U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

B4

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 0 6 2006

SRC 03 236 51961

IN RE: Petitioner: [redacted]
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:

[redacted]

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, 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 was incorporated in the State of Florida and is engaged in the business of selling and installing Isolated Concrete Forms.[1] It seeks to employ the beneficiary as its president. 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 based on three independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; 2) the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity; and 3) the record lacks sufficient evidence establishing the petitioner's ability to pay the beneficiary's proffered wage.

On appeal, counsel disputes the director's findings and submits a brief in support of his arguments.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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.

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[1] It should be noted that, according the Florida Department of State, Division of Corporations, the petitioner has been administratively dissolved due to its failure to satisfy the state's annual report requirements. Therefore, regardless of whether the petitioner's annual report issues in Florida can be easily remedied or not, it raises the critical issue of the company's continued existence as a legal entity in the United States. *See* Fla. Stat. 607.1421 (2006).

The first two issues in this proceeding call for an analysis of the beneficiary's employment capacity. The first issue is whether the beneficiary was employed abroad in a primarily managerial or executive capacity, and the second issue is whether the petitioner established that it would primarily employ the beneficiary in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily--
>
> (i) manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily--
>
> (i) directs the management of the organization or a major component or function of the organization;
>
> (ii) establishes the goals and policies of the organization, component, or function;
>
> (iii) exercises wide latitude in discretionary decision-making; and
>
> (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The record shows that the petitioner filed a Form I-140 on August 28, 2003. The petitioner provided the following job description in Part 6 of the Form I-140:

> His duties include establishing and executing marketing, financial and strategic plans for the U.S. [c]ompany. The [p]resident establishes the overall goals and policies of the organization. He supervises and controls the budget and strategic plans. He possesses the executive decision-making authority and the majority of his duties relates [sic] to operational and policy management of the U.S. operation.

In a separate letter dated August 4, 2003, the beneficiary, in his capacity as president of the petitioning entity, stated that 100% of his duties would involve executive decision-making authority and would be related to operation and management functions. He further stated that the petitioner has six employees as well as independent contractors and subcontractors.

On October 20, 2003, the director issued a request for initial evidence (RIE). The following documentation was requested and addressed the issue of the beneficiary's employment abroad and in the United States: 1) evidence of each company's staffing levels, the names, position titles, and duties of each company's employees; 2) a detailed description of the beneficiary's day-to-day duties with a percentage of time assigned to each duty in order to indicate how much of the beneficiary's time has been and would be devoted to each of the listed duties; 3) the petitioner's tax documentation establishing salaries paid to employees of the petitioner; and 4) copies of all contracts and agreements that establish the petitioner was provided with employees.

In response, the petitioner provided the following documents:

1. Its own 2002 federal tax return.

2. A number of W-2 wage and tax statements issued by [redacted] and [redacted]. in 2002.

3. Personnel service agreements with Central Leasing and [redacted] showing the existence of a contractual relationship in which each company agreed to provide the petitioner with requested personnel. Both agreements indicate that the companies providing the personnel would issue the necessary W-2s.

Although the director specifically requested that the petitioner provide quarterly tax returns and documents determining the petitioner's employees at the time period that included the date the Form I-140 was filed, the petitioner failed to do so. The petitioner also failed to provide job descriptions for any of the beneficiary's subordinates either abroad or in his position in the United States.

The petitioner provided the following description of the beneficiary's position abroad:

> [The beneficiary] spends 100% of his time on executive duties. His executive experience, professional education and administrative expertise in running a business are essential to the success of the Canadian [c]ompany. As [v]ice [p]resident and [g]eneral [m]anager of the Canadian [c]ompany, [the beneficiary] reports directly to the [p]resident of the Canadian [c]orporation. He directs and controls the operation and procedural functions of the various departments, e[.]g[.]: [sic] sales, marketing, and accounting departments. He is also involved in discretionary decision-making authority and the majority of his duties relate to operation and management functions of the company. He supervises and controls the budget, strategic

> plans and financial analysis of the Canadian company. As [v]ice [p]resident and [g]eneral [m]anager, he also directs the company's compliance with contractual agreements.

The petitioner provided the following description of the beneficiary's proposed duties in the United States:

> [The beneficiary] spends 100% of his time on executive duties. As [p]resident of the [c]ompany his duties include establishing and executing the marketing, financial and strategic plans for the [c]ompany. He establishes the overall goals and policies of the organization. He will perform executive decision making authority, and the majority of his duties relates [sic] to operational and policy management of the [c]ompany. The [p]resident's executive experience, professional education, and administrative expertise in running a business are essential to the success of the [c]ompany. As the [c]ompany's revenues increase, the [p]resident's salary will also increase.

It is noted that the petitioner failed to provide the requested percentage breakdowns of the specific duties the beneficiary performed abroad and would perform as part of his proposed position in the United States.

On July 27, 2004 and again on August 31, 2004, the director issued a request for evidence (RFE) informing the petitioner that additional documentation would be necessary in order to determine the petitioner's eligibility for the immigration benefit sought on behalf of the beneficiary.

In a letter dated October 29, 2004, the beneficiary, on behalf of the petitioner, stated that the petitioner's prior attorney was no longer representing the petitioner in the present matter. The beneficiary stated that he was in the process of finding new counsel who would assist in responding to the director's RFE. It is noted, however, that there is no evidence indicating that the petitioner subsequently supplemented the record with any of the information requested in the RFE. 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).

On February 25, 2005, the director denied the petition basing the denial, in part, on the conclusion that the petitioner failed to establish the beneficiary's employment abroad and in the United States in primarily managerial or executive capacities. While the AAO concurs with the director's conclusion, her reference to the petitioner's tax documentation reflecting dates prior to the filing of the Form I-140 are not relevant and should not have been referenced in reaching the proper conclusion. Even if documentation shows that the petitioner was statutorily ineligible to classify the beneficiary as a multinational manager or executive in 2000 or 2002, the petitioner's eligibility must be based on facts in existence at the time of filing the Form I-140. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

On appeal, counsel discusses the petitioner's failure to properly respond to the RFE, claiming that the petitioner was unable to secure counsel to assist in providing the necessary information. However, the record clearly shows that the beneficiary was aware of the RFE prior to the expiration of the 12-week response period. Moreover, the director did not issue a denial for nearly four months after the petitioner's October 29, 2004 response to the RFE. Thus, the record shows that the petitioner was aware of the RFE and could have submitted further evidence or information within that four-month time period with or without the assistance of counsel; the petitioner's failure to act cannot be overlooked. *See* 8 C.F.R. § 103.2(b)(14).

Additionally, the director's RFE was formulated with plain yet specific language, which clearly described the information necessary for proper adjudication of the petitioner's eligibility. A significant portion of the request dealt directly with the beneficiary's own job duties. Counsel's claim that the petitioner required the assistance of counsel to provide information regarding the beneficiary's own job duties lacks merit and credibility. Accordingly, where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Under the circumstances, the AAO need not and does not consider the sufficiency of the additional information submitted on appeal with regard to the beneficiary's foreign and U.S. job duties.

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant matter, the record lacks sufficient information regarding the specific job duties the beneficiary performed abroad and would perform in the United States on a daily basis. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Without the necessary information, which was specifically requested in the director's requests, the AAO cannot gauge the beneficiary's position within either hierarchy, his role with respect to subordinate employees, the identities of the beneficiary's subordinates within the foreign and U.S. entities, or the beneficiary's supervisory duties at least with respect to individuals directly employed by the foreign and U.S. entities. The AAO cannot conclude based on the documentation provided that the beneficiary's employment abroad or his proposed employment in the United States primarily involve qualifying duties within managerial or executive capacities. Based on these two separate grounds for ineligibility, this petition cannot be approved.

The remaining issue in the proceeding is whether the petitioner has established its ability to pay the beneficiary's proffered wage.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the instant matter, the Form I-140 was filed in August of 2003. As such, the petitioner must establish its ability to pay as of that date. Although the director requested documentation of the petitioner's ability to pay in the initial notice dated October 20, 2003, it is clear that any 2003 tax documentation belonging either to the petitioner or the beneficiary would not have been made available as the 2003 tax year had not ended at the time the notice was issued. However, the director's second request for information was issued in July of 2004 and re-sent in August of 2004, at which time the necessary documentation should have been available. In fact, the latest RFE specifically notes the need for more recent documentation than what was previously

submitted in order to determine that the petitioner met the requirements specified in 8 C.F.R. § 204.5(g)(2). However, as previously stated, the petitioner failed to respond to the director's most recent request for evidence. Accordingly, the director's conclusion that the petitioner failed to establish its ability to pay is correct. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Notwithstanding the AAO's concurrence with the director's overall conclusion, the director improperly relied on irrelevant evidence in reaching her decision. As previously implied, the documentation submitted in response to the director's initial request concerned the 2002 tax year. However, the Form I-140 was filed the following year. As such, the director improperly cited and relied on the tax documentation pertaining to the year prior to the filing of the Form I-140. While this was admittedly the only documentation available at the time the denial was issued, it cannot be used either to corroborate or to refute the petitioner's claim with regard to its ability to pay. Despite counsel's flawed analysis, the record contains no evidence establishing the petitioner's prior payment or its ability to pay the beneficiary's proffered wage. Accordingly, based on this third ground of ineligibility, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.