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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

B4



DATE: JUN 20 2012

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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,

Perry Rhew
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 Delaware corporation that seeks to employ the beneficiary as its operations manager. 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 the petitioner submitted a supplemental statement, which included an overview of the petitioner's business, the business of its affiliates, and descriptions of the beneficiary's foreign and proposed employment. The petitioner also provided supporting evidence in the form of its financial and corporate documents as well as documents pertaining to its U.S. and foreign affiliates.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a notice of intent to deny (NOID) dated May 12, 2010 informing the petitioner of various evidentiary deficiencies. The director determined that the record lacked evidence showing that: 1) the beneficiary was employed abroad in a qualifying capacity; 2) the petitioner has a qualifying relationship with the beneficiary's foreign employer; 3) the petitioner was doing business for one year prior to filing the Form I-140; 4) the beneficiary would be employed in the United States in a qualifying capacity; and 5) the petitioner has the ability to pay the beneficiary's proffered wage.

The petitioner provided a response, which included a percentage breakdown of the beneficiary's responsibilities with the foreign entity as well as a description of the beneficiary's proposed employment. In discussing the beneficiary's employment in the United States, the petitioner stated that the beneficiary was in charge of setting up operations for the petitioner's affiliate and has continued to provide services to the affiliate entity since its setup. Additionally, the petitioner provided corporate and financial documents pertaining to its U.S. and foreign affiliates.

After reviewing the record, the director concluded that the petitioner failed to overcome two of the five regulatory requirements that were previously listed in the NOID. Specifically, the director determined that the petitioner failed to show that: 1) the beneficiary would be employed in the United States in a qualifying capacity; and 2) the petitioner has the ability to pay the beneficiary's proffered wage. With regard to the beneficiary's proposed employment, the director observed that the beneficiary has spent most of her time performing services for the U.S. affiliate and further observed that the beneficiary has been remunerated by the petitioner's U.S. affiliate rather than the petitioner, thus indicating that the beneficiary does not have an employer-employee relationship with the petitioner, i.e., the proposed U.S. employer.

On appeal, counsel submits a brief in which he disputes both grounds for denial, contending that the petitioner controls the beneficiary's U.S. employment despite the fact that the beneficiary performs services for and is remunerated by the petitioner's U.S. affiliate. Counsel further claims that the beneficiary's responsibilities are performed under the direction of the petitioning entity and that the beneficiary's work for the affiliate is part of the petitioner's "regular business."

With regard to the petitioner's ability to pay, counsel claims that the petitioner provided funding for the start-up of its U.S. affiliate in the form of monetary loans, which he claims is evidence that the petitioner has the ability to pay the beneficiary's proffered wage.

Additionally, the petitioner provided a support statement dated September 7, 2010 from its president reiterating the assertions made in counsel's appellate brief. The petitioner also provided a copy of its own 2007 tax return and the 2009 tax return of its U.S. affiliate.

The AAO finds that neither counsel's arguments nor the assertions in the president's support statement are sufficient to overcome the grounds for denial. All relevant documentation will be fully addressed in the discussion below.

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.

The first issue to be addressed in this proceeding is the beneficiary's employment capacity in her proposed position with the petitioning U.S. entity. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that it would employ the beneficiary in the United States in a qualifying 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.

As a preliminary matter, the AAO notes that the content of the instant discussion will be limited to the beneficiary's proposed role and job duties with the petitioning entity, i.e., the entity that filed the Form I-140 on the beneficiary's behalf. While the AAO acknowledges the petitioner's submission of documentation that shows the existence of an affiliate relationship between the petitioner and [REDACTED] (from hereon), a separate U.S. entity, the petitioner's ability to demonstrate the existence of the affiliate relationship is entirely irrelevant, as it does not address any element that pertains to the petitioner's eligibility. Regardless of the petitioner's affiliate relationship with [REDACTED] is not the petitioning entity. Therefore the AAO will not consider or address any job duties the beneficiary performs for [REDACTED] nor will the AAO examine [REDACTED] financial documents, which are irrelevant to the issue of the petitioner's eligibility for the benefit sought.

That being said, the AAO finds that the director unnecessarily issued a conclusion concerning the issue of an employer-employee relationship between the petitioner and the beneficiary. First, the AAO observes that the director's conclusion was entirely based on the beneficiary's current, rather than her proposed employment. In other words, the petitioner is only burdened with having to establish that the beneficiary's foreign and

proposed employment will fit the statutory and regulatory criteria. The mere fact that the beneficiary was working for the petitioner's U.S. affiliate at the time of filing does not serve as a sufficient basis upon which to conclude that the prospective employment would not result in an employer-employee relationship.

Accordingly, the AAO will focus on other factors that have proved to be better indicators as to the managerial or executive capacity of the beneficiary's *proposed* employment. In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as the actual duties themselves 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); see also 8 C.F.R. § 204.5(j)(5). The AAO will also consider other relevant factors, such as the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks.

While the petitioner provided a percentage breakdown discussing the job duties and responsibilities that were entailed in the beneficiary's foreign position, the description of the beneficiary's U.S. employment was primarily limited to describing her role in setting up operations for [REDACTED]. As previously noted, any information that pertains to the services the beneficiary provided and would provide for [REDACTED] is entirely irrelevant for the purpose of determining the managerial or executive capacity of the beneficiary's proposed position with the petitioning entity. If the general consensus among the stockholders (who are common both to the petitioner and to [REDACTED]) was that the [REDACTED] would most benefit from the beneficiary's services, then [REDACTED] could have filed the Form I-140 on the beneficiary's behalf. However, [REDACTED] is not the petitioner named in the instant Form I-140, and it is therefore not [REDACTED] burden to establish the petitioner's eligibility.

The petitioner bears the burden of establishing that the beneficiary would carry out job duties as its employee and that such job duties would primarily be within a qualifying managerial or executive capacity. Merely claiming that the services the beneficiary would perform for [REDACTED] would ultimately benefit the petitioning entity is not sufficient, as the beneficiary would be directly performing those services for an entity that is separate from the petitioner, regardless of the petitioner's affiliate relationship with [REDACTED]. The record contains information that has little to no probative value in determining what job duties, if any, the beneficiary would directly perform for the petitioning entity. Therefore, the AAO is unable to conclude that the beneficiary would be employed by the petitioning entity and that such employment would consist primarily of job duties that are within a qualifying managerial or executive capacity. On the basis of this initial conclusion, this petition cannot be approved.

The issue of the petitioner's ability to pay the wage offered is governed by the regulation at 8 C.F.R. § 204.5(g)(2), which 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 determining the petitioner's ability to pay the proffered wage, USCIS 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, there is no indication that the beneficiary has been employed by the petitioner or that the petitioner has compensated the beneficiary a salary equal to or greater than the proffered wage.

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.

The petitioner filed the Form I-140 on March 9, 2010. The petitioner has provided no evidence other than its 2007 corporate tax return to establish its ability to pay. 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)). As the record lacks any documentary evidence establishing the petitioner's ability to pay beginning on the filing date of the petition, the AAO finds that the petitioner has failed to meet the requirements discussed at 8 C.F.R. § 204.5(g)(2).

Lastly, the AAO will withdraw two of the director's affirmative findings that were favorable to the petitioner.

First, the AAO turns to the issue of the beneficiary's employment abroad. Specifically, in reviewing the percentage breakdown the petitioner provided in response to the NOID, the AAO finds that the job description fails to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. Under the heading of "Planning and Execution of Business Strategies," to which the petitioner allocated 25% of the beneficiary's time, the petitioner indicated that the beneficiary's job duties included conducting market research, attending medical association meetings to identify client needs, researching new products, forecasting market trends, formulating marketing campaigns. The AAO finds that these are marketing and sales related tasks and are not tasks performed in a qualifying managerial or executive capacity.

Under the heading of "Customer Focus and Interaction," to which the beneficiary allocated 15% of her time, the AAO finds that the petitioner performed other non-qualifying operational tasks, including visiting client sites to attend client meetings, addressing customer concerns, and assisting clients with developing maintenance schedules.

Although there is an element of discretionary authority and autonomy that is common to all of the above tasks, the AAO finds that the tasks themselves cannot be deemed as qualifying within a managerial or executive capacity. Additionally, while the petitioner indicated that another 40% of the beneficiary's time was allocated to overseeing employees within the sales department, the petitioner did not provide sufficient information about the employees' educational credentials, which would indicate whether the individuals under the beneficiary's supervision were professional employees, and the petitioner failed to provide any information about the foreign entity's organizational hierarchy that would help the AAO to understand whether the beneficiary's subordinates were managerial or supervisory employees. In light of the above deficiencies, the AAO finds that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. The director's affirmative finding to the contrary will therefore be withdrawn and the adverse finding will be entered in its place.

The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) requires the petitioner to establish that it had been doing business for at least one year prior to filing the Form I-140. 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 AAO finds that the director erroneously issued a favorable finding on the basis of the petitioner's submission of its corporate tax returns. Contrary to the director's reliance on tax records, the AAO does not deem a petitioner's tax returns to be adequate evidence of how frequently that entity engages in business transactions. In fact, even if tax returns were deemed an acceptable means of establishing that a petitioner is doing business, the record in this matter shows that the petitioner failed to provide the petitioner's tax returns to account for the relevant time period. The record shows that the petitioner filed the Form I-140 on March 9, 2010. As such, the petitioner has the burden of establish that it was doing business during the one-year period that directly preceded the filing of the petition. The petitioner submitted its 2004 and 2005 tax returns in support of the petition and its 2007 and 2008 tax returns in support of the appeal. None of these documents even pertain to the time period in question.

In light of the above, the AAO finds that the petitioner failed to provide evidence to establish that it was conducting business on a regular, systematic, and continuous basis during the requisite time period and on the basis of this conclusion, the AAO's adverse finding will replace the director's favorable finding.

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). Therefore, based on the additional grounds of ineligibility discussed above, this petition cannot be approved.

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.