U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF U&AT-I-, INC.

DATE: DEC. 8, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a California corporation that serves as an import, export and marketing of construction products company, seeks to employ the Beneficiary in the United States as its Executive Manager. 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, Nebraska Service Center, denied the petition. The matter is now before us on appeal.[1] The matter will be remanded to the Director for further proceedings consistent with this opinion and for the entry of a new decision.

I. THE ISSUES

The Director denied the petition, finding that the evidence of record did not establish that the Beneficiary would be employed in a qualifying managerial or executive capacity. Beyond the decision of the Director, we will also address whether the evidence of record establishes that the Petitioner has a qualifying relationship with the foreign entity, and whether the Petitioner has demonstrated that it has the ability to pay the proffered wage.

II. 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

[1] We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*.

> employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien 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 only to 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)(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.

III. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The sole issue addressed by the Director is whether the evidence of record establishes that the Beneficiary will be employed in the United States in a qualifying managerial or executive capacity as defined at section 101(a)(44) of the Act.

In denying the petition and the subsequent motion, the Director found that the Petitioner had not provided sufficient information to demonstrate that the Beneficiary will be relieved from performing non-qualifying duties. The decision on motion states that the Petitioner "has not identified any non-qualifying, operational, or administrative tasks associated with the [Beneficiary's position description] or who within its organization performs those tasks." We note that the record includes a detailed

position description for the Beneficiary, along with organizational charts, position descriptions, and payroll statements in support of the Petitioner's assertion that the Beneficiary has subordinate employees to perform non-qualifying duties.

Upon review, the Petitioner has established by a preponderance of the evidence that the Beneficiary will be employed in a qualifying executive capacity. Whether the Beneficiary is employed in a qualifying capacity turns on whether the Petitioner has sustained its burden of proving that her duties are "executive" in nature. The Petitioner has met this burden and the Director's decision will be withdrawn.

IV. QUALIFYING RELATIONSHIP

Notwithstanding our decision to withdraw the Director's decision, we are unable to sustain the appeal as a result of evidentiary deficiencies that preclude an affirmative finding of eligibility.

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.

The petitioner has not demonstrated that it has a qualifying "affiliate" relationship with the foreign entity. The petitioner has presented incomplete evidence relevant to the Beneficiary's ownership of the Petitioner. Although the Petitioner asserts that it is 100% owned by the Beneficiary and submitted stock certificate number four dated April 1, 2010 indicating that the Beneficiary owns 1,000 shares, the record does not include copies of the stock transfer ledger, or any of the other stock

certificates issued to other parties. In addition, the Petitioner's 2012 IRS Form 1120, the Petitioner indicated that was not owned by a foreign person at Schedule K.

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). Overall, the record as presently constituted does not establish that the petitioner has not demonstrated that it has a qualifying "affiliate" relationship with the foreign entity, and for this reason, the Petition cannot be approved. We will remand the matter to the Director for further proceedings consistent with this discussion.

V. ABILITY TO PAY

Beyond the decision of the Director, the Petitioner has not provided sufficient evidence to establish its ability to pay the Beneficiary's proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part, the following:

> *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 indicated at 8 C.F.R. § 204.5(g)(2), the Petitioner has the burden of establishing its ability to pay commencing with the date it files the Form I-140. In order to establish the ability to pay, the Petitioner must provide copies of its annual reports, federal tax returns, or audited financial statements for the relevant time period in question. In the present matter, the Form I-140 indicates that the Beneficiary will be paid $60,000. The record does not reflect any evidence reflecting the Petitioner's ability to pay the proffered wage from the priority date, and for this additional reason, we will remand the matter to the Director for further proceedings consistent with this discussion.

VI. CONCLUSION

In order to determine whether the Petitioner is eligible for the immigrant classification sought herein, additional evidence pertaining to the Petitioner's claimed relationship with the foreign entity and its ability to pay the proffered wage is required. Accordingly, the instant matter must be remanded to the Director for the purpose of allowing the Petitioner the opportunity to supplement the record with evidence that may address the deficiencies described above.

ORDER: The decision of the Director, Nebraska Service Center is withdrawn. The matter is remanded to the Director, Nebraska Service Center for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of U&AT-I-, Inc.*, ID# 14697 (AAO Dec. 8, 2015)