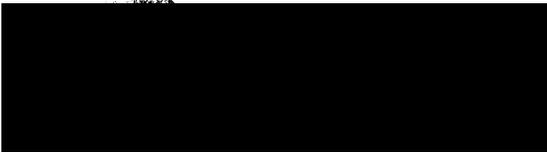


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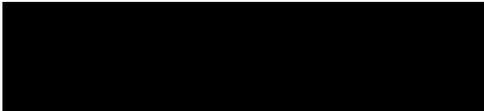


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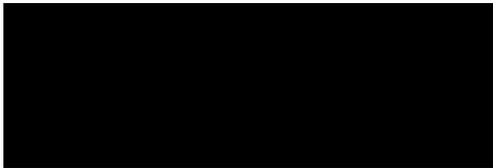
FILE: WAC 02 083 52972 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



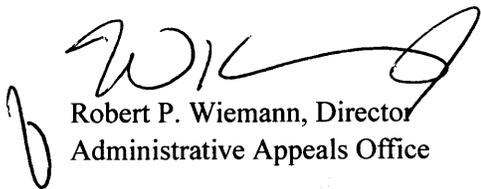
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to  
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is a corporation organized in the State of Delaware in August 1999. It provides marketing, sales, and technical support in the United States for technologies and software manufactured in Israel. It seeks to employ the beneficiary as its chief executive officer. 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 had not established its ability to pay the beneficiary the proffered wage of \$150,000 per year.

On appeal, counsel for the petitioner asserts the “decision is the product of an arbitrary abuse of discretion.”

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 issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered wage of \$150,000 per year.

The regulation at 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 petitioner provided copies of its Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return for the years 2000 and 2001. The petitioner's 2000 IRS Form 1120 showed \$125,000 as compensation for officers, \$1,631,333 as salaries and wages, and a net income of negative \$3,986,934. The petitioner's 2001 IRS Form 1120 showed no compensation of officers, \$2,859,167 as salaries and wages, and a net income of negative \$5,576,760. The petitioner provided copies of its year 2000 IRS Forms W-2, Wage and Tax Statement, issued to its employees. The beneficiary's IRS Form W-2 showed that the beneficiary received \$68,750 in 2000. The petitioner also provided a copy of a quarterly summary and wage analysis for the quarter ending March 31, 2001, the quarter in which the petition was filed. The summary showed that the beneficiary had received \$38,400 for the quarter.

The director observes that the submitted tax returns have not been signed by an authorized representative of the petitioner and have not been certified filed by the IRS. The director also observes that the petitioner did not provide audited financial statements for the year 2001. The director noted that it appeared the petitioner was meeting its financial obligations through the support of the parent company or shareholders. The director determined that the petitioner had not established its ability to pay the beneficiary the proffered wage.

On appeal, counsel for the petitioner observes that CIS has found it had the ability to pay the proffered wage on numerous past occasions based on similarly submitted evidence. Counsel contends that assets invested by the petitioner's shareholders in the petitioner are no longer the property of the shareholder(s) but become the property of the petitioner. Counsel also notes that the petitioner raised substantial funds in growth capital through Series B financing. Counsel provides press releases announcing the petitioner's new funding. Counsel also provided copies of sales and licensing agreements to demonstrate the petitioner's ability to generate revenue.

Counsel's evidence is noteworthy but is not sufficient to overcome the decision of the director. When determining the petitioner's ability to pay the proffered wage, CIS 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. In the present matter, the petitioner has established that it has employed the beneficiary since March 2000. The petitioner, however, has not provided evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage. The beneficiary's IRS Form W-2 shows the beneficiary was paid less than half the proffered wage in the year 2000. The petitioner's quarterly summary and wage analysis for the first quarter of 2001 shows that the beneficiary was paid a little over one-quarter of the proffered wage. The record does not contain evidence of the beneficiary's salary, if any, for the remainder of the year. The petitioner's 2001 IRS Form 1120 does not reflect compensation for officers. The AAO cannot conclude that the petitioner has paid the beneficiary the proffered wage.

CIS 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 CIS) 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.

The petitioner's 2001 net income is negative \$5,576,760. Although the petitioner has paid a significant amount in salaries, the petitioner has not shown that it has paid the beneficiary the proffered wage in the past or could pay the beneficiary the proffered wage and continue to meet its other obligations. The petitioner did not submit California Forms DE-6 for the year 2001 as requested by the director. 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's California Forms DE-6 or the IRS Forms W-2 for the year 2001 could confirm or raise concerns regarding the petitioner's ability to pay the beneficiary the proffered wage.

Finally, 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. In this matter, the petitioner's net assets are negative \$10,283.

Of note, counsel's assertions and press releases regarding the petitioner's funding or potential for funding are not sufficient to establish the petitioner's ability to pay the proffered wage. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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.