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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: JUN 19 2012 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 Florida company engaged in antique restoration services and commercialization of antique goods, and it 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.

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 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 that it will pay the beneficiary \$28,000.00 per year. On the Form I-140, the petitioner also indicates that the petitioner's gross annual income is \$216,081.31, the net annual income is \$22,589.35, and it currently employs 5 individuals. 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.

The petitioner did not submit any documentation evidencing that it paid the beneficiary's proffered salary of \$28,000 per year. The petitioner did not provide paystubs or Form W-2 to indicate the salary received by the beneficiary. As an alternate means of determining the petitioner's ability to pay, the AAO will examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on net income shown 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 submitted an unaudited profit and loss statement for August 1, 2007 through July 23, 2008 that stated a net income of \$31,535.74, after payment of salaries in the amount of \$37,333.30. The petitioner also provided Form 1120, U.S. Corporation Income Tax Return, for 2007 that indicated gross receipts of \$31,746.00 and payment of salaries and wages of \$4,667.00.

In response to the director's request for evidence, the petitioner submitted an unaudited profit and loss statement for January through December 2009. This statement states a net income of \$9,863.66, after payment of salaries in the amount of \$55,999.96. The petitioner also submitted a second profit and loss statement from January 1 through September 14, 2009 that indicates a net income of \$11,348.73, after payment of salaries in the amount of \$34,666.64. The petitioner does not explain why it paid salaries and wages for three months from September until December 2009 in the amount of \$21,333.32, when it only paid \$34,666.64 in salaries and wages for the previous eight months. There is an increase in salaries and wages from September until December 2009 that is not explained. It is not clear if there was in fact an increase in salaries paid or if the financial statements are inaccurate. 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 petitioner also submitted Form 1120, U.S. Corporation Income Tax Return, for 2009 that indicated payment of salaries and wages in the amount of \$56,000.00. According to the petitioner's organizational chart, the petitioner employs the beneficiary, an operative manager, an administrative assistant, three restorer employees, a financial consultant, and a legal consultant. It is not clear how the petitioner can pay the beneficiary's salary of \$28,000 per year while also paying the salaries of five other employees and two consultants. As noted in the tax documents for 2009, the petitioner only paid \$56,000 in salaries and wages and only has \$9,861.00 in taxable income. Thus, the evidence is not sufficient to establish that the petitioner can pay the beneficiary's salary of \$28,000 per year and pay the salaries of all the employees listed on the organizational chart. 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)). 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.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision. 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. The petitioner has not established that the beneficiary was employed abroad or would be employed in the United States in a qualifying managerial or executive capacity. For this additional reason, the petition may not 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). 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.