U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: WAC 99 211 50530 Office: CALIFORNIA SERVICE CENTER Date: FEB 27 2003

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in December of 1993. It is engaged in trading, investment, and property management. It seeks to employ the beneficiary as its president and chief executive officer. Accordingly, it 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 had not established a qualifying relationship with the beneficiary's overseas employer. The director also determined that the petitioner had not established its ability to pay the beneficiary the proffered wage.

On appeal, counsel for the petitioner asserts that the Service erred in reaching its decision.

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 the 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 that 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. 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's overseas employer.

In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas company.

8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Affiliate* means:
>
> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.
>
> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner claims that it is affiliated with the beneficiary's overseas employer in that both companies are majority owned and controlled by the beneficiary. The petitioner provided evidence that it had issued two stock certificates to the beneficiary. The first stock certificate was issued in December of 1993 for 100 shares of the petitioner. The second stock certificate was issued in August of 1998 for 1000 shares of the petitioner. The director requested evidence that the beneficiary had paid for the stock issued to him. In response, the petitioner provided copies of seven checks written on a bank account jointly held with his wife. The director noted that four of the seven checks contained a notation that the funds were loaned to the petitioner. The beneficiary's wife signed the checks containing the loan notation. The director further noted that the checks were issued between 1994 and 1996 whereas the stock certificates were issued in 1993

and 1998. The director concluded that the petitioner had not submitted sufficient evidence to demonstrate a qualifying relationship with the overseas entity.

On appeal, counsel for the petitioner asserts that the director ignores the evidence that the beneficiary is legally the sole shareholder of the petitioner. Counsel submits the petitioner's notification of transaction filed in April of 1997 with the California Secretary of State reflecting that the petitioner had sold shares for money valued at $10,000. Counsel also submits the petitioner's notification of transaction filed in April of 1999 with the California secretary of state that the petitioner had sold shares for consideration other than money valued at $100,000. Counsel also explains that the personal loans made by the beneficiary to the petitioner were eventually used as consideration for the issuance of the additional 1000 shares. Counsel also refers to the petitioner's tax returns that reveal for the 1997 fiscal year (October 1, 1997 to September 30, 1998) that the petitioner had $10,000 capital stock at the beginning of the tax year and $110,000 capital stock at the end of the fiscal year. Counsel finally asserts that the cancelled checks provided by the petitioner indicate that at the very least the beneficiary is involved in the affairs of the corporation as an owner.

Counsel's assertions and explanations are not sufficient to overcome the director's decision in this proceeding. Counsel does not explain the personal signature on the checks issued from the beneficiary and his wife's joint account. It appears that the beneficiary's wife signed five of the seven checks issued from the joint checking account to the petitioner, four of them containing the loan notation. The petitioner issued its stock solely to [redacted] The petitioner has not provided sufficient information to indicate that George H.J. Shyu and the beneficiary are one and the same. The petitioner has not provided agreements or other evidence that the monies issued from the joint account were intended by the joint owners of the account to be for the purpose of the purchase of stock held solely by only one of the joint owners. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

This slight inconsistency becomes more significant when reviewing the ownership of the overseas entity. The beneficiary until November of 1998 owned only fifty percent of the overseas entity. At that time the beneficiary received an inter-spousal gift of stock increasing his ownership to fifty-five percent of the overseas entity. It is not clear from the documentary evidence provided that the beneficiary is the ultimate owner of the petitioner's stock. The beneficiary and his family apparently closely hold the petitioner and the foreign entity. However, the lack of direct payment for the petitioner's stock, the late

filings of the notice of transactions, the different name on the stock certificate, and the checks signed by the beneficiary's wife all raise sufficient concerns that have not been overcome by the petitioner on appeal. The petitioner has not conclusively established that the petitioner and the overseas entity are affiliates as defined by the Act.

The second issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered wage of $36,000 per year.

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.

The petition to classify the beneficiary as a multinational executive or manager was filed with the Service on July 27, 1999. The petitioner must demonstrate its ability to pay the beneficiary the proffered wage since that date. The petitioner submitted its Internal Revenue Service (IRS) Form 1120-A, U.S. Corporation Short-Form Income Tax Return for 1999 to demonstrate its ability to pay the proffered wage. The IRS Form 1120-A for the petitioner's fiscal year beginning October 1, 1998 and ending September 30, 1999 reflected a taxable income of $20,790. The IRS Form 1120-A did not reflect that the petitioner had previously paid or was currently paying the beneficiary a salary or compensation as an officer of the company.

In determining the petitioner's ability to pay the proffered wage, the Service will examine the net income figure reflected on the petitioner's 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 Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than 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. It is further noted that the petitioner has not demonstrated that if had sufficient net current assets in the year of filing to cover the proffered salary.

The petitioner has not sufficiently established that it has the ability to pay the beneficiary the proffered wage.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.