Thus, despite any evidence showing that the foreign petitioner has and would continue to supply all the funding necessary to financially support the U.S. business operation, the fact remains that the prospective U.S. employer must establish its own ability to pay the beneficiary's proffered wage, notwithstanding the ability of the foreign entity to meet that burden. *See* 8 C.F.R. § 204.5(g)(2).

Lastly, in a statement dated April 28, 2010 from the foreign entity's chief financial officer, [redacted] claimed that the petitioner and the U.S. entity "have approximately 900 employees and over 130 indirect employees in the United States." Similar information was reiterated in the April 28, 2010 written statement of [redacted], the U.S. entity's chief financial officer, who also indicated that between them, the foreign petitioner and the prospective U.S. employer have more than 100 employees in the United States. Although the regulations at 8 C.F.R. § 204.5(g)(2) clearly state that evidence in the form of a statement from a company financial officer can be considered for companies employing 100 or more workers, no evidence has been provided that the prospective U.S. employer has 100 or more employees, which would allow consideration of its financial officer's written statement. 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)). The AAO also points out that directed the AAO's attention to an audited annual report. However, as indicated above, the statement from the certified public accountant who wrote the April 19, 2010 statement, confirmed that the U.S. entity's financial report was not audited or reviewed. Therefore, at least one of the facts asserted by in her statement is contrary to the evidence on record.

While indicated in her April 28, 2010 statement that the foreign petitioner has been and will continue to pay the beneficiary's salary pursuant to a contractual agreement between it and the beneficiary's U.S. employer, the AAO again emphasizes the regulatory provision that requires the *prospective United States employer* to establish its ability to pay the proffered wage. In analyzing the 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, there is no evidence that the U.S. employer was able to pay the beneficiary's proffered wage at the time the petition was filed. On the basis of this conclusion, the instant petition cannot be approved.

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).

While not addressed in the director's decision, the beneficiary's foreign employer, which is separate from the U.S. entity that seeks to employ the beneficiary in the United States, is not qualified to file a Form I-140 on the beneficiary's behalf. Unlike the L-1A nonimmigrant visa classification, only the U.S. employer can file the Form I-140 visa petition on behalf of the beneficiary. Companies organized under the laws of a foreign country may file such a petition if it is specifically filed by a qualified branch office of such an entity, as opposed to the foreign office. The express provisions of 8 C.F.R. § 204.5(j)(1) state: "A United States employer may file a petition on the Form I-140 . . . ." Only a U.S.-based branch office, affiliate, or subsidiary of a foreign organization may file such a petition. *Matter of A. Dow Steam Specialities, Ltd.*, 19 I&N Dec. 389 (Comm'r 1986); *see also*, *Matter of Thornhill*, 18 I&N Dec. 34 (Comm'r 1981) (denying an immigrant visa petition because the status of the petitioner was neither settled, stabilized, nor permanent).

As previously noted, the petitioner in the present matter is not the United States employer, but rather the foreign entity that employed the beneficiary abroad prior to his entry to the United States to be employed by the U.S. entity. The instant Form I-140 was filed by an entity that is not eligible to file it. The petition cannot be approved for this additional reason.

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.