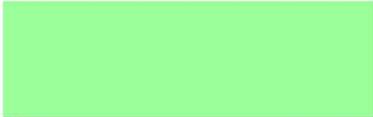




**U.S. Citizenship
and Immigration
Services**

(b)(6)



DATE: **MAR 09 2013**

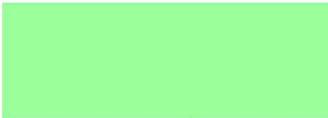
OFFICE: TEXAS SERVICE CENTER

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 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,

Rón Rosenberg
Acting Chief, Administrative Appeals Office

(b)(6)

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner subsequently filed an appeal with the Administrative Appeals Office (AAO). The appeal was dismissed and the matter is now before the AAO on motion to reopen and reconsider. Although the AAO will grant the petitioner's motion in order to address newly submitted evidence, the prior decision dismissing the appeal will be affirmed.

The petitioner is a United States branch office of a foreign company headquartered in [REDACTED] Syria. The petitioner 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 determined that the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage and denied the petition on that basis. The director rejected the petitioner's offer of documents addressing the foreign branch's ability to pay, instructing the petitioner that evidence of ability to pay must necessarily pertain to the U.S. branch where the beneficiary's proposed employment would take place.

The AAO concurred with the director's analysis and conclusion, pointing out that the petitioner failed to provide acceptable forms of documentation. The AAO specifically rejected the petitioner's offer of a statement from the foreign branch's financial manager as permissible supporting evidence, stating that the record lacks evidence showing that the foreign entity employs more than 100 employees and beyond that, that the foreign entity's ability to pay cannot be used to determine the prospective U.S. employer's ability to pay.

The AAO also issued additional findings beyond those found in the director's decision. Namely, the AAO determined that the petitioner failed to provide sufficient evidence to show that: (1) the beneficiary was employed abroad in a qualifying managerial or executive capacity; (2) the beneficiary would be employed by the petitioning U.S. employer in a qualifying managerial or executive capacity; and (3) the U.S. petitioner is doing business in the United States. Additionally, the AAO addressed the issue of credibility, pointing that the petitioner provided inconsistent evidence with regard to its ownership of [REDACTED] a claimed U.S. subsidiary.

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 whether the petitioner has provided sufficient evidence to establish that it has the ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states, 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

(Emphasis added.)

As a preliminary matter, nowhere in the above provision is there any indication that U.S. Citizenship and Immigration Services (USCIS) considers the records of the entire organization when addressing the issue of ability to pay. To the contrary, as emphasized in the AAO's prior decision, a number of regulatory provisions, including 8 C.F.R. § 204.5(g)(2), are concerned only with documents pertaining to the prospective U.S. employer. Regardless of the fact that the petitioner is a branch office of, and not wholly separate from, the beneficiary's employer abroad, the key concern in establishing the ability to pay is to determine that the branch that operates in the United States is able to compensate the beneficiary's proffered wage. The petitioner's submission of credible and reliable evidence to establish that the main branch office abroad employs at least 100 employees is therefore irrelevant in this matter and will not be examined, as this evidence does not establish the U.S. entity's ability to pay.

Counsel has indicated that he was the catalyst for the petitioner's decision to operate in the United States as a branch of the foreign entity rather than as a separate parent, subsidiary, or affiliate entity. Counsel contends that the purpose of advising the petitioner to operate as a branch office was so that the petitioner would not be considered individually separate from its counterpart, which operates abroad. The underlying contention is that the petitioner will get more favorable treatment if it is considered as part of one large organization than if the petitioner is considered by itself as a separate entity. However, the language of 8 C.F.R. § 204.5(g)(2) is unambiguous in expressly stating that the key focus in determining the ability to pay is the financial status of the "prospective United States employer."

While the AAO acknowledges that the petitioner is part of a single multinational organization, whose main branch operates in Syria, it is not the intent of 8 C.F.R. § 204.5(g)(2) to consider all documents that broadly

demonstrate the financial solvency of the entire organization. Therefore, regardless of the fact that the foreign operating branch and the petitioner are part of the same organization, only those documents that establish the financial ability of the U.S.-based branch will be considered. Counsel has not pointed to any statute, regulation, or precedent decision that contradicts the AAO's objective analysis. While counsel interprets the AAO's reiterations as an indication that the AAO is "stubbornly trying to maintain an unsupportable position," he does not point to any legal authority to contradict the AAO's discussion, which is based on the express language of the regulatory provision in question.

The AAO allowed the petitioner ample opportunity to provide any evidence that is relevant to determining the U.S. branch's ability to pay the beneficiary's proffered wage, indicating its willingness to consider a variety of documents in addition to those that are expressly enumerated at 8 C.F.R. § 204.5(g)(2). However, counsel finds this approach objectionable as well, asserting that the AAO "does not have the authority to declare a new procedure specifically for branch offices." Counsel's assertions are not supported by the language in 8 C.F.R. § 204.5(g)(2), which states that additional evidence not expressly cited in the regulation can also be considered. While the regulation expressly mentions profit/loss statements, bank account records, and personnel records among the additional documents that USCIS may consider, there is no indication that this is an exhaustive list of the types of evidence the AAO may review. See 8 C.F.R. § 204.5(j)(3)(ii), which allows USCIS broad discretion to request additional evidence where it deems appropriate to do so.

In light of the above, the AAO finds that the petitioner has failed to establish its ability to pay the beneficiary's proffered wage and thus has not shown that the appeal was erroneously dismissed.

The next two issues to be addressed in this proceeding call for an analysis of the beneficiary's respective positions with the foreign entity abroad and with the foreign entity's U.S. branch office.

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 examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the beneficiary's job duties. See 8 C.F.R. § 204.5(j)(5). Published case law supports the pivotal role of a clearly defined job description, deeming the actual duties themselves as the factors that determine 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).

In the prior decision, the AAO informed the petitioner that the record lacked the necessary information determining the job duties the beneficiary performed during his employment abroad and the job duties he would perform during his proposed employment at the U.S. branch office. Despite the AAO's focus on the beneficiary's actual job duties, the petitioner failed to supplement its written motion with additional job descriptions containing detailed lists of job duties. Instead, counsel focuses his attention on the AAO's citation of a precedent decision which requires the petitioner to support its claims by submitting documentary evidence. Specifically, counsel asserts that reliance on *Matter of Soffici*, 22 I&N Dec. 158 (Comm. 1998), which cites to the precedent set in *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972), should be limited to those cases where there are factual discrepancies or anomalies. Counsel's reasoning, however, is not supported by the cited case law, as the associate commissioner's decision in *Matter of Soffici* does not indicate that supporting evidence is needed only for the purpose of clarifying factual inconsistencies. Rather, the associate commissioner focused on the lack of supporting evidence establishing that the petitioner met some of the key statutory requirements that pertain to the alien entrepreneur classification pursuant to section 203(b)(5) of the Act.

As a matter of policy, counsel's assertions are not reasonable. Counsel cannot expect that the petitioner rely solely on third party attestations as a means for supporting the petitioner's claims. For instance, if the petitioner were to claim that its organizational hierarchy is comprised of a certain number of employees assuming certain specified positions within the hierarchy, it is not unreasonable for USCIS to require the petitioner to provide supporting documentary evidence, such as payroll documents or quarterly wage statements, to establish the existence of the claimed staffing. Simply having someone attest to the information as a means of corroborating the petitioner's claim is not sufficient. If such reasoning were to be broadly applied, any company, regardless of its ability to meet the statutory and regulatory requirements, could make any number of claims knowing that no contemporaneous supporting evidence is required as a means of corroboration.

Even if the AAO were to focus on third party attestations, such as the affidavit of [REDACTED] (which has been submitted in support of this motion), the AAO questions the relevance of this document, which pertains entirely to the beneficiary's role within [REDACTED]. Regardless of the petitioner's ability to show ownership of [REDACTED], the fact remains that the latter entity did not file this petition on behalf of the beneficiary. The petition was filed by the U.S. branch of a foreign entity, whose alleged business purpose in the United States, according to Part 5, Item 2 of the Form I-140, is to engage in sales and international transactions. While a foreign entity's purchase of ownership shares in a U.S. entity, as the petitioner claims to have done with regard to [REDACTED], qualifies as an international transaction, the beneficiary's role in the continued operations of the purchased entity is not relevant. The petitioner must provide an adequate discussion of the actual job duties the beneficiary performed in his position with [REDACTED] overseas and the job duties he would be expected to perform for that entity's U.S. branch operation. Here, the petitioner has failed to provide the key information delineating the beneficiary's specific job duties either abroad or in the United States. Without such information, the AAO cannot affirmatively conclude that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity.

Next, the AAO will determine whether the petitioner provided evidence to establish that it has been and continues to provide goods and/or services on a regular, systematic, and continuous basis. See 8 C.F.R. § 204.5(j)(2).

The petitioner has not supplemented the record with any new documents pertaining to the business activities of [REDACTED] Company's U.S. branch operation. As discussed in the AAO's previous decision, providing documents to show that the petitioner's claimed U.S. subsidiary—[REDACTED]—is doing business in the United States is not relevant to a discussion of whether the petitioner itself is doing business in the United States. The record contains no evidence to establish that the U.S. branch office of the beneficiary's foreign employer is providing goods and/or services on a regular, systematic, and continuous basis. The single transaction of purchasing a business in the United States is not sufficient to show that the petitioner continued to engage in similar such transactions. Therefore, the AAO finds that the U.S. branch office is not more than "the mere presence of an agent or office." *Id.*

Third, as pointed out in the AAO's prior decision, even if the AAO were to consider the business activities of [REDACTED], the petitioner has submitted insufficient and conflicting information regarding its ownership of that corporation. To reiterate the AAO's prior observations, the petitioner previously provided stock certificates numbered one, two, and three to establish the petitioner's acquisition of [REDACTED] stock. However, the AAO noted that stock certificates numbered two and three were endorsed on the back, without a date, representing that the share certificates were transferred to [REDACTED].

Additionally, the petitioner submitted a letter from [REDACTED] President of [REDACTED] who provided an explanation that seemingly corroborated the general claim of the petitioner's ownership interest in [REDACTED]. The AAO rejected [REDACTED] statement, finding that the statement did not constitute documentary evidence pursuant to *Matter of Soffici*, 22 I&N Dec. at 165. As previously noted, counsel's objections to the AAO's citing of *Matter of Soffici* to support the need for corroborating documentary evidence were not valid, particularly when the AAO's purpose in seeking documentary evidence, in place of written attestations, was to resolve a perceived anomaly. Contrary to counsel's objections, the AAO was justified in requiring that the petitioner provide documentation to support the claims made in Mr. [REDACTED] statement, which

were not consistent with the evidence on record. The fact that the petitioner has not produced the required evidence to cure this deficiency will result in another adverse finding on this issue as well.

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). Based on all of the grounds of ineligibility discussed above, including those that were not originally cited in the director's decision, the denial of the petition will be affirmed.

The AAO hereby affirms its prior decision dismissing the appeal for the above stated reasons, with each considered as an independent and alternative basis for dismissal. 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 AAO's decision dated February 7, 2012 will be affirmed.