

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE:

OCT 07 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

(b)(6)

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 Texas limited liability company that seeks to employ the beneficiary as its General Manager.¹ 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 has 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 additional documentation that was previously unavailable and asserts that the petitioner has now demonstrated an ability to pay the proffered wage. Counsel provides a legal brief and additional evidence in support of the appeal.

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.

¹ The petitioner indicated its name as [REDACTED] on the Form I-140, Immigrant Petition for Alien Worker. The petitioner also uses the name [REDACTED] on various documents throughout the record.

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 Proffered Wage

The sole issue addressed by the director is whether the petitioner established its ability to pay to the beneficiary the proffered wage of \$45,000 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 July 30, 2012. The petitioner, a freight forwarding business, stated that the beneficiary has been offered a full-time position serving as the General Manager. The petitioner indicated on the Form I-140, Immigrant Petition for Alien Worker, that it has a gross annual income of \$806,058 and a net annual income of \$620,082.

At the time of filing, the petitioner submitted the following documents relevant to its ability to pay the proffered wage: (1) IRS Form 1065 U.S. Return of Partnership Income for 2008, 2009, and 2010 showing the company's net income of \$36,517 for the most recent return; (2) an unsigned document entitled "Working Balance Sheet" dated December 31, 2010; (3) IRS Form 941, Employer's Quarterly Federal Tax Return, for the last three quarters of 2011; and (4) bank statements for the period February 1, 2012 to April 30, 2012.

On February 8, 2013, the director requested additional evidence (RFE) to establish the petitioner's ability to pay the beneficiary's proffered wage of \$45,000 per year as of July 30, 2012 and continued ability to pay. The director requested a one of three types of evidence to include: (1) federal income tax returns with all accompanying schedules for 2011; (2) a 2011 annual report; or (3) 2011 audited financial statements. The director also requested evidence of wages paid to the beneficiary for 2011 and 2012.

In response to the RFE counsel submitted the following documents: (1) a copy of the beneficiary's IRS Form W-2 for 2012 indicating that he received \$8,148 in wages and (2) IRS Form 1065, U.S. Return of Partnership Income for 2011 showing the company's net income as \$31,137. In an accompanying letter, the petitioner explained that the beneficiary was employed for only part of the year in 2012. The record reflects that the beneficiary was admitted to the United States as an L-1A nonimmigrant on June 11, 2012.

On April 24, 2013, the director denied the petition finding that the petitioner failed to establish that it had the ability to pay the proffered wage to the beneficiary. 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 2011 were sufficient to compensate for the difference between the wages paid and the proffered wage.

On appeal, the petitioner submits a copy of its IRS Form 1065, U.S. Return of Partnership Income for 2012 showing a net loss of \$23,519. The petitioner also submits a "Comparative Chart" submitted by a CPA showing an increase in revenues between the first quarter of 2013 and the last quarter of 2012, as well as investment in fixed assets for the years 2011 and 2012. Counsel emphasizes that the organization made substantial investments in fixed assets and remodeling expenses in 2012 as compared to 2011 and asserts: "If we consider the investments made by [the petitioner] in 2012, it is arguable that the Petitioner had the ability to pay the proffered salary of \$45,000." Counsel requests a favorable exercise of discretion in light of the petitioner's financial information for 2013 and the fact that the petitioner "incurred expenses which are not part of their ordinary expenses, including evidence in fixed assets."

B. Analysis

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that it had the ability to pay the proffered wage at the time of filing.

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 \$8,148 in wages to the beneficiary. In response to the RFE, the petitioner states that the beneficiary did not work a full year in 2012 but fails to indicate the beneficiary's start date. The beneficiary's resume stated that he began working for the petitioner in June of 2012 and that information is consistent with his date of admission to the United States as an L-1A nonimmigrant authorized to work for the petitioner. Assuming this start date to be accurate, the beneficiary's salary of \$8,148 paid over the course of six and a half months does not establish that the petitioner was paying the beneficiary the proffered wage of \$45,000.

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 July 30, 2012, the AAO will examine the petitioner's tax return for 2012, which was previously unavailable but is now provided on appeal. The petitioner does not contest the director's finding that its 2011 Form 1065 did not provide evidence of the company's ability to pay the proffered wage.

The petitioner's IRS Form 1065 U.S. Return of Partnership Income for calendar year 2012 presents a net taxable income of -\$23,519. Therefore, for tax year 2012, the petitioner did not have sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage.

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 1065 U.S. Return of Partnership Income for 2012, Schedule L, the company has net current assets in the amount of \$15,441. Therefore, the petitioner did not establish the ability to pay the proffered salary based on its net current assets during the relevant year.

The petitioner requests additional scrutiny of the company assets and liabilities because as noted above, petitioner asserts that it would have been able to pay the beneficiary's salary had it not

made the investments in fixed assets. The petitioner is essentially stating that in the future its profits will remain the same and its net income will increase without the fixed asset purchases. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). While the petitioner has provided an explanation for the company's net loss in 2012, the evidence does not show that the petitioner's net income has been consistently sufficient to pay the proffered wage of \$45,000.

The petitioner indicates that the beneficiary is replacing a former employee in the position of general manager. Specifically, the petitioner indicates that the beneficiary replaced Francisco Saldivar as general manager in 2012. The petitioner provided evidence that it paid Mr. [REDACTED] \$36,180 in 2011, a figure which is lower than the beneficiary's proffered wage. The petitioner did not provide evidence of wages paid to Mr. [REDACTED] in 2012. Further, the petitioner did not provide any supporting evidence of Mr. [REDACTED]'s job title and dates of employment and termination.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage beginning on the priority date/filing date. Accordingly, the appeal will be dismissed.

IV. Conclusion

The appeal will be dismissed for the above stated reasons. 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.