

(b)(6)



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

DATE: **DEC 12 2014** 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)

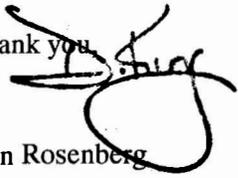
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg  
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 corporation that claims to operate as a business services provider. It seeks to employ the beneficiary in the United States as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States or that he was employed abroad in a qualifying managerial or executive capacity.

### I. The Law

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.

## II. Procedural History

The record shows that the petition was filed on July 9, 2013 and was accompanied, in part, by a supporting statement, dated June 24, 2013, signed by the beneficiary in his capacity as the petitioner's president. The beneficiary explained that while the petitioner was originally established for the development of oil and gas production, this project was deemed to be unprofitable and caused the petitioner to redirect its focus to providing "supporting services to other businesses," including call center services, marketing services, merchant services, and data processing and software development services. The supporting statement also included a description of the beneficiary's proposed position with the U.S. entity as well as the position the beneficiary formerly held during his employment with the petitioning entity. With regard to the former employment, the beneficiary stated that he directed the company's investment budget, developed new clients, and "analyzed, planned, and implemented operations to maximize returns on investments." The petitioner

also provided a description of the beneficiary's proposed employment, which the director included in the denial. As such, we need not restate this information in our current discussion. The petitioner provided other supporting evidence including corporate documents, tax returns, a printout out of the petitioner's information sheet describing the services it provides and the companies it subcontracts to provide the services, photographs of the petitioner's office space, and documents pertaining to the foreign entity.

On January 16, 2014, the director issued a request for evidence (RFE), informing the petitioner that the record lacked sufficient evidence to establish that the beneficiary was employed abroad and would be employed in the United States in a managerial or executive capacity. The director instructed the petitioner to list the beneficiary's specific tasks with each entity and assign time constraints to individual tasks within the respective entities. The director also asked the petitioner to describe both entities' products and services and to include the administrative tasks necessary to produce the products or provide the services along with an explanation of who performs such operational tasks. Lastly, the director asked the petitioner to provide a payroll summary for the beneficiary and his subordinates as well as organizational charts corresponding with the beneficiary's foreign and U.S. employment, showing each entity's staffing structure, and listing all of the employees and contractors in the beneficiary's immediate division, department, or team.

The response included a statement from counsel, dated January 31, 2014, who reiterated claims previously made with regard to the beneficiary's employment capacity with the foreign and U.S. entities. The petitioner also provided a statement from the beneficiary, dated January 24, 2014, which included the beneficiary's U.S. job description and job descriptions of the beneficiary's three subordinate employees –

We note that the petitioner did not provide the requested percentage breakdown indicating what portion of time the beneficiary would allocate to his assigned job duties. The petitioner provided its corresponding organizational chart depicting the beneficiary, his three subordinates, and the companies each individual is said to manage at the bottom tier of the hierarchy. With regard to the beneficiary's employment abroad, the petitioner provided a job description from the foreign entity's current director, who listed the beneficiary's former duties and responsibilities and indicated what percentage of time the beneficiary allocated to his assigned duties. The job description was accompanied by an organizational chart, which depicted the beneficiary at the top of an organization and four positions – one CFO, one financial analyst, one individual listed as "legal department," and one position titled "Business Marketing Relationship – all directly subordinate to the beneficiary. The petitioner also provided various business and tax documents, bank statements, and the beneficiary's travel itinerary.

In a decision dated March 3, 2014, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. The director found that the job descriptions offered with regard to the beneficiary's former and proposed positions were vague and of limited evidentiary value. The director also found that the record lacks sufficient evidence to establish that either of the beneficiary's employers have the staff necessary to allow the beneficiary to focus his time to performing primarily executive tasks.

On appeal, counsel disputes the director's decision with regard to the beneficiary's proposed employment, contending that the petitioner "ignored factual evidence" and erroneously required the petitioner to establish that the beneficiary's proposed employment would be both in a managerial and an executive capacity. Counsel neither disputed nor addressed the director's conclusion with regard to the beneficiary's employment abroad. As a result of having failed to address the beneficiary's employment abroad, we find that the petitioner effectively conceded to the conclusion as it specifically pertains to the beneficiary's former

employment and the petition must be denied based on the petitioner's failure to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. We find that no further discussion of the beneficiary's employment abroad is necessary. Accordingly, the decision below will address the director's findings and counsel's assertions with regard to the beneficiary's proposed position with the petitioning entity.

Upon review, and for the reasons stated below, we find that the petitioner has failed to establish that the beneficiary would be employed in a primarily managerial or an executive capacity.

### III. Issue on Appeal

As indicated above, the primary issue to be addressed below is whether the beneficiary's proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity.

In general, when examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the description of the beneficiary's proposed job duties in his prospective position with the petitioning entity. See 8 C.F.R. § 204.5(j)(5). Published case law has determined that the duties themselves will reveal the true nature of the beneficiary's 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). We then consider the beneficiary's job description within the context of the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees who are available to relieve the beneficiary from having to primarily perform operational duties, the nature of the petitioner's business, and any other factors that may contribute to a comprehensive understanding of the beneficiary's actual duties and role within the petitioning entity.

Turning to the job description provided in the beneficiary's January 24, 2014 statement, the beneficiary claimed that he does not have a fixed schedule and declined to provide the requested time allocations indicating what portion of his time he planned to spend performing each of his assigned tasks. As such, the job description provided fails to comply with the director's express RFE instructions and precludes us from gaining an understanding of highly relevant information about the proposed employment. Further, the beneficiary's job description does not clarify how meeting with the company's three employees allows the beneficiary to successfully direct the petitioner's "financial and budget activities," maximize investments, and improve the petitioner's efficiency, all of which the beneficiary listed among his assigned job duties. The beneficiary did not explain what issues would be addressed during meetings with his subordinates or how such information would impact the beneficiary's ability to direct budgets, maximize investments, and increase company efficiency.

The beneficiary went on to state that he is responsible for analyzing company operations for the purpose of determining how to reduce costs, improve programs, or change company policies. The petitioner failed to clarify how performing such analysis would entail tasks and objectives that are different from those carried out and attained in the course of directing the company's budgets and finances. The beneficiary's claim that he is responsible for finding new ways to market the petitioner's products and services is both general and confusing when considered in light of the petitioner's overall business purpose, which the petitioner claimed is to hire companies to provide services addressing the specific needs of the petitioner's clients. First, it is unclear how marketing the petitioner's services can be deemed as a qualifying managerial- or executive level task. Second, the beneficiary's reference to the provision of products is inconsistent with the claim that the

petitioner is a provider of services. In fact, the petitioner did not specify which products it sells or provide any evidence to support this seemingly inconsistent claim. 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).

Next, the petitioner claimed that the beneficiary would direct, plan, and implement policies and objectives in an effort to maximize returns on investments and increase productivity. However, this statement conveys no meaningful information about the beneficiary's specific tasks and primarily restates aspects of the statutory definition of executive capacity. See section 101(a)(44)(B)(ii) of the Act. Similarly, the petitioner vaguely stated that the beneficiary would direct activities concerning pricing, sales, and expansion of services, thus failing to explain what actual tasks he would perform. In other words, by broadly stating that the beneficiary would "direct" various activities, the petitioner failed to define the beneficiary's actual contributions with respect to the petitioner's pricing, sales, and expansion. Likewise, while the petitioner claimed that the beneficiary would "direct" investigations concerning customer complaints, the petitioner did not specify who, if not the beneficiary, would actually address and resolve those complaints. In other words, the petitioner did not establish that someone other than the beneficiary would carry out the underlying operational tasks of addressing customer complaints. In addition, the claim that the beneficiary would negotiate and approve contracts or agreements with contactors, distributors, or other entities is also vague, as it fails to convey substantive information as to the specific contractors and distributors the beneficiary deals with or the nature of the contracts and agreements he negotiates in the course of the petitioner's business.

Although the beneficiary also indicated that he would be responsible for preparing budgets to be reviewed by financial advisers, the petitioner did not include a financial adviser position in its organizational hierarchy or provide any evidence to establish its use of financial advisers. 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)).

Further, the petitioner provided several questionable documents to support the claim that the beneficiary assesses the petitioner's investment opportunities. Namely, the petitioner provided several weekly assessments regarding potential investments on the letterhead of "[REDACTED]". All three assessments listed the beneficiary as the client contact on behalf of the petitioner and contained the name "[REDACTED]" indicating that he was the individual who wrote the reports. Given that "[REDACTED]" is listed on the petitioner's organizational chart as one of its three managers and was included in the petitioner's quarterly wage reports as one of its employees, it is unclear why his name appears on the assessments as the writer of all three reports, which indicates that he is in fact an employee of "[REDACTED]". In addition, close review of the January 5, 2014 and January 14, 2014 reports shows printing abnormalities at the bottom left corner, where the company's name and address are printed, thus giving rise to question the validity of the reports and the information they contain. Supporting case law states that when doubt is cast on any aspect of the petitioner's proof, such doubt may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

On appeal, counsel cites supporting case law, indicating that the governing standard of proof in this immigration proceeding is the preponderance of the evidence rather than the clear and convincing standard, as indicated in the director's decision. We find that counsel properly pointed out that the director's reference to

the clear and convincing standard of proof was incorrect. As supported by relevant case law, the applicable standard in this proceeding is the preponderance of the evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). As such, the director's reference to an incorrect standard of proof is hereby withdrawn.

Notwithstanding the director's erroneous reference, the previously described deficiencies pertaining to the beneficiary's deficient job description and the petitioner's submission of deficient supporting documents strongly indicate that the record supports the director's decision. Further, counsel erroneously references 8 C.F.R. § 204.1(h) to support the assertion that the service provides the petitioner with an explanation of any evidentiary deficiencies and a request for additional evidence is incorrect. First, the referenced section does not exist in Title 8, Code of Federal Regulations. Second, the provisions that govern the issuance of notices of derogatory information and requests for additional evidence are found at 8 C.F.R. § 103.2(b)(8) and they do not require that the director issue any notice prior to the final notice of denial. Thus, counsel's implication that the director's decision is not "fair and reasonable" because it was not preceded by a notice of intent to deny is not supported by law or regulation. Moreover, as discussed above, the record shows that the director issued an RFE on January 16, 2014 and expressly notified the petitioner that the "evidence submitted is not sufficient." The director then proceeded to delineate the type of evidence the petitioner should submit in order to properly supplement the record with the information that is necessary to determine whether the petitioner meets the eligibility criteria. In light of these facts, it is unclear what error counsel claims the director committed.

Lastly, counsel's citation of unpublished AAO cases in support of the appeal is not persuasive. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

In summary, the record shows that the petitioner submitted potentially altered documents with questionable probative value to support one of its claims. This considerable deficiency leads us to doubt the reliability of the beneficiary's supporting statements and other supporting evidence submitted. Accordingly, based on deficiencies pertaining to the petitioner's credibility and in light of the petitioner's submission of deficient evidence pertaining to the beneficiary's employment with the foreign and U.S. entities, we find that the petitioner failed to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity.

#### **IV. Beyond the Director's Decision**

In addition, while not previously addressed in the director's decision, the record indicates that the petitioner failed to provide evidence to establish that it has been and continues to do business on a regular, systematic, and continuous basis. *See* 8 C.F.R. § 204.5(j)(2). Despite statements on record indicating that the petitioner changed business direction and is currently operating as a service provider, the petitioner did not provide evidence to establish its business associations with clients or the entities that the petitioner has allegedly contracted to provide various business services to its clients. As previously indicated, the petitioner must provide documentary evidence in order to support its assertions. *See Matter of Soffici*, 22 I&N Dec. at 165.

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 ground of ineligibility discussed above, this petition cannot be approved.

#### V. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.