



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

In Re: 20793622

Date: JUN. 02, 2022

Appeal of Texas Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner, describing itself as an importer and exporter of [ ] products, seeks to permanently employ the Beneficiary as its chief executive officer (CEO) in the United States under the first preference immigrant classification for multinational executives or managers. Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C).

The Director of the Texas Service Center denied the petition, concluding the Petitioner did not establish, as required, that it had the ability to pay the Beneficiary's proffered salary. On appeal, the Petitioner contends that the Director was mistaken in concluding it did not have the ability to pay the Beneficiary's proffered wage.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

## **I. LEGAL FRAMEWORK**

An immigrant visa is available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate. Section 203(b)(1)(C) of the Act.

The Form I-140, Immigrant Petition for Alien Worker, must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. See 8 C.F.R. § 204.5(j)(3).

## **II. ABILITY TO PAY**

The first issue we will analyze is whether the Petitioner established that it had the ability to pay the Beneficiary's proffered wage as of the date the petition was filed through the date of this adjudication.

We note that the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

In the Form I-140, Immigrant Petition for Alien Worker, Part 6, Item 8 the Petitioner indicated that the Beneficiary's annual wage would be \$48,000 per year.<sup>1</sup> In denying the petition, the Director pointed to submitted documentation reflecting that the Beneficiary was only paid \$36,000 during 2017 and a provided 2017 IRS Form 1120, U.S. Corporation Income Tax Return, indicating that it did not have sufficient net income or net current assets to pay the remaining \$12,000 of his proffered wage.

Upon review, we agree with the Petitioner that the Director was mistaken in concluding it did not have the ability to pay the Beneficiary's wage in 2017. The record reflects that the Petitioner paid the Beneficiary \$36,000 during 2017 and its IRS Form 1120 from that year reflected that it had sufficient net current assets at the end of the year to pay him the remaining amount to account for his entire proffered wage of \$48,000.

However, the regulations explicitly state that "the petitioner must demonstrate [the] ability [to pay] at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." The submitted documentation indicated that the Petitioner no longer had the ability to pay the Beneficiary's proffered wage at the end of 2018 and it provided no further supporting documentation to substantiate its ability to pay his wage through to the date of this appeal in February 2020. The Petitioner submitted a 2018 IRS Form 1120 indicating in item 12 that it paid \$36,000 for "compensation of officers," as well as an IRS Form 941 from the second quarter of 2018 indicating it paid him \$9,000 in wages during that quarter.<sup>2</sup> The provided documentation also reflects that the Beneficiary was paid \$36,000 in 2017 and it further submitted his 2019 IRS Form W-2, Wage and Tax Statement, showing that he was paid this same salary in 2019. As such, the preponderance of the evidence indicates that the Beneficiary was also very likely paid \$36,000 in 2018, as he was

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<sup>1</sup> The petition was filed on July 28, 2016. The Director issued a request for evidence (RFE) in June 2018 to which the Petitioner responded in September 2018. The Director later issued a notice of intent to deny (NOID) in December 2019 to which the Petitioner responded later that same month. The petition was denied on January 10, 2020.

<sup>2</sup> We note that the payment for \$9,000 per quarter for one year would equal \$36,000 in wages paid to the Beneficiary.

compensated in 2017 and 2019. Therefore, the Petitioner did not provide sufficient evidence to demonstrate that it paid the Beneficiary his proffered wage of \$48,000 in 2018.

As an alternate means of determining a petitioner's ability to pay, we examine a 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 Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *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*, 623 F. Supp. at 1084, the court held that former Immigration and Naturalization Service (INS) properly relied on the petitioner's net income figure reflected on its corporate income tax returns rather than gross income. The court rejected the argument that INS should have considered income before expenses were paid rather than net income. There is no precedent that would allow the Petitioner to "add back to net cash the depreciation expense charged for the year." See, e.g., *Chi-Feng Chang*, 719 F. Supp. at 537; see also *Elatos Rest. Corp.*, 632 F. Supp. at 1054.

The Petitioner's most recent 2018 IRS Form 1120 reflected a net taxable income of \$3,791. As such, not only did the Petitioner not pay the Beneficiary his proffered wage of \$48,000 in 2018 its annual tax return demonstrated that could not pay the remainder of his wage out of its annual net income.

In addition, if a petitioner does not have sufficient net income to pay the proffered salary, we will review its net current assets. Net current assets are the difference between a petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that a petitioner has as of the date of the petition 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 we are satisfied that a petitioner's current assets are sufficiently "liquid" or convertible to cash, or cash equivalents, then a petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

Therefore, we will look to Schedule L of the Petitioner's most recent 2018 Form 1120 to determine the Petitioner's net current assets during that year. Schedule L of the Petitioner's 2018 IRS Form 1120 reflected that it had net assets of \$19,680 and net liabilities of \$20,347 as of the end of 2018, or net current assets of -\$667. As such, the Petitioner did not establish with sufficient evidence that it had the ability to pay the difference between what it likely paid the Beneficiary in 2018, \$36,000, and his proffered wage of \$48,000 using net current assets. Further, as noted, the Petitioner does not address this material deficiency on appeal with additional assertions or documentary evidence, nor does it provide other supporting evidence to establish that it had the ability to pay the Beneficiary's proffered wage through to the date of this appeal.<sup>3</sup>

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<sup>3</sup> The Petitioner again submitted supporting documentation indicating that it paid the Beneficiary only \$36,000 in 2019, but it provided no 2019 IRS Form 1120 to assess whether it had sufficient net income or net current assets during that year to pay the remainder of his proffered wage.

In conclusion, although the Director erred in evaluating the Petitioner's ability to pay in 2017, this error does not affect the outcome of this appeal, since the provided evidence reflects that it did not have the ability to pay his proffered wage in 2018 or in any subsequent year prior to the date of the appeal.

### III. EXECUTIVE CAPACITY IN THE UNITED STATES

Upon *de novo* review, we will also enter an additional basis for denial to inform the Petitioner that this issue must be addressed in any future proceedings. The Petitioner has not established that the Beneficiary would be employed in an executive capacity in the United States. The Petitioner does not claim on the record that the Beneficiary would be employed in a managerial capacity in the United States. Therefore, we restrict our analysis to whether the Beneficiary would be employed in an executive capacity.

"Executive capacity" means an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

To be eligible as a multinational executive, the Petitioner must show that the Beneficiary will perform the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(B)(i)-(iv) of the Act. If the record does not establish that the offered position meets all four of these elements, we cannot conclude that it is a qualifying executive position.

If the Petitioner establishes that the offered position meets all elements set forth in the statutory definition, the Petitioner must prove that the Beneficiary will be *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006). In determining whether a given beneficiary's duties will be primarily executive, we consider the petitioner's description of the job duties, the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

The Petitioner stated that it was focused on leading the "invention, development and manufacture of the industry's most advance[d] [redacted] products such as [redacted] [redacted] As of the date the petition was filed in July 2016<sup>4</sup>, the Petitioner submitted an organizational chart reflecting six employees, including the Beneficiary, an administrative manager and sales manager reporting to him, as well as an administrative assistant, an "expedition" employee, and a sales employee below the Beneficiary's subordinates.

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<sup>4</sup> The Petitioner had not provided an updated organizational chart since this time.

However, the Petitioner submitted substantial documentation reflecting the Beneficiary's performance of non-qualifying operational duties as of the date the petition was filed, and thereafter, leaving uncertainty as to whether he would primarily perform the qualifying duties of an executive under an approved petition. For instance, the Petitioner provided several of its invoices dating from December 2015 through July 2016, near to the date the petition was filed, listing the Beneficiary as the sales representative who received and processed them. Likewise, the Petitioner submitted invoices from shipping vendors from February 2016 and April 2016 showing the Beneficiary as the listed shipper. Similarly, the record included numerous invoices from vendors for the purchase of equipment and materials during 2016, most including the Beneficiary as the contact who completed these orders. The Petitioner also submitted documentation reflecting the Beneficiary's involvement in selling items on eBay throughout 2016. Further, it provided supporting documentation with a 2020 Form I-485, Application to Register Permanent Residence showing the Beneficiary's likely involvement with non-qualifying operational duties after 2016, including several company invoices again listing him as a sales representative throughout 2019.

Whether the Beneficiary is an executive employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" executive. *See* sections 101(a)(44)(B) of the Act. Here, the Petitioner does not credibly articulate and document what proportion of the Beneficiary's duties would be executive functions and what proportion would be non-qualifying. The Petitioner submits substantial documentation indicating that the Beneficiary's duties primarily involved administrative or operational tasks but it did not quantify the time he spends on these duties as compared to qualifying executive-level tasks. For this reason, we cannot determine whether the Beneficiary would primarily perform the duties of an executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Although we did not expect the Petitioner to articulate and document every executive-level task to be performed by the Beneficiary, it is reasonable to expect that it would provide sufficient detail and documentation to sufficiently corroborate his performance of qualifying duties, particularly since it asserts that he has been employed in this role since his transfer to the United States as an L-1A intracompany transferee in June 2015. As such, it would be reasonable to expect that there would be sufficient detail and supporting documentation to substantiate the Beneficiary's executive-level tasks during this time, such as his direction of and delegation to his claimed subordinates. However, the Beneficiary's duty description includes no such detail, but only broad generic tasks such as his responsibility for "policies and objectives" and his contract negotiations with unidentified "government agencies, third party vendors, and major clients." In contrast, as we have discussed, there is significant supporting evidence reflecting the Beneficiary's performance of non-qualifying operational duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive 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, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Lastly, the record includes evidence indicating that the Petitioner did not have, and would not have, sufficient staff to relieve the Beneficiary from performing non-qualifying operational duties and to elevate him to an executive-level role. For instance, the provided IRS Forms 1120 from 2017, 2018 and 2019 reflect that it paid no salaries or wages to any employees beyond the Beneficiary. In fact, the 2018 IRS Form 1120 included a portion reflecting wages paid from 2015 to 2018, and this reflected

that it had only paid approximately \$31,000 in salaries during this whole period, an amount that does not support its asserted organizational structure. Likewise, state quarterly wage forms from each quarter of 2019 show that the Petitioner only paid wages to the Beneficiary and no other employees. This conflicting evidence leaves substantial doubt as to whether the Petitioner was, and would be, sufficiently staffed to support the Beneficiary in an executive-level capacity. The Petitioner must resolve discrepancies and ambiguities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Therefore, for the foregoing reasons, the Petitioner has not established that the Beneficiary would be employed in an executive capacity in the United States. For this additional reason, the appeal must be dismissed.

**ORDER:** The appeal is dismissed.