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

(b)(6)

DATE: APR 0 1 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 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 in accordance with the instructions on 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,

Ron Rosenberg
Acting 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 [redacted] that seeks to employ the beneficiary as its director of business development. 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 additional documentation asserting 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.

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 a proffered wage of $60,000 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.

The petitioner filed the immigrant visa petition on June 17, 2011. The petitioner, an independent investment advisory firm established in 2002, stated that the beneficiary has been offered a full time position serving as the director of business development. The petitioner indicated on the Form I-140, Immigrant Petition for Alien Worker, that it has a gross annual income of $220,324 and a net annual income of $7,995.

The petitioner submitted the following documents relevant to its ability to pay the proffered wage in support of the petition: (1) IRS Form 1065 U.S. Return of Partnership Income for 2010 showing the company's net income of $7,995; (2) a copy of the petitioner's 2010 IRS Form W-3, Transmittal of Tax and Wage Statements indicating that the company issued five Forms W-2 and paid total wages of $105,487.75; (3) a second copy of the petitioner's 2010 IRS Form W-3, Transmittal of Tax and Wage Statements, indicating that the company issued one Form W-2 and paid total wages of $30,000; (4) a copy of the beneficiary's IRS Form W-2 for 2010 indicating that he received $30,000 in wages; (5) a letter from a foreign accountant indicating that the beneficiary received a salary of Bs.F. 90,000,00 and bonuses of $19,069.98 in 2010 and a salary of Bs.F. 30,000 and bonuses of $4,767.25 during the first four months of 2011; (6) a letter from the petitioner's accountant dated May 12, 2011 stating that prior to 2011, the beneficiary was compensated as a 1099 independent contractor but began working full time for the petitioner in 2011 with a current salary of $30,000; (7) an unaudited balance sheet for the period January through March 2011; (8) a compiled financial statement for the period ended on December 31, 2010; (9) a self-prepared and unsigned document entitled Summary of Significant Accounting Policies, dated December 31, 2010; (10) IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2011; (11) Florida Form UCT-6, Employer's Quarterly Report, for the first quarter of 2011, which indicates that the beneficiary received total wages of $9,082.61; and (12) tax returns, financial statements and other documents for the beneficiary's former foreign employer.

On August 6, 2011, the director requested additional evidence (RFE) to establish the petitioner's ability to pay the beneficiary's proffered wage of $60,000 per year as of June 17, 2011 and continued ability to pay. The director suggested the inclusion of audited profit/loss statements, bank account records, and/or personnel records.

In response to the RFE counsel submitted the following documents: (1) a letter from the petitioner's accountant explaining that the company's IRS Form 1065, U.S. Return of Partnership Income, for 2010 was prepared using the cash basis of accounting method while the financial statements were prepared using the accrual basis of accounting method; (2) IRS Forms 941 Employer's Quarterly Federal Tax Return, and Florida Forms UCT-6 for the first two quarters of 2011; (3) unaudited financial statements for the periods ended August 31, 2011 and June 30, 2011; (4) an employment letter from the petitioner, dated September 13, 2011, confirming the beneficiary's position title and salary of $60,000 to be paid 50% by the petitioner and 50% by the alleged foreign parent company; (5) a letter from the foreign company, dated September 14, 2011, asserting that the beneficiary currently works for the petitioner with a gross salary of $60,000 but the foreign company was paying 50% of his salary; (5) pay stubs from the petitioner and documents reflecting a bonus payment paid to the beneficiary in September 2011; (6) bank records; (7) letter of reference; and (8) a copy of the beneficiary's 2010 foreign income tax return.

As part of the RFE response, petitioner asserted the financial statement for the period that ended June 30, 2011 reflecting a net ordinary income of $37,568.15, and the financial statement for the period that ended August 31, 2011 reflecting a net ordinary income of $42,360.50, establish the petitioner's ability to pay the proffered wage.

On January 9, 2012, the director denied the petition finding that the petitioner failed to establish it could 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 Form 1065 U.S. Return of Partnership Income for 2010 were sufficient to cover the difference between the wages paid and the proffered wage.

On appeal, counsel for the petitioner explains that the claimed foreign parent company agreed to pay 50% of the beneficiary's salary despite the beneficiary's full time employment for the petitioner in 2011. Counsel states that "during 2011 [the beneficiary's] compensation was almost entirely covered by the Petitioner." Therefore, petitioner asserts that the beneficiary's 2011 IRS Form W-2, which reflects payments in the amount of $54,709, establishes the petitioner's ability to pay as of June 17, 2011 and beyond.

The petitioner further explains that errors made on Schedule L of the company's IRS Form 1065 filed for tax year 2010 resulted in an inaccurate reflection of petitioner's current net assets. Allegedly, the petitioner's accountant erroneously recorded long term mortgage debt as short term debt, thus inaccurately creating a net liability for the year. Additionally, the petitioner requests consideration of financial statements for periods ending August 2011 and October 2011, and assets not previously calculated in determining the company's net income. On behalf of the

petitioner, counsel also urges consideration of the future performance of the company and the petitioner's anticipated growth in business development and profitability.

Upon review, the petitioner's assertions are not persuasive. 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 FormW-2 for 2010 reflecting its payment of $30,000 in wages to the beneficiary. As this petition was filed in June 2011, the petitioner supplemented the petition on appeal with a 2011 Form W-2 for the beneficiary from the petitioner reflecting income paid in the amount of $54,709.49. Based on the petitioner's quarterly wage reports for the second quarter of 2011, the petitioner was paying the beneficiary $2,500 per month at the time of filing. The petitioner has not provided evidence that it was paying the beneficiary a wage equal to or greater than the proffered annual wage of $60,000 at the time of filing.

Nevertheless, the petitioner asserted that the claimed foreign parent company agreed to pay 50% of the beneficiary's salary as a full-time employee for the petitioner. In support of the assertion the petitioner provided financial documents including salary paid to the beneficiary by the foreign company. Notwithstanding this assertion, the ability to pay a proffered wage must be shown by the petitioner itself. The petitioner is a Florida limited liability company, a separate legal entity from the foreign corporation. The debts and obligations of a corporation or LLC are not the debts and obligations of the owners, the members, the stockholders, other companies, or anyone else. A corporation is a separate and distinct legal entity from its owners or stockholders. Consequently, any assets of its stockholders or of other enterprises or corporations cannot be considered in determining the petitioning company's ability to pay the proffered wage. See *Matter of M,* 8 I&N Dec. 24 (BIA 1958; AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel,* 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Thus, the foreign company's financial assistance will not be considered.

The AAO notes the inconsistency of petitioner's documentation asserting the beneficiary's status as an independent contractor while simultaneously representing him as a regular employee in 2010. In addition, the petitioner submitted two different IRS Forms W-3 for 2010 and failed to provide any explanation for the existence of two versions of the same tax document. 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).

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 June 17, 2011 and the petitioner's tax return for 2011 has not been made available, the AAO must examine the petitioner's tax return for 2010. The petitioner's IRS Form 1065 U.S. Return of Partnership Income for calendar year 2010 presents a net taxable income of $7995.00. 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's net income for tax year 2011 cannot be determined because the petitioner did not provide a tax year 2011 return or provide reliable audited financial statements or balance sheets.

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 2010, Schedule L, the company has a net current liability in the amount of -$495,675. Therefore, the petitioner cannot establish the ability to pay the proffered salary. However, petitioner requests additional scrutiny of the company assets and liabilities because as noted above, petitioner asserts that the portion of the Form 1065 U.S. Return of Partnership Income for 2010 reflecting assets and liabilities is inaccurate. According to schedule L, the petitioner has $15,986 in short term assets and $511,661 in short term liabilities. Notably, petitioner failed to provide an amended Form 1065 U.S. Return of Partnership Income, Schedule L, or any documents to support its claim on appeal. Nevertheless, even if the short term mortgage liability was removed and the form recalculated, the petitioner would still have only $15,986.00 in current assets. Adding together current assets, net income and the beneficiary's salary for tax year 2010 would still not meet the proffered wage.

While the petitioner submitted financial statements and banking documents for 2011, a 2011 IRS Form 1065 U.S. Return of Partnership Income was apparently not yet available for submission. The financial statements submitted by the petitioner were unaudited. In accordance with the regulation at 8 C.F.R. § 204.5(g)(2) when a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, the financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free from material misstatements. According to the accountant's cover letter dated February 6, 2012:

> A compilation is limited to presenting in the form of financial information that is the representation of management. We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance of them.

Therefore, as stated in the report, 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 citing *Matter of Sonegawa,* 12 I&N Dec. at 612 (Reg'l Comm'r. 1967). Therefore, petitioner submits documents reflecting current business levels and anticipated profitability for 2012. The petitioner indicates that it expects to increase profits, hire new personnel, and increase salaries of those currently employed. However, the petitioner is a small company offering documentation covering a very short period of time. 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). Further, the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967). In this matter, the evidence does not warrant such consideration.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2010 and 2011 therefore the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date/filing date. Accordingly, the appeal will be dismissed.

III. Qualifying Relationship

Beyond the decision of the director, the petitioner has not established that a qualifying relationship exists between the foreign employer and U.S. company. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally*

§ 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The petitioner claims to be a subsidiary of a Venezuelan company, which previously employed the beneficiary as its Finance Director. At the time of filing, counsel stated that the petitioner "has always been majority owned (51%) by the Foreign Parent Company The petitioner indicated that the foreign company "belongs to the same group of company's [*sic*] as which was incorporated in 1999. The petitioner indicated that, since its incorporation in 2006, . has offered the same services and products originally offered by The petitioner indicated that is owned by (67%) and (33%).

The U.S. company's articles of organization do not list the membership, however a comparison of the membership interest certificates and tax return documents submitted by the petitioner reveals unresolved inconsistencies.

As evidence of the claimed parent-subsidiary relationship, the petitioner submitted the following membership certificates: (1) No. 1 issuing 51 membership units to on January 3, 2002; (2) No. 2 issuing 49 membership units to on January 3, 2001; (3) No. 3 issuing 27.500 membership units to on January 2, 2008; (4) No. 4 issuing 20.000 membership units to on January 2, 2008; and (5) No. 5 issuing 2.500 membership units to on January 2, 2008.

According to the petitioner's 2010 Form 1065 at Schedule B-1, owns 64.548 percent of the company, which is not the percentage ownership reflected by the petitioner's membership certificates. Further, the membership certificates do not support counsel's assertion that "has always" owned 51% of the petitioning company.

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). Furthermore, without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control. For this additional reason, the appeal will be dismissed.

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 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. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.