**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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAY 20 2014 OFFICE: NEBRASKA 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 (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 initially approved by the Director, Nebraska Service Center. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice[1] of his intention to revoke the approval of the preference visa petition, and his reasons therefore. The director ultimately revoked the approval of the petition. The matter subsequently came before the Administrative Appeals Office (AAO) on appeal, which was summarily dismissed. The matter is now before the AAO pursuant to a motion to reconsider. The motion will be granted. However, the underlying decision dismissing the appeal will be affirmed.

The petitioner is a California corporation that seeks to employ the beneficiary as its "Chief Executive Officer/Managing Director." 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 revoked approval of the petition after concluding that the petitioner had failed to establish its eligibility at the time of filing.

## 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):
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> * * *
>
> > (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

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[1] Although the director titled the notice "Notice of Intent to Deny," for the purpose of clarification it must be noted that the record shows that the petition was approved on April 28, 2010. Thus, given that the petition had not been denied, the notice issued to the petitioner directly prior to the final notice of revocation is one that informs the petitioner of the director's intent to revoke approval, rather than deny the petition.

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.

Additionally, section 205 of the Act, 8 U.S.C. § 1155, states the following: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime* . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

*Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

## II. Procedural History

The record shows that the petitioner filed the Form I-140 on June 26, 2009 and that the petition was approved on April 28, 2010. Notwithstanding the approval of the petition, further review of the record caused the director to reconsider matters pertaining to the petitioner's eligibility.

Accordingly, the director issued a notice, dated March 23, 2010, informing the petitioner of numerous evidentiary deficiencies, which, if unresolved, would result in finding the petitioner ineligible for the immigration benefit sought. Specifically, the director addressed the following issues: (1) deficient evidence of the petitioner having done and continuing to do business in the United States; (2) the petitioner's ability to pay the beneficiary's proffered wage; (3) the petitioner's qualifying relationship with the beneficiary's foreign employer; and (4) whether the beneficiary's proposed position with the U.S. entity would be within a qualifying managerial or executive capacity. The director questioned whether the petitioner's status as a suspended corporation in the State of California precludes the petitioner from doing business. The director expressly asked the petitioner whether it is operating as [redacted] LLC and if so, the petitioner was asked to provide evidence showing a buyout, merger, or name change of the predecessor business, i.e., the petitioner, by the successor business, i.e., [redacted].

In response to the director's notice, the petitioner expressly stated that it is not operating as [redacted] but rather that the petitioner owns 50% of [redacted] which is doing business as the [redacted] With regard to the issue of ability to pay, the petitioner explained, and provided documentation to show, that [redacted] compensated the beneficiary $36,425, while the foreign employer compensated the petitioner $18,000 in 2009, thus cumulatively comprising a total wage of $54,000. The petitioner also provided evidence showing that it cured the deficiency that resulted in the suspension of its corporate status.

Additionally, the petitioner provided a copy of the agreement showing its acquisition of shares, an organizational chart depicting the organizational structure and chain of command as of January 25, 2010, and a letter of employment, dated March 30, 2010, signed by the assistant general manager and director of sales of the who stated that the beneficiary is overseeing the hotel's remodeling and filling in as the head housekeeper "until a suitable candidate can be found." Mr. further stated that the beneficiary spends her time "reviewing and inspecting the remodeling of the hotel as well as obtaining bids for same in addition to checking rooms after they are cleaned and running the housekeeping department."

The director reviewed the petitioner's submissions and determined that the petitioner failed to establish its eligibility based on statutory and regulatory grounds as well as one common law ground. Specifically, the director found the petitioner statutorily ineligible based on its failure to establish that: (1) it has been and is currently doing business; (2) it has the ability to pay the beneficiary's proffered wage; and (3) it would employ the beneficiary in the United States in a qualifying managerial or executive capacity. Additionally, relying on the common law definition of the term "employee" the director further determined that the petitioner failed to establish that it and the beneficiary have an employer-employee relationship. With regard to the common law definition, the record shows that the notice of intent neither addressed nor requested that additional evidence be provided to show the existence of an employer-employee relationship between the petitioner and the beneficiary. Therefore, given that the petitioner was not previously informed of the additional adverse ground nor allowed the opportunity to address the ground in response to notice of intent, the director's adverse conclusion regarding a ground that was not previously addressed in the notice of intent is contrary to the provisions specified at 8 C.F.R. § 205.2(b), which states, the following, in pertinent part:

> The petitioner or self-petitioner must be given the opportunity to offer evidence in support of the petition or self-petition and in opposition to the grounds alleged for revocation of the approval.

In light of the director's failure to allow the petitioner the opportunity to address the director's adverse finding regarding the lack of an employer-employee relationship between the petitioner and the beneficiary, the director cannot base the revocation on this issue and the adverse finding with regard thereto is hereby withdrawn.

## III. Issues on Appeal

With the exception of the finding that is being withdrawn, this decision will address the following issues: (1) the petitioner doing business in the United States; (2) the petitioner's ability to pay; and (3) the beneficiary's employment capacity in her proposed position with the petitioning entity.

### A. Doing Business

The first issue to be addressed in this matter is whether the petitioner provided sufficient evidence to establish that it meets the provisions of 8 C.F.R. § 204.5(j)(3)(i)(D), which requires that the petitioner establish that it had been doing business for one year prior to filing the Form I-140. That burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

The regulation at 8 C.F.R. § 204.5(j)(2) defines doing business as 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.

In the matter of the instant revocation, the petitioner has provided evidence to show that it acquired 50% ownership interest in an entity that is doing business by operating a hotel. In its response to the director's notice of intent the petitioner strongly denied operating as and instead, provided a statement on appeal in which it clarified its role in the hospitality industry as an entity engaged in the business of acquiring and improving hotels. However, the evidence the petitioner provided shows that its first, and thus far only, hotel acquisition took place on August 1, 2008, as evidenced by the execution date on the written agreement between the petitioner and who agreed to sell her 50% ownership interest in Given that the petitioner filed the Form I-140 on June 26, 2009, thus requiring the petitioner to establish that it was doing business as of June 26, 2008, the fact that the petitioner's first acquisition of a hotel did not take place until August 1, 2008 precludes the petitioner from being able to establish that it had been engaged in acquiring and renovating hotels as of June 26, 2008, or one year prior to filing the petition. *See* 8 C.F.R. § 204.5(j)(3)(i)(D). As the director accurately pointed out based on her review of the petitioner's financial documents, the petitioner has not provided evidence of having compensated any personnel, paid for goods, or having engaged in any other types of business transactions.

While the petitioner disputes the director's adverse finding regarding its business activity in the United States, the focus on business activities is misplaced given that these are two separate entities, only one of which filed the instant petition. Despite the petitioner's acquisition of an ownership interest in in August 2008, this single transaction is not sufficient to establish that the petitioner has engaged in the regular, systematic, and continuous provision of goods and/or services. Moreover, given that the transaction did not occur until approximately eleven months prior to the filing of the petition, it cannot be concluded that the petitioner meets the filing criterion, which requires that the petitioner must have been doing business for at least one year prior to filing the instant petition. *Id.*

B. Ability to Pay

The second issue to be addressed in this matter is whether the petitioner meets the requirement discussed at 8 C.F.R. § 204.5(g)(2), which states the following, 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.

As pointed out in the director's notice of intent, the petitioner initially made inconsistent claims with regard to the beneficiary's proffered wage. Namely, while the petitioner claimed at Part 6, Item 9, that the beneficiary would be paid $700 per week, which equates to approximately $36,400 annually, the petitioner's supporting statement, dated June 22, 2009, indicates that the beneficiary would be compensated $54,000 annually in her

proposed position with the U.S. entity. In its response to the director's notice of intent, the petitioner provided evidence explaining the inconsistency. Specifically, the petitioner provided evidence of the wages paid to the beneficiary in 2009 by her foreign employer and by showing that the beneficiary was compensated a total of $54,425 by the two entities combined. It appears that payment of $36,425 toward the beneficiary's annual salary in 2009 explains why the Form I-140 shows $36,400 as the beneficiary's proffered wage, thus resolving the apparent inconsistency noted in the director's notice of intent.

The above analysis notwithstanding, the provisions of 8 C.F.R. § 204.5(g)(2) are clear in requiring that the petitioner, as the prospective U.S. employer, establish its ability to pay the beneficiary's proffered wage. Although the record indicates that is the beneficiary's employer and supporting evidence shows that it has the ability to pay the proffered wage as claimed in the Form I-140, the petitioner does not, nor plans to, employ the beneficiary. Rather, the beneficiary's U.S. employer, i.e., is an entirely separate entity in which the petitioner has purchased an ownership interest. On appeal, the petitioner asserts that "is the operating entity of the Petitioner" and further contends that this business relationship is sufficient to establish the petitioner's ability to pay. However, as stated above, the record shows that the beneficiary is not, nor plans to be, employed by the petitioning entity. Despite ability to pay the beneficiary's proffered wage, the petitioner cannot meet the requirements of 8 C.F.R. § 204.5(g)(2) unless it provides evidence establishing its own, rather than the investment company's, 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In the present matter, given the overall lack of documentary evidence establishing the petitioner's own financial status and in light of the fact that the petitioner's ability to pay claim rests entirely on its reliance on the business relationship it has established with by virtue of having acquired an ownership interest as an investor in it cannot be concluded that the petitioner has, or had at the time of filing, the ability to pay the beneficiary's proffered wage.

C. Managerial or Executive Capacity of the Proposed U.S. Employment

The final issue to be addressed in the present matter is the beneficiary's proposed employment with the petitioning entity and whether that position would be within a qualifying managerial or executive capacity.

In general, when examining the executive or managerial capacity of the beneficiary, the AAO reviews the totality of the record, starting first with the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed 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 will then consider this information in light of other relevant factors, such as job descriptions of the beneficiary's subordinate employees, the nature of the business conducted by the entity in question, the size of that entity's subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role and job duties.

In the present matter, the petitioner's June 22, 2009 supporting statement contained the following description of the beneficiary's proposed employment with the petitioning entity:

> Since her entry into the U.S. as an intra-company transferee, [the beneficiary] has served [the petitioner] as CEO/Managing Director. In this capacity, she performs many of the same executive functions enumerated above, including the planning, development, and establishing policies and objectives of [the petitioner] with the goal of increasing profit, optimizing expenses through marketing and business development and operating efficiency. In addition, [the beneficiary] seeks out new business opportunities and devises methodologies and approaches to the improvement of current projects and investments, such as the . She also oversees a General Manager to ensure all subordinate personnel are compliant with established company goals and policies.
>
> [The beneficiary] is currently responsible for directing the overall expansion of [the petitioner] which includes the purchase and renovation of the , including the quality control, financial, and accounting activities of [the petitioner]. [The beneficiary] confers with the General Manager to plan business objectives, to develop organizational policies, to coordinate functions and operations and to establish responsibilities and procedures for attaining the company's objectives. [She] reviews activity reports and financial statements to determine progress and status in conditions. She also directs and coordinates financial programs to provide funding for new and continuing operations to maximize returns on investments and to increase operational efficiency. [She] evaluates the performance of the General Manager regarding compliance with established policies and hire [*sic*] and fire [*sic*] employees. As CEO/Managing Director, [the beneficiary]'s primary responsibility remains the growth and profitable operation of [the petitioner].
>
> In sum, [the beneficiary] has autonomous control, and exercises wide latitude in discretionary decision-making in establishing the most advantageous courses of action for the successful operation of [the petitioner].

The director's review of the record shortly after the approval of the petition showed a lack of sufficient evidence establishing the beneficiary's qualifying employment with the petitioning entity. Accordingly, the director expressly advised the petitioner that in order to meet eligibility requirements, additional evidence was necessary to establish that the beneficiary's proposed employment would be primarily within a qualifying managerial or executive capacity. In order to guide the petitioner's response, the director requested that the petitioner provide "a clearly itemized list of how the beneficiary spends her time in work, and the nature of her activities."

Despite the director's express instructions, the petitioner provided a brief statement from the assistant general manager and director of sales of the , an employee of the investment entity. In an undated statement, Mr. briefly described the petitioner's business relationship with the and generally referred to the beneficiary's position "in an upper management capacity" where her key focus is overseeing the remodeling of the hotel in which the petitioner invested its funds. Mr. further explained that due to the hotel's current inability to fill the position of head housekeeper, the beneficiary was helping out by assuming that position herself on a temporary basis. Her purportedly temporary position as head housekeeper calls for the beneficiary to check rooms after they have been cleaned and generally head the housekeeping department. The petitioner provided no evidence that could be construed as an itemized list of the beneficiary's proposed tasks with the petitioning entity. The only

evidence that addresses the beneficiary's job duties pertains to her current position as head housekeeper of the and her "upper management capacity" position, which also appears to pertain to the beneficiary's position directly with the hotel, rather than with the petitioner itself. In whole, the petitioner failed to provide the evidence requested in the director notice of intent. It is noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, the petitioner seeks to supplement the record with an additional job description that is contained within a statement, dated January 17, 2011, where the petitioner claims that the beneficiary's job duties in her foreign and proposed positions are "substantially similar" with the exception of her "temporary housekeeping duties." However, the supplemental job description will not be considered. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, evidence that is offered for the first time on appeal need not be considered. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's notice where such evidence was requested. *Id.*

Furthermore, in reviewing the organizational chart that the petitioner provided in response to the director's notice of intent, it does not appear that the staffing structure that was depicted in the chart reflected the petitioner's own staffing. Rather, as with other evidence provided in support of the instant petition, the employees listed in the chart, including the beneficiary herself, are employees of rather than the petitioning entity. Given the petitioner's understanding that its investment in entitles the petitioner to claim as part of its own organization, the petitioner's claim of employing six employees at the time of filing does not create an inconsistency, which would lead this office to question the petitioner's credibility. However, the petitioner's understanding that its acquisition of an ownership interest in entitles the petitioner to assume the business activities and employees of its investment company is incorrect.

As discussed above, the petitioner and the company in which it purchased an ownership interest are two separate entities, which continue to exist simultaneously. corporate existence remains undisturbed, despite its change in ownership. The assumption that investing in entitles the petitioner to claim the latter entity's income and employees as part of its own organization is unfounded. In this matter, the petitioner has failed to establish that it has any employees or that it has a valid position within a managerial or executive capacity to offer the beneficiary. Rather, it appears that if the petitioner were to be approved, the beneficiary would maintain her current position with and that this is in effect the proposed position. Thus, regardless of whether the beneficiary's job duties with would be primarily within a qualifying capacity – and there is insufficient evidence on record to suggest that they would be – the petitioner has failed to provide evidence to support the claim that it would employ the beneficiary in a qualifying managerial or executive capacity.

## IV. Conclusion

Under the circumstances, the record lacks evidence to establish that the petitioner was eligible for the immigration benefit sought at the time of filing.

Accordingly, the approval of the petition will remain revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation. 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 motion is granted. The underlying application is denied.