



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAY 01 2015**

FILE #: [REDACTED]

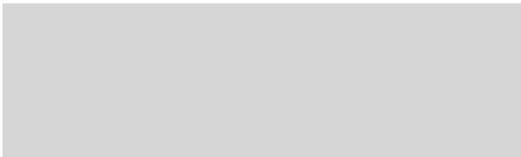
I-140 RECEIPT #: [REDACTED]

I-290B RECEIPT #: [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 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 preference visa petition was denied by the Director, Texas Service Center. The petitioner subsequently filed a Form I-290B seeking to appeal the director's decision before the Administrative Appeals Office (AAO). The director erroneously treated the appeal as a motion, which the director dismissed. As the appropriate course of action required the director to forward the appeal to the AAO if he did not intend to take favorable action, we hereby withdraw the director's decision on motion and will issue our own decision addressing the issues that served as grounds for denial.¹ The appeal will be dismissed.

The petitioner is a New York corporation that operates a real estate management and consulting company. The petitioner seeks to employ the beneficiary in the United States as its senior vice 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.

In denying the petition, the director determined that the petitioner failed to demonstrate eligibility based on the following findings: (1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and (2) the petitioner failed to establish that it had been doing business in the United States for one year prior to filing the petition; and (3) the petitioner failed to establish its ability to pay the beneficiary's proffered wage.

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

¹ See 8 C.F.R. § 103.3(a)(2)(iv).

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. Factual Background and Procedural History

The record shows that the petition was filed on July 8, 2013. The petition was accompanied by a supporting statement from the petitioner, dated July 3, 2013, as well as corporate documents pertaining to the U.S. and foreign entities and bank statements and tax documents pertaining to the petitioner.

On August 29, 2013, the director issued a request for evidence (RFE), informing the petitioner of various evidentiary deficiencies. The director instructed the petitioner to provide, in part, a supplemental description of the beneficiary's employment with the foreign entity, and evidence demonstrating that the petitioner had been doing business for at least one year prior to filing the instant petition.

The petitioner's response included a statement containing the beneficiary's job description with the foreign entity. The petitioner described the beneficiary's employment with the foreign entity, including an hourly breakdown of the various activities that consumed the beneficiary's time from Monday through Friday. The petitioner also provided an organizational chart depicting the foreign entity's management structure and the employees who were depicted as subordinates to the beneficiary in her former position abroad. With regard to the U.S. business activities, the petitioner provided payroll documents and copies of two consulting contracts – one dated August 30, 2012 and the other dated May 15, 2013.

After reviewing the petitioner's submissions, the director determined that the petitioner failed to meet relevant eligibility criteria and denied the petition in a decision dated February 13, 2014. First, the director addressed the beneficiary's former employment with the foreign entity, finding that the beneficiary was not employed abroad on a full-time basis. The director expressed doubt as to the claim that the beneficiary was performing duties for two companies simultaneously and concluded that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying capacity. Next, the director addressed the petitioner's business activity in the United States, finding that the two submitted consulting contracts were not supported by evidence showing that the petitioner actually carried out the terms of either contract. The director also determined that emails and undated contracts that the petitioner provided in response to the RFE were not sufficient to establish that the petitioner had been doing business for the requisite time period. Lastly, the director found that the petitioner failed to provide sufficient supporting evidence establishing its ability to pay the beneficiary's proffered wage of \$42,000 annually.

On appeal, counsel submits a brief and supporting documents disputing the director's conclusions.

Upon review, and for the reasons stated below, we find that the petitioner has overcome two of the director's adverse findings. Beyond the decision of the director, we also find that the petitioner has not demonstrated that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity.

III. Issues on Appeal

As indicated above, the primary issues that were addressed in the director's decision and which will be addressed in the discussion below pertain to the beneficiary's qualifying employment abroad and the commencement period of the petitioner's business activity in the United States.

A. Qualifying Employment Abroad

First, we will address the beneficiary's former position with the petitioning entity. 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 with the petitioning entity. 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 in the context of the employer's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that may contribute to a comprehensive understanding of a beneficiary's actual duties and role within the petitioning entity.

Having conducted a review of these relevant factors in the matter at hand, we find that the foreign entity's organizational structure, the beneficiary's job description, and the job descriptions of the beneficiary's subordinates indicate that the foreign entity was properly staffed and was reasonably capable of relieving the beneficiary from having to allocate her time primarily to non-qualifying operational tasks. Based on the evidence provided regarding the foreign entity's organizational composition, the beneficiary's placement therein, and the job duties performed by the beneficiary and her subordinates, we find that the petitioner successfully established that the foreign entity more likely than not had the ability to relieve the beneficiary from having to allocate her time primarily to the performance of non-qualifying tasks and that the beneficiary was more likely than not employed in a qualifying managerial or executive capacity.

B. Doing Business in the United States

The second issue to be addressed in this matter is whether the petitioner meets the eligibility criteria described at 8 C.F.R. § 204.5(j)(3)(i)(D), which requires the petitioner to establish that it has been doing business for at least one year prior to filing the Form I-140. 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 July 3, 2013 supporting statement, the petitioner was described as "a real estate development and management company engaged in various assets management." To date, evidence to support this claim includes the following:

1. The petitioner's offer letter, dated April 19, 2013, offering to purchase nine buildings on the campus of [REDACTED]
2. A confidentiality agreement signed on May 5, 2013 by the petitioner and representatives of [REDACTED] – the two parties to the agreement.
3. A string of emails – the first of which was sent on July 7, 2012 – from and to the petitioner's personnel – [REDACTED] – regarding the petitioner's interest in the purchase of [REDACTED].
4. A separate string of emails, also dating back to July 2012, discussing the petitioner's desire to rent land in order to set up college and high school campuses accompanied by a town center.
5. A string of emails from October 2012 seeking to contact representatives of [REDACTED] in an effort to purchase the school.

6. A string of emails from November 2012 concerning title insurance and a workers compensation policy for the petitioner.
7. Two consulting agreements, executed October 30, 2012 and May 15, 2013, naming the petitioner as the provider of consulting services to [REDACTED] and [REDACTED], respectively.
8. An attorney letter, dated February 4, 2011 discussing the terms of the petitioner's stock purchase agreement, wherein the petitioner sought to purchase property, which was referred to as "[REDACTED]." The letter is accompanied by a stock purchase agreement and a rider annexed thereto, both signed by president of the petitioning entity. In addition, the petitioner provided photocopies of two checks – one showing attorney's fees paid to the attorney who represented the petitioner in the purchase deal and the other showing the petitioner's down payment of \$80,000 made toward the purchase of [REDACTED].
9. A follow-up attorney letter, dated May 17, 2012, addressed to [REDACTED] regarding the terms of closing on the above described stock purchase.
10. A follow-up string of emails, dated September 18, 2012, indicating that the petitioner's attorney anticipated a closing date of October 24, 2012.
11. Attorney retainer agreement, dated September 12, 2012, instructing the petitioner to sign the letter and comply with instructions – annexed to agreement as Exhibit A – to wire the retainer fee of \$25,000. The signed retainer agreement was accompanied with a check, dated September 13, 2012, from the petitioner made out to the representing firm.

Based on our review of the above described documentation and a number of notable deficiencies discussed below, we find that the petitioner failed to establish that it had been doing business for one year prior to filing the instant Form I-140.

First, with regard to the offer letter described in No. 1 above, the specific terms of accepting the offer as put forth by the petitioner requires the accepting party – [REDACTED] – to sign the offer and return it to the petitioner no later than April 19, 2013, 5:00 pm. The record shows that while Mr. [REDACTED] did sign the offer, he did not comply with the terms of execution, as he indicated that the letter was signed on April 24, 2013, which is five days later than the terms specified by the offering party, i.e. the petitioner. As the accepting party failed to comply with the specific terms of acceptance and given the lack of evidence showing that the petitioner was willing to go forward with its offer, despite the accepting party's failure to fully comply with the offer terms, it is unclear whether the purchase agreement was valid. Accordingly, the probative value of the confidentiality agreement, discussed in No. 2 above, is questionable, as the agreement pertains to the purchase offer described herein, which itself has not been proven to be valid. In other words, the lack of evidence showing the accepting party's timely acceptance of the petitioner's original purchase offer significantly undermines the probative value of the purchase offer itself. As such, the confidentiality agreement, which is premised on the existence of a valid agreement between the offering and accepting parties, would also be deemed as lacking in probative value. Further, even if the agreement were deemed valid, this single transaction that took place approximately four months prior to the filing of the Form I-140 would be insufficient to establish that the petitioner had been doing business for one year prior to filing.

Second, while the strings of emails, described in Nos. 3-6 above, indicate the petitioner's attempt to enter into contractual agreements for the purchase of real estate, the emails are not supported by corroborating evidence showing that the petitioner took steps to complete the suggested purchase transactions. Therefore, the emails

showing the petitioner's intent to engage in business transactions are insufficient to establish that the petitioner was doing business during the requisite time period.

Third, with regard to the two consulting agreements, described in No. 7 above, the petitioner did not provide supporting evidence to show that it actually carried out its obligations under the terms of the agreements and was paid for providing consulting services. A contract alone does not establish that the petitioner provided services in compliance with its contractual obligations.

Fourth, with regard to the sales and purchase transaction discussed in Nos. 8-10, we note that while the original attorney letter, which names the selling and purchasing parties and specifies the property the petitioner sought to purchase, is dated February 4, 2011, the attached stock purchase agreement and the separate rider agreement are neither dated nor signed by the seller or the corporate agent representing the seller's interests. Thus, despite a follow-up email specifying a closing date for the sale and purchase transaction, the record lacks evidence establishing the existence of a valid contract.

Finally, with regard to the petitioner's submission of an attorney retainer agreement, dated September 12, 2012, despite the fact that the petitioner's president – [REDACTED] – signed the agreement, the record lacks sufficient evidence establishing that the petitioner actually complied with the specific terms of the agreement and thus does not establish that counsel was retained. Namely, the contract expressly states that in order to retain the attorney, the petitioner must comply with the payment instructions included in Exhibit A, which was attached to the retainer agreement and provides the specific account information to facilitate the wiring of the \$25,000 retainer fee. The record does not show that the fee was wired per counsel's instructions. Instead, the petitioner provided a copy of a check signed by Mr. [REDACTED] to the order of the named law firm. The petitioner provided no evidence showing that the check was cashed by the firm or that the firm actually rendered any legal services to the petitioner during the relevant time period in question.

In addition, while the petitioner provided an uncertified 2013 tax return showing that it had \$1,095,401 in gross receipts or sales, the petitioner did not support this claim with any invoices or other evidence to establish precisely how the petitioner generated the disclosed revenue. In other words, the record is unclear as to which business transactions during the relevant one-year period prior to filing the petition resulted in the petitioner's gross earnings. 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)).

Accordingly, in light of the numerous deficiencies catalogued above, we find that the above documents fall short of establishing that the petitioner engaged in the regular, systematic, and continuous provision of goods and/or services for one year preceding the filing of the Form I-140 and on the basis of this finding the petition cannot be approved.

C. Ability to Pay

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.

Although the petitioner failed to provide sufficient evidence in its RFE response to establish its ability to pay, the record shows that on appeal the petitioner supplemented the record with additional documentation, including the petitioner's 2013 tax return. We therefore find that the petitioner has overcome the director's finding regarding to the petitioner's ability to pay.

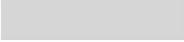
IV. Beyond the Director's Decision

Beyond the director's decision, we find that the record does not contain sufficient evidence to support the finding that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. Although the petitioner provided a job description for the proposed employment that is similar in content and degree of detail as was provided with regard to the beneficiary's foreign employment, the record is unclear as to whether the U.S. entity had the necessary personnel to support the beneficiary in a position that would primarily entail tasks of a qualifying nature.

Despite the seven-employee organizational structure that was depicted in the organizational chart that was provided with the RFE response, the petitioner originally claimed only four employees at the time the petition was filed. While it is understandable that the petitioner may have hired additional personnel between the time the petition was filed and the time of its RFE response, the petition can only be approved on the basis of facts and circumstances that existed at the time of filing. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner must therefore establish that the four-person staff, which comprised the entire organization at the time of filing, was sufficient to relieve the beneficiary from having to allocate her time primarily to the petitioner's daily operational tasks.

In the present matter, the petitioner did not clarify which positions were filled at the time of filing, thus precluding an understanding of who within the organizational hierarchy was available to perform the daily operational tasks. In other words, the beneficiary's job description indicates that job duties would revolve around underlying tasks performed by a financial manager, a development manager, an office manager, and a project manager. However, the record lacks sufficient evidence establishing which of these positions were actually filled at the time of filing. The record also lacks evidence to establish that the beneficiary allocated the primary portion of her time overseeing the work of supervisory, professional, or managerial employees. Given that the petitioner provided pay stubs for the office manager and clerk, it is reasonable to assume that several of the managerial positions were vacant at the time the petition was filed, thus leading us to question who was assisting the beneficiary with the tasks that are now assigned to the financial and development managers. Further, despite the petitioner's reference to a project manager in describing the beneficiary's job duties, a project manager position was not included in the most recent organizational chart.

In light of the deficiencies catalogued above, we find that the petitioner failed to provide sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. For this additional reason, the petition cannot be approved. 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, 1037 (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).

V. Conclusion

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