



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF H-USA, INC.

DATE: JAN. 4, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a real estate consultancy and sales company, seeks to permanently employ the Beneficiary as its commercial director under the immigrant classification of a multinational executive or manager. *See* Immigration and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The decision will be withdrawn and the matter will be remanded for a new decision.

I. 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.

A United States employer may file Form I-140 to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager.

II. ISSUE ON APPEAL – ABILITY TO PAY

The Director's only stated ground for denial of the petition was that the Petitioner did not establish its ability to pay the Beneficiary's proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The Petitioner filed Form I-140 on July 15, 2013. On that form, the Petitioner stated that it would pay the Beneficiary \$55,000 per year, and that it had one employee in the United States. Other materials in the record show that the Beneficiary is that employee, having last entered the United States on May 21, 2013.

The Director denied the petition on May 8, 2015, concluding that the Petitioner had not established its ability to pay the Beneficiary's proffered wage from the filing date onward. The Director noted that the Petitioner's 2012 income tax return showed negative net income and disclosed no information about the company's assets. The Director acknowledged that the Petitioner had submitted copies of bank statements, but found that these documents "cannot show the sustainable ability to pay a proffered wage."

On appeal, the Petitioner submits a brief disputing the denial and addressing the director's adverse findings. The Petitioner also submits additional financial documentation as evidence of its ability to pay the proffered wage, including audited financial statements for 2013 and 2014.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon reviewing the entire record of proceeding as supplemented by the petitioner's submission on appeal, we conclude that the record now contains sufficient evidence to overcome the basis for the director's decision.

Specifically, the totality of the evidence now establishes that the Petitioner has the ability to pay the proffered wage from the priority date. Nevertheless, review of the record reveals another potential ground for denial, which prevents us from approving the petition outright.

III. BEYOND THE DIRECTOR'S DECISION

Because we review the record on a *de novo* basis, we may identify additional grounds for denial beyond what the Service Center identified in the initial decision. *See Siddiqui v. Holder*, 670 F.3d 736, 741 (7th Cir. 2012); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). In this instance, review of the record reveals information which may

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undermine the Petitioner's claim that the Beneficiary's position meets the statutory definitions of a managerial and/or executive capacity at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44).

On the petition, the Petitioner claimed to employ one employee. The record reflects that the Beneficiary was the Petitioner's sole employee at the time of filing. The Petitioner has asserted that the Beneficiary fills a managerial role by directing the activities of personnel at [REDACTED] vice president of sales at [REDACTED] stated in a letter dated June 17, 2013:

[The Petitioner] has been working with [REDACTED] as an independent contractor for the last two years. . . .

....

[The Petitioner] has total access and direct contact to [REDACTED] associates, secretaries and brokers. [REDACTED] has a team of employees helping [the Petitioner] to prepare real estate events and to prospect potential Brazilians [*sic*] clients to [REDACTED] network.

[REDACTED] stated that the [REDACTED] team working with the Petitioner includes "two Brazilian Realtors: [REDACTED] and [REDACTED] both work at [REDACTED] as Sales Associate Brokers."

Subsequently, in response to the RFE, the Petitioner submitted an organizational chart, identifying various [REDACTED] employees as "Independent Contractor[s]" working for the Petitioner and reporting to the Beneficiary. This contrasts with [REDACTED] statement that it is the Petitioner who "has been working with [REDACTED] as an independent contractor." The Petitioner's financial documents, including tax returns and audited statements, do not show any payments to contractors. [REDACTED] documented payments to the Petitioner indicate that the Petitioner is [REDACTED] contractor, rather than the other way around.

The Beneficiary's 2012 IRS Form 1040, U.S. Individual Income Tax Return, on which the Beneficiary identified his occupation as "real estate broker assoc." The record documents commission payments from [REDACTED] to the Petitioner. Taken together, this information suggests that the Beneficiary sells real estate under contract to [REDACTED]. The record does not support the Petitioner's claim that the Petitioner has contracted with [REDACTED] to provide support staff to the petitioning company.

Beyond the evidence in the record, we have uncovered additional information that bears on this issue.

Although the petitioner bears the burden to establish eligibility for the benefit sought, USCIS may verify information submitted to meet that burden. Agency verification methods may include, but are not limited to, review of public records and information; contact via written correspondence, the Internet, facsimile or other electronic transmission, or telephone; unannounced physical site inspections of residences and places of employment; and interviews. *See generally* sections 103,

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204, 205, 214, 291 of the Act; 8 U.S.C. §§ 1103, 1154, 1155, 1184, 1361 (2012);
8 C.F.R. § 103.2(b)(7) (2014).

Matter of Simeio Solutions, LLC, 26 I&N Dec. 542, 543-44 n.3 (AAO 2015).

Publicly available information, consulted in an attempt to verify the Petitioner's claims, further undermine the Petitioner's assertions regarding the nature of the Beneficiary's relationship to [REDACTED]. Florida state records list the Beneficiary and [REDACTED] as licensed "Real Estate Sales Associates" employed by [REDACTED] respectively.¹ As of December 28, 2015, [REDACTED] own web site² listed [REDACTED] and the Beneficiary as "Realtor-Associates" at [REDACTED] offices at [REDACTED]. This information casts further doubt on the assertion that [REDACTED] and [REDACTED] are contracted subordinates of the Beneficiary. Instead, it appears to place the individuals on an equal footing.

The Petitioner's claim that the Beneficiary is a manager rests largely on the assertion that [REDACTED] employees perform non-qualifying operational tasks on the Beneficiary's behalf. The above information is in conflict with that claim. Therefore, it is not evident that the Petitioner has met its burden of proof to establish that the Beneficiary primarily performs qualifying managerial functions. It is also possible that the Petitioner has misrepresented the nature of the Beneficiary's work with [REDACTED]. Although the Petitioner has overcome the stated basis for denial, we cannot properly approve the petition unless and until the Petitioner resolves this additional issue. Any future decision by the Director on this petition must take into account the above information, as well as any further information that additional USCIS inquiries may bring to light.

III. CONCLUSION

The Petitioner has overcome the only stated ground for denial of the petition, and therefore the Director's decision cannot stand. Nevertheless, the petition cannot be approved unless and until the Petitioner has addressed concerns regarding the nature of the Beneficiary's position with the petitioning company and his relationship with [REDACTED]. Therefore, we withdraw the denial of the petition and remand the matter for a new decision consistent with the above discussion. The burden remains on the Petitioner 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).

¹ Sources: [REDACTED] (last accessed December 28, 2015); [REDACTED] (last accessed December 28, 2015).

² Sources: [REDACTED]

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

Cite as *Matter of H-USA, Inc.*, ID# 14985 (AAO Jan. 4, 2016)