



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 06 2013

OFFICE: NEBRASKA 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 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 California limited liability company that seeks to employ the beneficiary in the United States as president/owner of its manufacturing, sales, consulting, and gas station business. 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 documents which contained relevant information pertaining, in part, to the beneficiary's proposed employment with the petitioning entity. The petitioner also provided supporting evidence in the form of corporate, business, and financial documents pertaining to the beneficiary's U.S. employer and its business operations.

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) informing the petitioner of various evidentiary deficiencies. The petitioner was instructed to provide evidence establishing that it had been doing business for at least one year prior to filing the petition. The director also requested evidence to establish that the beneficiary would function at a senior level within the organization through the management or direction of a department, subdivision, function or component or through the employment of a professional, managerial or supervisory staff that would relieve him from primarily performing non-qualifying duties.

Although the petitioner provided a supplemental job description for the beneficiary's U.S. position, brief employee job descriptions, an organizational chart, and additional employee pay stubs for some months in 2010, the petitioner failed to provide much additional documentation reflecting the business transactions completed by the petitioner in the year preceding the filing of the petition.

After considering the petitioner's response, the director denied the petition, concluding that the petitioner failed to establish: (1) that it would employ the beneficiary in a qualifying managerial or executive capacity; and (2) that it had been doing business for at least one year prior to filing the petition.

On appeal, counsel for the petitioner disputes the denial of the petition and urges consideration of the petitioner as a small business. Counsel cites to unpublished AAO decisions in support of the assertion that the beneficiary may perform some non-qualifying duties and still be employed in a position that is primarily managerial or executive. Further, counsel asserts that the beneficiary's role as a consultant qualifies him as a function manager. Finally, counsel reasserts that the petitioning company has been engaged in the regular, systematic, and continuous provision of goods and services.

The AAO finds that counsel's assertions are not persuasive and thus fail to overcome the director's adverse decision. A comprehensive analysis of the AAO's findings is provided 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 addressed by the director is whether the petitioner established that it had been doing business for at least one year prior to the date the Form I-140 was filed. 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 petitioner submitted Articles of Organization which indicate that the company was established on November 20, 2008. The petitioner filed the Form I-140 on December 31, 2009. Therefore, according to the regulatory requirement specified in 8 C.F.R. § 204.5(j)(3)(i)(D), the petitioner must establish that it has been engaged in the "the regular, systematic, and continuous" course of business since December 30, 2008. See 8 C.F.R. § 204.5(j)(2).

Upon review, the AAO concurs with the director's finding that the petitioner failed to establish that it was engaged in business on a "regular, systematic, and continuous" basis during the relevant 12-month period. *See id.* While the petitioner stated at the time of filing that it has "shipments already arrived, manufacturing started" and that its consultation business is in "full force," it did not provide documentary evidence of a full year of business activities. In fact, the record contains evidence of only two sales transactions that pre-date the filing of the petition, evidenced by two purchase orders from [REDACTED] dated November 9 and December 10, 2009. The petitioner indicates that the first order was delivered in December 2009, the month in which the petition was filed.

The petitioner submitted numerous documents including emails and correspondence dating back to April 2009, which indicate interest, inquiries or intent to engage in the purchase of moth balls, air fresheners and other products manufactured by the foreign entity and sold by the petitioner. However, as of the date of filing, the only completed transaction documented in the record occurred in December 2009. The petitioner also included emails and correspondence primarily to and from the personal e-mail account belonging to the beneficiary's spouse. These e-mails suggest that she was engaged in providing [REDACTED] consulting services, but the petitioner provided insufficient corroborating evidence, such as evidence of invoices issued by the petitioner for these services, or evidence of payments received from clients and deposited to the petitioner's account. Without such evidence, the AAO cannot conclude that the beneficiary's spouse was providing these services on behalf of the petitioner, as the petitioner's name does not appear in any of the e-mails and she did not use the company's telephone number or company e-mail account. In fact, the e-mails reference her affiliation with [REDACTED] rather than the petitioning company. Further, while the petitioner provided evidence that the beneficiary's spouse arranged television advertising for the Fengshui services she provides, the invoices requesting payment for advertising services were issued to [REDACTED] and not to the petitioner. There is no evidence that the petitioner has registered [REDACTED] as a fictitious name, or any other evidence to link the [REDACTED] consulting business with the petitioner's import business. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The AAO notes that the petitioner indicated on the Form I-140 that its business activities include operation of a gas station. However, the petitioner failed to provide any evidence related to this claimed component of its business at the time of filing. In response to the NOID, the petitioner submitted an organizational chart which identifies a "Manager Gas Station" and two cashiers. The accompanying pay stubs for these employees indicates that they first earned wages several weeks subsequent to the filing of the petition. The petitioner submitted evidence that it was registered as a foreign company authorized to do business in Florida as of January 2010, also subsequent to the filing of the petition. The evidence submitted on appeal indicates that the petitioner entered into a management agreement with a Florida corporation, [REDACTED], on January 24, 2010, under which the petitioner agrees to manage a gas station located in [REDACTED] as an independent contractor.

Finally, the petitioner failed to submit evidence which could have offered corroboration to its claim that it has been doing business for one full year, such as a copy of its 2008 and 2009 federal income tax returns (IRS Forms 1120 or 1065). 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Therefore, while the petitioner claims to be engaged in three or more types of business activities, it has failed to provide probative evidence that it had been doing business as defined in the regulations for one year at the time the petition was filed. Accordingly, the appeal will be dismissed.

The second issue addressed by the director is whether the petitioner established that it would employ the beneficiary in a primarily 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.

In reviewing the beneficiary's employment capacity, the AAO gives primary consideration to the petitioner's description of the beneficiary's proposed position, 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 petitioner's 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 that it will employ the beneficiary in a qualifying managerial or executive capacity. The petitioner asserted that the beneficiary "will spend almost 100% of his time exercising his discretionary authority in managing customer relations, marketing, and trading on behalf of [the petitioner], and operating the overall business activity in United States." Although the petitioner claims to be engaged in product trading, manufacturing and consulting, the evidence reveals that the petitioner has not yet established any manufacturing capabilities, but has initiated trading in products manufactured by its claimed foreign parent company. In addition to the trade and manufacturing, the petitioner also claimed to be engaged in the business of [REDACTED] and indicated on the Form I-140 that it operates a gas station.

Notwithstanding the petitioner's claims, the description of the beneficiary's proposed employment submitted at the time of filing the petition indicates that a considerable portion of the beneficiary's time would be allocated to daily operational tasks. For example, the petitioner stated that the beneficiary will "assist in consultation and marketing" of the [REDACTED] business, negotiate contracts with vendors and customers, perform market research and "provide consultation and marketing for the [REDACTED]". A review of the submitted evidence, which includes extensive e-mail correspondence authored by the beneficiary, indicates that he is very much involved in day-to-day sales negotiations with prospective clients. While the AAO acknowledges that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

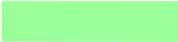
Further, while the petitioner indicated that the beneficiary oversees the company's activities through his subordinate personnel, it did not reconcile this claim with the initial position description which indicates that he directly performs sales, marketing and consulting activities.

With respect to the petitioner's staffing, it claimed to employ two full time workers and two contract workers. According to the petitioner's organizational chart there were three direct subordinates to the beneficiary, including [REDACTED] sales manager for marketing in Florida, the beneficiary's spouse, [REDACTED] consultant, and [REDACTED] manager of finance and administration in California. The chart identifies a "supervisor manufacturing, ordering, inventory," [REDACTED] subordinate to the manager of finance and administration. The petitioner provided very brief duty descriptions for each worker. The petitioner failed to explain which two workers were full-time and which two were contractors. The limited payroll documentation provided by the petitioner failed to adequately resolve the matter.

Nevertheless, the beneficiary is not required to supervise personnel, but if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisors, managers or professionals in order to establish that his personnel responsibilities are qualifying managerial duties. See § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner claimed that all four workers had a degree but it was not established that a bachelor's degree was actually necessary for any of the positions held. Furthermore, even if the petitioner had established the requirement it failed to provide evidence of the education levels attained by the workers. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

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 any 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.

On appeal the petitioner asserts that the director failed to consider the beneficiary's role as a consultant in determining whether he qualifies as a function manager. However, the evidence does not support that the beneficiary would be managing the consultation function, rather it shows, at most, that he would actually perform the function. The petitioner states that the beneficiary provides very specialized consultation services and performs the function which is essential for business development. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. The petitioner did not meet its burden in this case.

Finally, although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. 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 one-year-old company that claimed to be engaged in "trading/manufacturing/consulting " with a projected gross annual income of \$300,000. Although the petitioner claimed to also have a gas station, it was not staffed since the evidence indicates that the petitioner signed a management agreement giving it authority to manage the gas station several weeks after the petition was filed. A 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). The company employed the beneficiary as president, plus it claimed to employ a sales manager, a finance and administration manager, a consultant, and one subordinate supervisor handling manufacturing-related issues. The AAO notes that most of the employees have a managerial job titles. Further, the petitioner explained, and the record reflects, that it was the beneficiary who was negotiating with, and in the final order stage, with some customers. 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 president and the employees described. 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.

The petitioner maintains the burden of establishing that the beneficiary would more likely than not primarily perform tasks within a qualifying managerial or executive capacity. Given the numerous deficiencies discussed above, the AAO finds that neither the beneficiary's job description nor the petitioner's organizational composition at the time of filing adequately establish that the petitioner would be able to relieve the beneficiary from having to allocate the primary portion of his time to non-qualifying operational tasks. Therefore, on the basis of this conclusion, the instant petition cannot be approved and the appeal will be dismissed.

Beyond the decision of the director, the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage of \$40,000 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) states the following, in pertinent part:

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 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, the petitioner provided no evidence that it had previously compensated the beneficiary and it provided no tax returns or any other documentation sufficient to establish its ability to pay the proffered wage. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). For this additional reason, the petition cannot be approved.

Additionally, in the present matter the petitioner has not established that a qualifying relationship exists with the beneficiary's overseas employer. 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 regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

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.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In this matter, the petitioner's Certificate of Permanent Registration, Central Excise Registration Certificate, import export documents and other foreign tax documents adequately reflect the beneficiary's ownership as sole proprietor of the Indian foreign entity.

However, the petitioner has not submitted sufficient evidence of the ownership of the U.S. company. The petitioner submitted a letter dated December 20, 2009, stating that the petitioner is a wholly owned U.S. branch office of the Indian foreign entity. In support of the assertion, the petitioner submitted articles of organization. The articles of organization, dated November 20, 2008, indicate that the company has one manager and identify the beneficiary as organizer and agent for service of process. This document establishes management but does not establish that the petitioner's manager is also its owner.

As general evidence of a petitioner's claimed qualifying relationship, a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or control of an LLC. LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each

member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

For these additional reasons the appeal will be denied and the petition 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).

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.