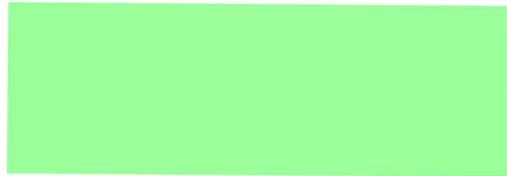


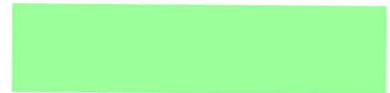


U.S. Citizenship
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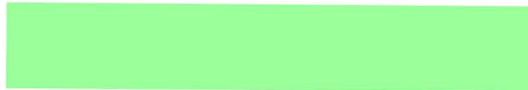
(b)(6)



DATE: **MAR 28 2014** OFFICE: TEXAS SERVICE CENTER



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 (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. All documents related to this matter have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Thank you,


of Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the record remanded for the entry of a new decision based upon all the evidence in the record.

The petitioner filed this immigrant petition 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 petitioner, a Florida corporation states that it operates a real estate management company. It seeks to employ the beneficiary as its president.

The director denied the petition, concluding that the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage.

On appeal, counsel disputes the director's conclusions and submits a supporting statement along with supplemental documents in an effort to overcome the basis for denial.

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.

II. Ability to Pay

The sole issue addressed by the director is whether the petitioner established 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.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on March 22, 2011. It indicated on the Form I-140, at Part 6, that it will pay the beneficiary a salary of \$67,000.00 per year.

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 case, the petitioner submitted copies of the beneficiary's Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement for 2011 and 2012, paystubs and payroll summary. According to the Form W-2 for 2011, the petitioner paid the beneficiary a salary of \$70,001.58. The beneficiary's Form W-2 for 2012 indicates that the petitioner paid him a salary of \$85,000.00. The petitioner has shown its ability to pay the proffered wage and the director's adverse finding will be withdrawn.

III. Employment in a Managerial or Executive Capacity

Although the director's sole ground for denial will be withdrawn, the petitioner has submitted insufficient evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity as those terms are defined at sections 101(a)(44)(A) and (B) of the Act.

In examining the executive or managerial capacity of the beneficiary, USCIS 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). In addition, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

The petitioner stated on the Form I-140, Immigrant Petition for Alien Worker, that it is engaged in real estate management and employs four individuals. The petitioner seeks to employ the beneficiary as its President.

In a letter submitted in support of the petition, counsel provided a description of the beneficiary's proposed duties indicating that the beneficiary would allocate 50% of his time to duties categorized as "Executive Direction," 20% of his time to "Executive Management" duties and, 30% of his time to "Executive Marketing" duties. While the petitioner provided a list of duties to be performed within each area of responsibility, it failed to convey what the beneficiary would be doing on a day-to-day basis as the president of a real estate management company. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The record as presently constituted also includes inconsistent information regarding the petitioner's staffing levels and organizational structure. At the time of filing, the petitioner listed the beneficiary's subordinates as the Operations Manager, Rental Account Manager, Director of Property Sales and Acquisitions, Negotiator Real Estate, and Real Estate Secretary. However, according to the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2011, the petitioner had only four employees at the time of filing. In addition, the petitioner stated on the Form I-140 that its current number of employees as of March 2011 was four.

The petitioner also provided copies of IRS Forms W-2 for 2010. The evidence reflects that the petitioner paid \$1,842.00 to the Director of Property Sales and Acquisitions, \$7,791.00 to the Operations Manager, \$6,722.00 to the Rental Account Manager, and \$1,136.98 to the Negotiator Real Estate. According to the documentation submitted, it does not appear that the petitioner employs the secretary as listed on the organizational chart.

Further, based on the information reported on the petitioner's quarterly tax returns, it does not appear that the petitioner employed the individuals listed on the organizational chart on a full-time basis. As the beneficiary was the only full time employee, it is not clear who would perform the non-managerial duties that are necessary to run a business such as marketing, bookkeeping, budgeting, negotiations, customer service, as well as day-to-day clerical, administrative and bookkeeping tasks. The petitioner has not identified employees within the petitioner's organization, subordinate to the

beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business.

Thus, the petitioner provided an overly vague description of the beneficiary's duties which failed to establish what percentage of his time would actually be allocated on qualifying tasks. Further, the record as presently constituted does not establish that the petitioner has the organizational structure to support the beneficiary's claimed executive position.

The record also contains insufficient and incomplete information regarding the nature and scope of the petitioner's operations. In the Form I-140, the petitioner stated that it is engaged in real estate management. However, the petitioner submitted the City of Plantation Local Business Tax Certificate that classified the petitioner as "Real Estate Broker/Appraiser/Office." In addition, the beneficiary is licensed by the State of Florida by The Department of Business and Professional Regulation Division of Real Estate as a Sales Associate.

Moreover, in response to the Notice of Intent to Deny, the petitioner stated that the beneficiary is not employed by True Faith Real Estate, a separate company which lists properties under his name, and explained that it is customary for real estate associates to contract with a broker for the purpose of listing or advertising properties. However, this information does not clearly explain why the beneficiary was selected as the listing agent while performing the duties of president for a separate company.

Overall, the record is unclear with respect to the nature of the beneficiary's duties and the nature and scope of the petitioner's operations and organizational structure, information which is material to a determination regarding the beneficiary's employment capacity.

Accordingly, the director is requested on remand to issue a request for evidence to the petitioner, asking for additional evidence to establish that the beneficiary would be employed in a qualifying managerial or executive capacity, and to clarify its staffing levels and the nature of the business as of the date of filing.

IV. Doing Business

Finally, the record as presently constituted lacks evidence to establish that the petitioner has been doing business for at least one year prior to filing the Form I-140. *See* 8 C.F.R. § 204.5(j)(3)(i)(D).

The Form I-140 was filed on March 21, 2011. In an effort to establish that it meets the above criterion, the petitioner submitted invoices showing that the petitioner provided property management services between May and October 2010. Thus, the petitioner did not submit evidence to establish that it has been doing year for the entire year prior to filing the Form I-140.

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).

In view of the foregoing, the previous decision of the director is withdrawn. The petition is remanded to the director for further consideration, and if appropriate, the issuance of a new request for evidence or notice of intent to deny. The director may request any additional evidence considered pertinent. Upon review of all the evidence, the director will enter a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.

ORDER: The decision of the director dated July 31, 2013 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision, which, if adverse, shall be certified to the AAO for review.