(b)(6)

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

DATE: MAY 07 2013 OFFICE: NEBRASKA 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 law was inappropriately applied by us in reaching our 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 request 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 that any motion must 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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Utah limited liability company (LLC) that seeks to employ the beneficiary as its Chief Executive Officer (CEO). 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.

In support of the Form I-140, counsel for the petitioner submitted a letter stating that the beneficiary is the petitioner's president and founder. The petitioner also provided a variety of business related documents regarding the petitioner and the beneficiary's foreign employer.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. On January 19, 2012, the director issued a request for evidence (RFE) informing the petitioner of various evidentiary deficiencies. The director requested additional evidence relating to the beneficiary's proposed employment with the U.S. petitioner and with his foreign employer. Specifically, the director requested the beneficiary's job title, dates of employment, a statement regarding the beneficiary's supervisor, title and level of authority, and a detailed description of the beneficiary's day-to-day duties with the percentage of time allocated to each duty. The petitioner was also asked to provide organizational charts for both companies and detailed information regarding each company's employees, including as their duties and their educational qualifications.

In response to the RFE, the petitioner provided: (1) a letter from counsel dated April 11, 2012; (2) a copy of its IRS Form 1120, U.S Corporation Income Tax Return for tax year 2011; (3) articles of organization for the petitioner; (4) a certificate of registration for the foreign employer; (5) petitioner's meeting minutes for a meeting held on January 5, 2011; (6) the foreign employer's meeting minutes for a meeting held on November 9, 2009; and (6) a variety of documents relating to the petitioner's products.

Also included in the meeting minutes were references to, and short descriptions of, the positions for two other named employees who were appointed as managers with the petitioner. A similar document was submitted for the foreign employer which reflected the beneficiary as managing director and included the names of two managers along with a very short duty description for each position. The petitioner provided no other relevant documentation in response to the RFE.

After considering the petitioner's response, the director determined that the petitioner failed to establish that the beneficiary had been employed abroad, or would be employed in the United States, within a qualifying managerial or executive capacity. Specifically, the director determined that the record did not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. Further, the director found that the petitioner had not established the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who could relieve him from performing non-qualifying duties.

On appeal, counsel submits a letter and additional documents to further develop the beneficiary's duties with the foreign employer and the U.S. petitioner. The petitioner includes an organizational chart and a more detailed duty description for the beneficiary with percentages of time allocated to each general duty with the foreign company and the U.S. petitioner. In addition the petitioner provides employment agreements for the beneficiary and two other employees with the foreign company and the U.S. petitioner, and detailed duty descriptions for both companies' employees. Counsel now requests further consideration of the petition in light of this newly submitted evidence.

In the evidence submitted on appeal, the petitioner provided a much more comprehensive duty description for the beneficiary's duties with both the U.S. petitioner and the foreign employer, and the petitioner and foreign employer's consolidated organizational chart. However, the petitioner failed to provide any of this information with the original petition or in response to the director's specific request for this particular information. Notably, regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

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). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

In this matter, the petitioner provided documents that were partially responsive to the RFE therefore the petitioner's RFE response will be deemed a request for a decision on the record, and a decision will be issued on the basis of the record as it existed upon receipt of the timely filed RFE response in accordance with 8 C.F.R. § 103.2(b)(11). The petitioner may not now request that USCIS consider evidence sought by, but not submitted in response to the RFE. Therefore, the AAO shall not consider the documentary evidence submitted with the Form I-290B and the petitioner's letter on appeal.

The petitioner asserted no additional issues on appeal, therefore the AAO will determine whether the director's decision to deny the petition was correct based on the record as supplemented by the petitioner's response to the RFE. As noted, the director determined that the petitioner failed to establish that the beneficiary's employment had been or would be within a qualifying managerial or executive capacity.

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.

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 director addressed the beneficiary's employment capacity in both his proposed position with the petitioning entity and his position with the foreign employer. The AAO gives primary consideration to the description of the beneficiary's previous and proposed position and duties, as a detailed description of the beneficiary's actual daily tasks tends to reveal the true nature of the employment. *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). The AAO also gives ample consideration to the job duties of the beneficiary's subordinate employees, the nature of the business, the employment and remuneration of employees, and any other facts that contribute to a comprehensive understanding of the beneficiary's actual role in a business.

In the present matter, the AAO finds that the petitioner has not established the beneficiary's qualifying employment in a managerial or executive capacity with the foreign employer. The petitioner provided evidence that the beneficiary was the sole owner of his foreign employer, a company registered in Australia on November 9, 2009. In response to the RFE, the petitioner reiterated the beneficiary's title as managing director of the company and identified two additional employees but failed to provide a description of the beneficiary's duties sufficient to establish that he has been employed in a primarily managerial or executive capacity.

The petitioner did provide a short duty description for the two additional employees, a manager of marketing and development and a manager of logistics and projects. Both of these managers were required to report to the beneficiary as managing director. No other employees were noted and no payroll evidence was submitted for any employees. Therefore, the record reflects that these

managers did not manage or supervise others and no evidence was submitted to establish them as professionals. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involved supervising employees, the petitioner must establish that the subordinate employees were supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

In addition, despite being requested by the director, the petitioner did not provide the level of education required to perform the duties of the two managers. Any 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). Thus, the petitioner has not established that these employees possessed or required a bachelor's degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees supervised subordinate staff members or managed a clearly defined department or function of the foreign entity, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees abroad were supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The director also found that the size of the company and number of individuals employed raised serious doubts that the beneficiary has been employed in a primarily managerial or executive capacity. The director reasonably concluded that the beneficiary, as the managing director with two subordinate employees, would necessarily be engaged in a wide range of functions and duties that are unrelated to and exceed the amount of time spent performing managerial and executive duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Accordingly, the petitioner has not established that the beneficiary was employed in a primarily executive or managerial capacity with his foreign employer. For these reasons the appeal will be dismissed.

The AAO also concurs with the director's finding that the petitioner has not established that it would employ the beneficiary in a primarily managerial or executive capacity. The petitioner identified the beneficiary as its president and founder but failed to provide a duty description. The petitioner also provided an abbreviated and consolidated organizational chart for the foreign employer and the petitioner. The Form I-140 petition indicated the petitioner is involved in the manufacture of organic cleaning products and had one employee. However, the organizational chart suggested there were three employees and other documents suggested at least one independent contractor. The two employees, not including the beneficiary, were referred to as a "formulations manager" and a "research and development manager" in counsel's letter dated October 20, 2011.

In response to an RFE, the petitioner provided its meeting minutes which described the beneficiary's CEO duties as follows:

> [T]o make all of the executive decisions for the company including but not limited to: the overall strategy and planning for the company; the responsibility for all financial and operational matters; the hiring and firing of all managerial staff; supervising the roles and duties of all managers. To direct and supervise any and all export opportunities for the company.

This duty description for the beneficiary is inadequate to establish that the beneficiary will be employed in a qualifying managerial or executive capacity. The petitioner's description is a mere generalized summary of the beneficiary's proposed responsibilities. No specific individualized duties or tasks were included leaving little idea of what the beneficiary would actually do on a day-to-day basis. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *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).

Additionally, as noted by the director, the AAO agrees that the petitioner has not established that it is adequately staffed to ensure the beneficiary is free to primarily perform managerial and executive duties. The petitioner's Form I-140 indicates that as part of the beneficiary's job he would "direct daily operations of [the petitioner], a company that manufactures, distributes, and exports natural and organic household cleaners made from pure essential oils." The petitioner claimed to employ one individual on the Form I-140. The petitioner has filed similar I-140 petitions on behalf of the other two manager/director employees. Nevertheless, whether this company has one CEO, or one CEO and two manager/directors, it is not reasonable to expect this type of company to operate as planned without the beneficiary's significant involvement in the routine day-to-day activities of running the business.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a nine-month old company that claimed to have a gross annual income of $150,000.00. The petitioner indicates that it intends to employ the beneficiary as CEO, as well as a formulations manager and a research and development manager, but did not document any current employees. The AAO notes that all of the proposed employees have managerial or executive titles. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as CEO and two managerial employees. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a

primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Finally, based on the record, the two proposed managers do not manage or supervise others and no evidence was submitted to establish them as professionals. Therefore, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. In this matter, it is a fact that the petitioner has not established. For these additional reasons, the appeal will be dismissed.

The AAO notes that the petitioner claims to be currently and solely manufacturing the petitioner's products in the United States however, the petitioner also states that it plans to open its first manufacturing plant in Salt Lake City by the end of 2011. Since the petitioner claims to manufacture the product it is unclear where the product has been and continues to be manufactured. 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, with the opening of this plant and other plants the petitioner hopes to employ over 500 more employees as represented on its organizational chart. However, the petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition as required pursuant to 8 C.F.R. § 204.5(j)(3)(i)(D). The regulation at 8 C.F.R. § 204.5(j)(2) states that "doing business" means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." The petition was filed on October 28, 2011. The petition indicates that the petitioner was established on June 1, 2010 but no substantiating evidence was submitted. In fact, the petitioner's Articles of Organization were filed on January 5, 2011, the Internal Revenue Service (IRS) Employer Identification Number Notice was dated January 31, 2011, the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return for 2011 reflects an incorporated date of January 5, 2011, and all business licenses and documents are consistent with that timeframe. Therefore, the evidence in the petition does not establish that the petitioner was doing business for at least one year prior to the filing date of October 28, 2011.

Furthermore, not only has the petitioner not been doing business for at least one year prior to filing the petition but it does not appear the petitioner has been doing business as defined above since its establishment in January 2011. The petitioner's IRS Form 1120 reflects minimal sales ($9,655) and operating expenses ($9,868) for 2011, and thus it is questionable whether the company was operational at the time the petition was filed in October 2011. For these additional reasons, the petition cannot be approved.

In addition, although not addressed by the director, the record contains insufficient evidence to establish that the petitioner maintains a qualifying relationship with the beneficiary's foreign employer. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States." A multinational executive or manager is one 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." Section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). The foreign company that employed the beneficiary must continue to exist and have a qualifying relationship with the petitioner at the time the immigrant petition is filed. 8 C.F.R. § 204.5(j)(3)(i)(C).

In this matter, the petitioner's evidence reflects that the foreign company employs only three individuals, including the beneficiary. These same three individuals are also identified as the U.S. petitioner's employees at the time the petition was filed, and USCIS records reflect that the petitioner has filed immigrant petitions for all three individuals. The petitioner has provided no evidence to establish who, if anyone, was working for the foreign company to keep it operational and there is no evidence in the record to establish that the foreign company was actually doing business at the time the petition was filed, such that it maintains the claimed qualifying relationship with the petitioner. For this additional reason, the petition cannot be approved.

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).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.