



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE:

JUN 22 2015

FILE #:

PETITION RECEIPT #:

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:

NO REPRESENTATIVE OF RECORD

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this Form I-140, Immigrant Petition for Alien Worker, 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 limited liability company organized in the State of Delaware, states that it is a subsidiary of [REDACTED] the beneficiary's last employer in the United Kingdom. The petitioner is engaged in providing litigation support services and seeks to employ the beneficiary as its production manager.

The director denied the petition on October 24, 2014 concluding that the petitioner had not established that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

On appeal, the petitioner submits additional evidence and asserts that the totality of the evidence in the record establishes that the beneficiary was employed by the foreign entity in a qualifying managerial 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 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 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.

In addition, the regulation at 8 C.F.R. § 204.5(j)(3)(i) instructs the petitioner comply with initial evidentiary requirements by providing evidence to establish that it meets the following criteria at the time the petition is filed:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

II. Factual Background and Procedural History

The record shows that the petition was filed on January 27, 2014. The petition was accompanied by a supporting statement, dated January 16, 2014, which included a list of the beneficiary's assigned job duties in his proposed position as production manager. The petitioner claimed to be a subsidiary of [REDACTED] a United Kingdom entity. The petitioner also submitted evidence in the form of bank, financial, and business documents pertaining to both the U.S. and foreign entities, and a copy of a letter dated December 22, 2008, which it had submitted in support of the beneficiary's initial L-1B nonimmigrant petition, and which included a brief description of the beneficiary's former duties as a production manager at the foreign entity's [REDACTED] office.

After reviewing the petitioner's submissions, the director issued a Request for Evidence (RFE), dated June 24, 2014, informing the petitioner that the record lacked sufficient evidence to establish that the beneficiary had been employed abroad or would be employed in the United States in a qualifying managerial or executive capacity.

Accordingly, the petitioner was instructed to provide percentage breakdowns of the job duties that comprised the beneficiary's employment abroad and job duties that would comprise his proposed employment with the petitioning entity. The petitioner was further instructed to list the employees within the beneficiary's division, department, or team in each of his respective positions and to explain who performed and would perform the productive and administrative tasks necessary to produce the products and/or services of each employing entity. In addition, the petitioner was asked to provide organizational charts for both companies showing each organization's overall structure and staffing levels and identifying the employees and contractors within the beneficiary's immediate division, department, or team by name and position title.

In response, the petitioner provided a statement, dated September 15, 2014, which included a brief overview of the beneficiary's employment abroad in the position of production manager as well as a job description and percentage breakdown of the beneficiary's proposed position with the petitioning entity. With regard to the beneficiary's former employment abroad, the petitioner indicated that the beneficiary assumed the position of production manager in September 2008 and continued in that position until March 2009, when he was ultimately transferred to the United States to assume his current position with the petitioning entity. The petitioner's position description was accompanied by the U.S. entity's organizational chart depicting five departments – marketing, global operations, professional services and business development, human resources, and accounting – that comprise the U.S. entity. Although the chart names the beneficiary as the direct subordinate of the head of the professional services and business development departments, it does not name any other employees who are assigned to the position titles that comprise the rest of the beneficiary's department or the four other departments in the petitioning entity.

In a decision dated October 24, 2014, the director denied the petition based on the finding that the petitioner did not provide the requested evidence needed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. The director noted that, while the petitioner responded to the RFE with documentation pertaining to the beneficiary's proposed employment with the petitioning entity, the RFE response did not address the director's request for similar evidence pertaining to the beneficiary's employment abroad. The director concluded that the petitioner provided sufficient evidence to demonstrate

that the beneficiary's proposed position in the United States is in a qualifying managerial or executive capacity.

On appeal, the petitioner submits a statement, dated November 17, 2014, which includes a list of job duties and percentage breakdown pertaining to the beneficiary's former employment as production manager of the petitioner's claimed parent entity. The petitioner also provides a chart describing the corporate structure of the foreign entity, along with two additional charts – one containing a broad depiction of the entity's organizational structure and another chart containing the specific breakdown of employees within the foreign entity's production department, which the beneficiary managed.

Upon review, and for the reasons stated below, we find that the evidence of record does not establish that the beneficiary's employment abroad meets the statutory and regulatory requirements listed above.

III. Issue on Appeal

As indicated above, the primary issue to be addressed in this proceeding pertains to the beneficiary's employment abroad with the foreign entity.

As a threshold issue, we find that the petitioner provided sufficient evidence on appeal to establish that the beneficiary's employment abroad as a production manager was in a qualifying managerial capacity. See section 101(a)(44)(A) of the Act. However, as indicated at section 203(b)(1)(C) of the Act, there are multiple statutory requirements that pertain to the beneficiary's employment with the foreign entity. Namely, in addition to establishing that the beneficiary's employment abroad was in a qualifying managerial or executive capacity, the relevant statutory and regulatory provisions also require the petitioner to establish that the qualifying employment abroad took place within a specific three-year time period and that the duration of such employment was for at least one year over the course of that three-year period. See 8 C.F.R. § 204.5(j)(3)(i)(B).

The petitioner readily stated that the beneficiary's former employment abroad in the position of production manager commenced in September 2008 and continued until March 2009, thus indicating that such employment lasted for a duration of no more than seven months. Although the petitioner has established that the beneficiary was employed by the foreign entity for well over one year, the record does not include any information pertaining to any other positions he held during his tenure with the foreign entity.

Upon review of a totality of the evidence, including the supplemental information provided on appeal, we find that the beneficiary's former employment abroad in the position of production manager was in a managerial capacity. However, the record does not contain evidence to establish that the beneficiary was employed abroad in a qualifying capacity for the requisite period of one year during the three years preceding his transfer to the United States to work for the petitioning entity. See 8 C.F.R. § 204.5(j)(3)(i)(B). As previously noted, despite the beneficiary's lengthy period of employment abroad, the record does not contain information regarding the positions he formerly held with the foreign entity, and therefore does not establish that any of these former positions were in a qualifying managerial or executive capacity. 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)).

Therefore, in light of the facts presented in the instant matter, the petitioner has not met its burden of establishing that the beneficiary was employed abroad in a qualifying capacity for one out of the three years prior to entering the United States to work for the petitioning entity and on the basis of this conclusion, the instant petition cannot be approved.

IV. Additional Issues

Since the identified basis for denial is dispositive of the petitioner's appeal, we need not address other grounds of ineligibility we observe in the record of proceeding. Nevertheless, we will briefly note and summarize them here with the hope and intention that, if the petitioner seeks again to employ the beneficiary in the proffered position in the requested immigrant visa classification, it will submit sufficient independent objective evidence to address and overcome these additional grounds in any future filing.

A. Qualifying Employment in the United States

First, we will address the beneficiary's proposed employment with the petitioning entity. While we acknowledge the director's conclusion that the petitioner provided sufficient evidence to establish that the beneficiary's proposed U.S. position as production manager would be in a qualifying managerial or executive capacity, we respectfully disagree with that finding. First, we observe that while the director's RFE expressly instructed the petitioner to assign time allocations to the beneficiary's proposed job duties, the petitioner assigned time constraints to vague job responsibilities, which fail to convey a meaningful understanding of the specific underlying tasks involved in meeting the beneficiary's overall objectives. For instance, the petitioner stated that the beneficiary would allocate 20% of his time to directing and coordinating the data processing function. However, it is unclear which specific tasks are included in this broad category. The petition was similarly vague in claiming that the beneficiary would spend 10% of his time directing data center activities and 15% of his time providing strategic guidance and training operational staff. The petitioner provided no discussion as to what types of activities the beneficiary would direct at the [REDACTED] data center. In addition, the petitioner did not explain what tasks constitute providing "strategic guidance" to operational staff; nor is it apparent that the beneficiary's responsibility for training an "operational staff," which may not be comprised of supervisory or professional employees, is within a qualifying managerial capacity.

In addition, the petitioner failed to comply with the director's RFE instructions, which expressly asked the petitioner to provide the names and job titles of all employees and contractors within the beneficiary's immediate division, department, or team. A review of the organizational chart that the petitioner submitted in its RFE response shows that, while the petitioner did name the beneficiary in his proposed position as production manager, the chart does not contain any other employee names. The chart merely shows that the beneficiary is directly subordinate to the vice president of global operations and has one technical client services analyst position reporting to him. We further note that a single analyst, whom the chart depicted as the beneficiary's only subordinate, does not corroborate the petitioner's claim that the beneficiary would oversee an "operational staff," which was referenced several times in the percentage breakdown that

accompanied the organizational chart. In fact, while the job duties that preceded the percentage breakdown indicated that "it is customary to send a team of investigators to collect data onsite at a client's premises," the record lacks evidence to support this claim. Again, we point to the RFE, which specifically instructed the petitioner to include the names of contractors used within the beneficiary's department. A review of the chart shows that no references were made to "a team of investigators" associated with the collection of data at client sites and no separate documents were provided to show that such teams were hired for the stated purpose. As previously noted, the petitioner's claims alone, without corroborating evidence, are not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.*

Lastly, we find that the original job description, which the petitioner included in its January 16, 2014 supporting statement, contains numerous non-qualifying tasks and is inconsistent with the organizational chart that was provided with the RFE response. Namely, the petitioner indicated that the beneficiary's proposed employment would include developing client relations and providing customer service, developing project enhancement tools, conducting research to improve work practices, producing employee manuals and training tools, conducting market research, providing clients with software training, and consulting clients regarding best practices and technology solutions. However, the petitioner did not establish that these numerous job duties are within a qualifying managerial or executive capacity. Rather, the petitioner provided an entirely new job description in response to the RFE without explaining why the job duties previously listed were not incorporated into the beneficiary's job description.

Furthermore, the petitioner's original claim – that the beneficiary would manage department heads – is not supported by the job description and organizational chart that were provided in the RFE response. As previously indicated, the only subordinate the organizational chart depicts under the beneficiary's proposed position is that of a services analyst. While the chart lists department heads within the organization, none are depicted as being subordinate to the beneficiary. Thus, the chart is inconsistent with the beneficiary's original job description. 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). While the beneficiary's job description is seemingly in line with the organizational chart that the petitioner provided on appeal to describe the foreign entity's staffing structure, the record lacks sufficient evidence to establish that the petitioner's organizational hierarchy has attained a stage of development where the beneficiary's tasks would be focused on the oversight of an essential function.

In light of the above, we find that the director's determination – that the petitioner provided sufficient evidence to establish that the beneficiary would be employed in a qualifying capacity – was incorrect. Given the various evidentiary deficiencies catalogued in this decision, the director's favorable determination with regard to the beneficiary's proposed position with the U.S. entity was not warranted.

B. Qualifying Relationship

Next, we will address the evidence regarding the petitioner's claimed qualifying relationship with [REDACTED] the beneficiary's former employer in the United Kingdom.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Assoc. Comm. 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the present matter, while the petitioner provided its articles of organization as well as formation documents for the foreign entity, none of these documents address the petitioner's ownership or indicate that the petitioner is a subsidiary of the foreign entity. As the record lacks corroborating evidence of the petitioner's claimed ownership, it does not support the petitioner's claim that it is the subsidiary of the beneficiary's former employer.

C. Ability to Pay

Lastly, we will address the issue of the petitioner's ability to pay, which was not previously addressed in the director's decision.

The regulation at 8 C.F.R. § 204.5(g)(2) states, 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.

In the present matter, despite the petitioner's submission of the beneficiary's pay stubs and copies of its quarterly tax returns, the petitioner did not provide evidence in the form of copies of its annual reports, federal tax returns, or audited financial statements. Thus, the petitioner did not meet the requirements of this regulatory provision.



V. Conclusion

We may deny an application or petition that fails to comply with the technical requirements of the law 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 we review appeals on a *de novo* basis).

Accordingly, the petition will be denied and the appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.