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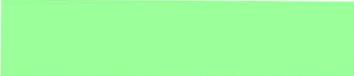
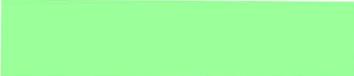
U.S. Citizenship
and Immigration
Services



DATE: DEC 24 2013

OFFICE: TEXAS SERVICE CENTER

FILE: 

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner is a New York branch office of an Israeli company that seeks to employ the beneficiary in the position of "VP Finance & Administration." 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 denied the petition concluding that the petitioner did not establish it had the ability to pay the proffered wage.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel submits a brief and additional documentation and asserts that the evidence of record establishes the petitioner's ability to pay the beneficiary's proffered wage.

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 or managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 sole issue addressed by the director is whether the petitioner established its ability to pay to the beneficiary the proffered wage of \$50,000 per year.

The regulation 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

A. Facts

The petitioner filed the immigrant visa petition on February 14, 2012. The petitioner, a diamond wholesaler established in 2003, stated that the beneficiary has been offered a full time position as its VP Finance & Administration. The petitioner indicated on the Form I-140, Immigrant Petition for Alien Worker, that it has a gross annual income of \$4,868,083 and a net annual income of -\$2,191.

The petitioner submitted the following documents relevant to its ability to pay the proffered wage in support of the petition: (1) a partial copy of its 2009 Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation, for the tax year ended on October 31, 2010; (2) a one-page profit and loss statement for the year ending December 31, 2010 for the Israeli company, prepared in the Hebrew language with an uncertified English translation; and (3) its U.S. bank statements for the months of December 2010 through August 2011. The parent company's profit and loss statement shows sales of \$4,868,083 and a net income of -\$2,191. The petitioning branch office's IRS Form 1120-F indicates \$341,943 in gross receipts or sales and a taxable income of -\$112,724.

On July 5, 2012, the director issued a request for evidence (RFE) in which he instructed the petitioner to provide, among other items, additional documentation to establish its ability to pay the beneficiary's proffered wage. Specifically the director requested one of three required types of initial evidence to include: (1) the petitioner's federal income tax return for 2011; (2) annual reports; or (3) audited financial statements. The director also requested evidence of wages paid to the beneficiary for 2011 and 2012.

In response to the RFE, the petitioner submitted the following documents: (1) its 2010 IRS Form 1120-F U.S. Income Tax Return of a Foreign Corporation; (2) IRS Forms 941, Employer's Quarterly Federal Tax Return, for the last three quarters of 2011 and first two quarters of 2012; (3) IRS Form W-2 showing wages paid to the beneficiary and pay statements for 2012 showing wages paid to the beneficiary's Israeli bank account by the foreign employer; (4) a 2011 audited financial statement for the foreign company; and (5) a mid-year balance sheet for the foreign employer signed by the CPA.

The petitioner's 2010 IRS Form 1120-F indicates gross receipts or sales of \$159,090 and taxable income of -\$87,346. In addition, the foreign entity's audited profit and loss statement shows that the company had a net loss for 2011.

In a letter accompanying the RFE response, counsel acknowledged the net loss reported on the petitioner's 2010 IRS Form 1120-F. Counsel asserted that the foreign entity pays the beneficiary the equivalent of \$1743.50 per month in Israel and has net assets in excess of the beneficiary's total proffered salary.

On January 9, 2012, the director denied the petition finding that the petitioner failed to establish its ability to pay the beneficiary's proffered salary of \$50,000. The director found that the petitioner did not pay the beneficiary the proffered wage and that neither the company's net income nor the company's net current assets as reflected on its IRS Form 1065 U.S. Return of Partnership Income for 2010 were sufficient to compensate for the difference between the wages paid and the proffered wage. Furthermore, the director observed that the foreign entity's audited financial statement showed negative value for net total assets.

On appeal, counsel for the petitioner explains that the foreign parent company paid the beneficiary wages of \$1,743.50 per month in Israel for a total of \$20,922 annually and that "combined with the U.S. salary beneficiary actually received \$25,880/year in compensation." Furthermore, counsel asserts that the petitioner's bank statements for 2011 show that the petitioner had sufficient liquid assets to pay the balance of the beneficiary's proffered salary. Finally, counsel states that the foreign entity's mid-year audited balance sheet for 2012 showed a net balance of over \$642,000.

The petitioner also provides the following documentation in support of the appeal: (1) copies of U.S. bank statements showing "more than sufficient funds in any given month to support the payment of the \$50,000/year salary offered"; (2) a CPA statement detailing the actual salary paid to the beneficiary in 2011 and 2012; (3) a letter from the petitioner's bank stating that it has a line of credit for \$1.2 million; (4) a letter from the petitioner's CPA stating that the company's profit for 2012 was \$339,000.; (5) an excerpt from the 2011 financial statement showing the company has an inventory of diamonds valued at \$1,385,844; and (6) IRS Form W-2 for 2012 showing that the beneficiary received \$18,850 in wages during the year in which the petition was filed.

B. Analysis

Upon review, the petitioner has not demonstrated its ability to pay the beneficiary's proffered wage as of the date the petition was filed.

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time of filing. 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 petitioner provided an IRS Form W-2 for 2012 reflecting its payment of \$18,850 in wages to the beneficiary. The beneficiary was paid an additional salary in Israel, but even if the two amounts were combined, the beneficiary's total salary payments were less than \$40,000 in 2012.

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).

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 petition's priority date falls on February 14, 2012 and the petitioner's tax return for 2011 or 2012 has not been made available, the AAO must examine the petitioner's tax return for 2010. The petitioner's IRS Form 1120-F U.S. Return of Foreign Corporation for 2010 (for the fiscal year ended on October 31, 2011) presents a net taxable income of -\$87,346. Therefore, for tax year 2010, the petitioner did not have sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage. The petitioner also provided a foreign audited profit and loss statement for the foreign company showing a new income of -\$5,037.

If the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

According to petitioner's Form 1120-F U.S. Income Tax Return of Foreign Corporation for 2010, Schedule L, the company has a net current assets of \$0 and current liability of \$0. Therefore, the petitioner cannot establish the ability to pay the proffered salary.

In response to the RFE, the petitioner provided the foreign company's audited financial statement for 2011. Under the subheading "Current Assets," the balance sheet shows cash, accounts receivable, and inventory for a sub-total of \$1,618,283 in assets. The statement has lines for "Client" and "Various debts due" without further explanation of the sources of the income. The balance sheet shows total current assets of \$2,020,686. The petitioner also shows "Current Liabilities" designated as "Banks," "Checks due" and "Suppliers," again without further explanation, for a total of \$2,050,411. The petitioner, therefore, shows total net assets of -\$29,725. Counsel asserted that the 2011 audited financial statement reflects net assets of \$642,587, but did not explain how this figure was derived, given that the sum of the line items categorized by the preparer as "Current Liabilities" was greater than the sum of those categorized as "Current Assets."

On appeal, the petitioner provides a letter from the petitioner's accountant showing a profit for the year of \$339,000. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Any document containing foreign language submitted to USCIS shall be accompanied by a full English translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. 8 C.F.R. § 103.2(b)(3). As there is no full English translation of an accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Therefore, the financial statements produced in the compilation are representations of management and are not reliable to demonstrate the ability to pay the proffered wage.

Finally, on appeal, counsel for petitioner asserts that USCIS may consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. Therefore, petitioner submits copies of bank statements showing balances in excess of the beneficiary's proffered wage each month. The petitioner's reliance on the balances in its bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "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 otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that is considered in determining the petitioner's net current assets.

The petitioner also provides a letter from a bank stating that it has a "credit facility" of \$1,200,000. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See* John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the petitioner's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall 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 U.S. employer – the U.S. branch office of the Israeli company– has the financial ability to directly remunerate the beneficiary at the proffered wage. Accordingly, the appeal will be dismissed.

III. Employment in a Managerial or Executive Capacity

Although not addressed by the director, a remaining issue in this matter is whether the petitioner established that the beneficiary has been employed abroad and would be employed in the United

States in a qualifying managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act.

The petitioner stated that the beneficiary was employed abroad and would be employed in the United States in the position of vice president of finance and administration. Counsel described her duties as follows:

1. Provide financial advice and direction, reporting to the President;
2. Develop and maintain external financial relationship with bankers, auditors, credit ratings, agencies, investment institutions and financial advisors;
3. Direct and supervise administrative and office management personnel for operations;
4. Prepare, produce, and review financial information for company reports, including presenting financial interpretation and analysis of reports and taxes and financial reporting purposes. Track income and expense, budgets and provide financial advice and direction;
5. Determine all financial requirements including cash management, investment and borrowing policies, cash management, accounting and financial reporting.

In the RFE, the director requested definitive statements addressing the beneficiary's specific daily job duties and the percentage of time spent on each duty in both the United States and Israel. The director also requested information regarding the beneficiary's subordinates in the United States and abroad, including their job titles, education level and whether they work full or part-time. The director observed that the initial evidence was "lacking detail."

In response to the RFE, the petitioner re-submitted essentially the same list of job duties provided in its initial letter. The petitioner indicated that the beneficiary allocates 20% of her time to develop and maintain financial relationships. The petitioner stated that the beneficiary allocates 30% of her time to direct and supervise administrative and operations personnel and added that this responsibility includes "review and approval of merchandise imported and exported; daily inventory control and final approval of all orders received," and "to approve or decline customer orders and terms of payment and delivery." The petitioner stated that the beneficiary allocates 30% of her time to preparing, producing and reviewing financial information, adding that this responsibility includes daily cash flow supervision and review and approval of expenses and payments. Finally, the petitioner stated that the beneficiary allocates 20% of her time to the previously stated responsibility for determining all financial requirements.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Here, while the petitioner has consistently stated that the beneficiary has been and will be responsible for overseeing the finances and administration of the company, it failed to provide a detailed description of the beneficiary's "specific daily duties" as expressly requested by the director. Specifics are clearly an

important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Any 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). The position description as written suggests that the beneficiary is involved in all financial functions and business transactions of the company and does not adequately distinguish between the qualifying and non-qualifying duties associated with these functions. For example, the petitioner has not explained what specific tasks the beneficiary performs related to "daily inventory control," "daily cash flow supervision," and tracking income expenses, and such duties are not clearly managerial or executive in nature.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The director provided the petitioner with an opportunity to identify the beneficiary's subordinates, their job titles and duties, their education levels, and to indicate whether they are full- or part-time employees. In response, the petitioner indicated that the beneficiary supervises an unidentified number and type of "clerks" and provided no additional information regarding these employees. It is thus unclear whether these are the "administrative and office management operations personnel" referenced in the beneficiary's position description. The petitioner also identified tax, insurance, banking, bookkeeping and accounting workers who were categorized as "outside contractor, part time personnel." The petitioner did not provide their job duties or other information requested by the director. Again, the 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). The petitioner has neither presented evidence to document the existence of these employees nor identified the specific services these individuals provide. Additionally, the petitioner has not explained how the services of the part-time contracted employees obviate the need for the beneficiary to engage in the day-to-day administrative and financial activities of the company. 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)).

The record shows that the petitioner has three employees including the beneficiary and paid \$3,000 in professional fees in its most recent fiscal year. The record does not establish the number or types of employees working in Israel or the identity of the petitioner's regular payroll employees. Overall, the evidence of record is insufficient to establish that the beneficiary was or would be relieved from performing routine duties associated with the day-to-day operations of the finance and administration functions that she is claimed to manage. The petitioner has not specifically identified

office or administrative personnel working for either organization, nor has it established that its part-time contract workers would be engaged in the company's daily cash flow, order processing, expense accounts and inventory control processes, all of which are encompassed in the petitioner's description of the beneficiary's duties.

Based on the petitioner's failure to provide a description of the beneficiary's specific daily duties and to identify and document the duties employed by any claimed subordinates, 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. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise or a department or function as the sole managerial employee. The petitioner must establish that someone other than the beneficiary is available to perform the non-qualifying duties associated with the functions or activities she is claimed to manage or direct. For these additional reasons, the 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).

IV. Conclusion

The appeal will be dismissed for the above stated reasons with each considered as an independent and alternative basis for denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.