



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

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

MATTER OF A-G- CORP.

DATE: JAN. 30, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an online merchandise retailer, seeks to permanently employ the Beneficiary as its CEO under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 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 a managerial or executive capacity.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish, as required, that the Beneficiary was employed abroad and would be employed in the United States in a managerial or executive capacity.

On appeal, the Petitioner disputes the Director's decision, arguing that the decision was not based on the facts and evidence in the record.

Upon *de novo* review of the record, we find that the record contains sufficient evidence to show that the Beneficiary was more likely than not employed abroad in a managerial or executive capacity; therefore, we will withdraw this ground as a basis for denial.

With respect to the Beneficiary's proposed employment in the United States, we find that the Director did not offer an adequate analysis of the evidence submitted so that the Petitioner was afforded a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. Therefore, we will remand the matter for further proceedings consistent with our discussion below.

I. LEGAL FRAMEWORK

Section 203(b)(1)(C) of the Act makes an immigrant visa available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate.

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. The petition

must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3).

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

As noted earlier, we find that the Director's decision did not adequately explain the deficiencies in the evidence such that would allow the Petitioner a meaningful opportunity to address the issues on appeal. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal). As the Petitioner points out on appeal, the Director misstated the Beneficiary's position title by referring to the Beneficiary as "president," a position title that does not apply either to the Beneficiary's position abroad or to his proffered position in the United States. Furthermore, while the Director concluded that the Beneficiary "performs and performed much of the work himself," he did not point to any evidence in the record that led him to make this conclusion or indicate that he considered all relevant factors, such as the size and staffing of the U.S. organization, prior to arriving at the final determination.

Notwithstanding the Director's lack of a complete analysis on this issue, the record currently is insufficient to establish that the Beneficiary would be employed in an executive capacity. Namely, the record includes a broad job description that lacks sufficient detail about the specific tasks the Beneficiary would perform within the context of the Petitioner's online retail operation. The actual duties themselves reveal the true nature of the 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).

Further, the record does not include sufficient evidence to show that the Petitioner's organizational hierarchy, at the time of filing, was adequately complex and could support the Beneficiary in a position where he would devote his time primarily either to managing a staff of supervisory, professional, or managerial employees, or, alternatively, that he would allocate his time primarily to directing the management of the organization and focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. Although the Petitioner states on appeal that it now has ten employees, only the facts and circumstances that existed at the time of filing can be considered in determining the Petitioner's eligibility. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). That includes evidence to demonstrate that the Petitioner is sufficiently staffed and able to relieve the Beneficiary from having to allocate her time primarily to non-executive tasks.

The definitions of executive and managerial capacity have two parts. First, the Petitioner must show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*,

940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See, e.g., Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533. The record as presently constituted does not meet these criteria.

III. DOING BUSINESS

In addition, while not previously discussed in the Director's decision, we note that the Petitioner did not establish, as required, that it had been doing business for one year prior to filing this petition. 8 C.F.R. § 204.5(j)(3)(i)(D). A petitioner may establish that it is "doing business" by demonstrating that it is providing goods and/or services in a regular, systematic, and continuous manner. 8 C.F.R. § 204.5(j)(2).

In the present matter, the Petitioner filed the Form I-140 in August 2014. In order to meet the regulatory requirements, the Petitioner must establish that it started doing business in August 2013. While the record contains numerous sales invoices, the earliest invoice in the record goes back to September 20, 2013. The record does not indicate that the Petitioner had been doing business in August 2013. Therefore, the record currently does not show that the Beneficiary had been doing business for the full year prior to filing this petition, as required.

IV. CONCLUSION

Although the Petitioner did not submit sufficient evidence to meet its burden of establishing that the Beneficiary will be employed in a managerial or executive capacity and that it had been doing business for one full year prior to filing the instant petition, the Director's decision did not adequately analyze the facts of the matter and apply the law. As the Director did not satisfy this condition, we will remand the matter for entry of a new decision. The Director should request any additional evidence deemed warranted and allow the Petitioner to submit such evidence within a reasonable period of time.

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

Cite as *Matter of A-G- Corp.*, ID# 1028715 (AAO Jan. 30, 2018)