U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF ACNA-, LLC

DATE: OCT. 5, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a grain dealer, processor, and exporter, seeks to permanently employ the Beneficiary as its general manager 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). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director, Texas Service Center, denied the petition, concluding that the evidence of record did not establish that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer. The Petitioner filed a motion to reconsider, which the Director denied.

The matter is now before us on appeal. On appeal, the Petitioner stated that the Director relied on erroneous assumptions regarding control of the petitioning company.

We issued a request for evidence (RFE), instructing the Petitioner to submit additional evidence regarding the ownership of the petitioning company and the foreign entity. The Petitioner submitted further evidence in response to our RFE.

Upon *de novo* review, we will remand the matter to the Director for further consideration and action.

I. LEGAL FRAMEWORK

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, Immigrant Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. A labor certification is not required for this classification.

The regulation at 8 C.F.R. § 204.5(j)(3) states:

> (3) Initial evidence—
>
> (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:
>
> (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. QUALIFYING RELATIONSHIP

The Director denied the petition based on a finding that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer.

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.

one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j).

The pertinent regulations at 8 C.F.R. § 204.5(j)(2) define the term "affiliate" as, generally:

> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual; [or]
>
> (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. . . .

The Director denied the petition, stating that, because "the beneficiary is not a firm, corporation, or other legal entity, his individual ownership of the foreign entity and U.S. entity would not classify him as a subsidiary." The Director focused on clause (B) of the above definition of "affiliate": "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." The Petitioner and the foreign entity are not affiliates under this definition.

But the record indicates that the Petitioner meets clause (A) of the definition: "One of two subsidiaries both of which are owned and controlled by the same parent *or individual*" (emphasis added). The Petitioner has established the Beneficiary's ownership and control of both the petitioning entity and the foreign entity, sufficient to establish a qualifying relationship. We therefore withdraw this ground for denial.

Because we have withdrawn the only stated ground in the latest denial notice, the denial cannot stand. Nevertheless, our review of the record reveals concerns about another issue, discussed below. In the course of our de novo review of the record, we may identify additional grounds for denial beyond those specified 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).

III. EMPLOYMENT IN A QUALIFYING MANAGERIAL OR EXECUTIVE CAPACITY

The Petitioner has not adequately shown that the Petitioner will employ the Beneficiary in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

The regulation at 8 C.F.R. § 204.5(j)(5) requires the Petitioner to submit a statement which indicates that the Beneficiary is to be employed in the United States in a managerial or executive capacity. The statement must clearly describe the duties to be performed by the Beneficiary.

The Petitioner initially submitted an unsigned and unattributed position description indicating that the Petitioner and its foreign affiliate are "integrated companies" with "integrated operations." The description stated that the companies "operate[] five grain elevator plants with drying and storage silos: one plant in Texas and four plants . . . in Northern Mexico." The job description indicated that the Beneficiary manages the U.S. and foreign companies from his Texas office, and that "[m]eetings with management are conducted by video on a scheduled daily basis and as needed

otherwise." The accompanying schedule described meetings on weekday mornings and on some afternoons, but did not account for the Beneficiary's full work week.

Most of the documentation relating to business activity is from Mexico, and as such it relates to the Beneficiary's management of the foreign affiliate rather than the petitioning U.S. employer. The Beneficiary's activities regarding the foreign entity do not constitute managerial or executive duties for the petitioning U.S. employer. The Beneficiary's continued authority over the foreign entity does not qualify him for immigration benefits, even if he exercises that authority from within the United States.

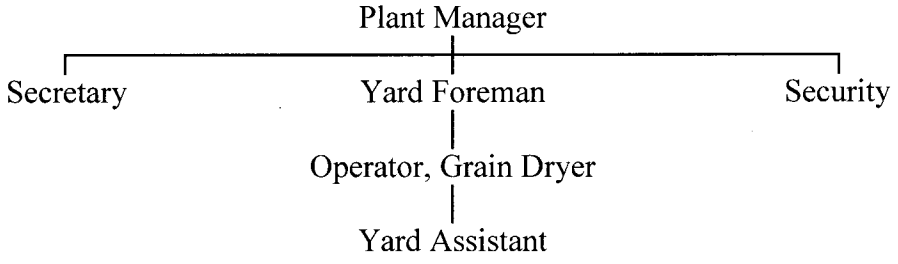
In our RFE, we stated that the submitted description "appears to account for only a minority of the Beneficiary's working hours" and did "not establish that the Beneficiary's duties are primarily managerial or executive." We requested a more detailed and thorough description, with supporting documentation.

In response, the Petitioner has submitted a 13-page description, which divides the Beneficiary's duties into the following broad categories:

- Marketing management – 25% of the Beneficiary's time
- Strategic planning – 20%
- Human resources management – 15%
- Financial management – 20%
- Security management – 10%
- Operations management – 10%

The new job description is unsigned and unattested, and not fully complete. For example, the second page includes this passage: "It is estimated that the General Manager spends xx% of his time in these price setting market watching activities." The job description refers to delegated activities, such as "directing marketing to SELLERS from whom [the Petitioner] purchases in the U.S.," but does not explain how subordinate employees or contractors would perform the operational tasks relating to these activities. For example, "directing marketing" may be a managerial activity, but actually performing front-line marketing work is not.

The Petitioner's organizational chart includes the affiliated company in Mexico, but the Beneficiary's authority over that company is non-qualifying for immigration purposes. The portion of the chart concerning the petitioning U.S. employer included the following information:



The only U.S. employee identified by name in the organizational chart is the plant manager, said to hold a bachelor's degree in industrial engineering. The plant manager's job description indicated that the plant manager answers to a manager of operations and a manager of administrative and financial operations, both of whom are based in Mexico.

The Petitioner asserts that each facility has a plant elevator manager and "supporting plant employees and drivers," but the Petitioner's documentation does not indicate that the U.S. operation is continuously fully staffed. The Petitioner's IRS Forms 1065, U.S. Returns of Partnership Income, indicate that the Petitioner paid less than $100,000 per year in salaries in 2012, 2013, and 2014. IRS Forms 941, Employer's Quarterly Federal Tax Returns, indicate that the Petitioner's U.S. staffing has fluctuated between three and 14 employees during 2014 and the first three quarters of 2015. IRS Forms W-2, Wage and Tax Statements, for 2014 show that the Petitioner paid salaries to 17 employees, only two of whom received amounts consistent with year-round, full-time employment (one of whom was the Petitioner's U.S. plant manager). Each of the other 15 employees received under $10,000, and nine of them earned less than $2,000.

Without sufficient evidence of the employment of subordinates to perform non-qualifying functions, the Petitioner has not provided sufficient evidence to show that the Beneficiary's proposed position in the United States would consist primarily of qualifying managerial or executive tasks. Therefore, the record, as it now stands, does not support approval of the petition. Any future decision by the Director must take this information into account.

IV. CONCLUSION

The Director's decision will be withdrawn, and the petition remanded, for the above stated reasons. 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).

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, which, if adverse, shall be certified to us for review.

Cite as *Matter of ACNA-, LLC*, ID# 14137 (AAO Oct. 5, 2016)