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FILE: [REDACTED] OFFICE: VERMONT SERVICE CENTER Date: JUL 14 2005
EAC 03 137 52403

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to
the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a Connecticut corporation engaged in providing management and professional services to small businesses. It seeks to employ the beneficiary as its president and chief operations officer (COO). 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. The director denied the petition on the following three grounds: 1) lack of sufficient evidence establishing a qualifying relationship between the petitioner and the beneficiary's foreign employer; 2) failure to establish that the beneficiary was employed abroad in a qualifying capacity; and 3) failure to establish that the beneficiary would be employed by the petitioner in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and submits a brief in support of her arguments.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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.

The first issue in this proceeding is whether the petitioner has submitted sufficient evidence to resolve the inconsistency discussed in the denial and, thereby, successfully establish that it has a qualifying relationship with the beneficiary's foreign employer.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

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

(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;

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the instant matter, the petitioner claims that it is a wholly owned subsidiary of Sagar Traders, located in India. In support of this claim, the petitioner submitted a stock certificate indicating that the foreign entity owns 200 shares of the petitioner's common stock, which has no par value. The petitioner also submitted a copy of its corporate charter filed with the State of Connecticut. No other evidence was submitted regarding the issue of the petitioner's ownership.

On March 29, 2004, the director denied the petition concluding that the petitioner submitted conflicting documentation regard its ownership. Namely, the director stated that the petitioner's corporate tax return for 2002 indicates that Ashok Nichani owns 100% of the petitioner, which contradicts the stock certificate submitted initially in support of the petition.

On appeal, counsel submits a brief claiming that the inconsistency was the result of the petitioner's accountant, who provided erroneous information in the tax return regarding the petitioner's ownership. The petitioner also submits a letter from its accountant discussing the error, as well as amended tax returns for the years 2000 through 2003 correcting the error.

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). Thus, while the documents submitted on appeal corroborate counsel's explanation for the factual discrepancy in question, they cannot be deemed "independent objective evidence." Rather, the evidence is merely a third party's explanation conveying the petitioner's claim. Furthermore, evidence that the petitioner creates after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice. Moreover, even if the AAO were to determine that the amended tax returns and the accountant's statement effectively resolve the inconsistency as noted by the director, the record as a whole lacks sufficient evidence to determine that the foreign entity purchased and paid for its claimed ownership in the petitioner.

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 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In 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 at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N at 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In the instant matter, the only contemporaneous evidence addressing the issue of the petitioner's ownership has been submitted in the form of a single stock certificate. The petitioner has not submitted any evidence in the form of bank wire transfer receipts or the minutes of any of the petitioner's stockholder meetings, which would indicate that the foreign entity made a capital contribution in exchange for its shares in the petitioning organization. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N 190 (Reg. Comm. 1972). Based on the evidence of record, the AAO concludes that the petitioner has failed to submit sufficient documentary evidence establishing a qualifying relationship with the beneficiary's foreign employer. Accordingly, based on this initial insufficiency, this petition cannot be approved.

Next, this proceeding will determine whether the beneficiary was employed abroad in a managerial or executive capacity and whether the petitioner would 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), 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.

In support of the initial petition, the petitioner did not provide any information in regard to the beneficiary's employment abroad. Consequently, the director issued a request for additional evidence on August 13, 2003. Specifically, the petitioner was instructed to describe the beneficiary's role within the foreign entity, as well as the management and personnel structures of that entity. The petitioner was also asked to indicate the job titles of the beneficiary's subordinates and their respective duties.

The petitioner responded with a statement, dated November 6, 2003, in which it claimed that the beneficiary's position abroad was that of partner and executive director of operations. The petitioner also indicated that the other partner was directly subordinate to the beneficiary's position and that the second tier of managers included a floor supervisor and quality control manager. The petitioner indicated that the third tier of the company's structure was comprised of four welders and three assemblers. The petitioner also included the following statement regarding the beneficiary's duties:

The beneficiary allotted 100% of his time to managerial and executive duties of Sagar Traders. He had full authority and discretion over all day-to-day activities and did not report to anyone, as there was no higher position than the one that [the beneficiary] held.

Technical and executive skills required to be the Executive Director of Operations, and partner of Sagar Traders, were controlling the economic well-being of the business and being able to control a 12[-]staff under him. Exercising control over personnel, creating policies and procedures for the business and creating and executing a sound economic plan are all indisputably executive and managerial duties.

More specifically, [the beneficiary] spent most of his time performing the following duties, which are all clearly executive and managerial in nature. He reviewed company operations to evaluate efficiency, effectiveness and fiscal responsibility, analyzed and interpreted past data and decisions in order to make good business decisions when planning marketing and future expenditures. He also provided short-term and long-term financial and operational plans for the business, by developing future business plans to promote the continued growth of the business. [The beneficiary] also, [sic] negotiated and reviewed contracts (purchase orders) with vendors and clients, kept records of aging payables and capital finance.

The petitioner also submitted the following documentation: 1) foreign entity's payroll registers for 1998 and 2003; 2) a letter from the foreign entity's accountant verifying the creation of a partnership in which the beneficiary was one of the partners and listing the amount of money the beneficiary withdrew from 1997 to 2000; and 3) the beneficiary's foreign income tax returns.

In the denial, the director noted that the beneficiary's name does not appear on any of the payroll registers, even though the beneficiary was still purportedly employed by the foreign entity in 1998. The director also discussed the discrepancy in monetary figures between the partnership income claimed in the beneficiary's tax returns and the figures listed by the foreign entity's accountant in a letter dated June 26, 2000. The director concluded that the submitted evidence does not establish that the beneficiary was actually employed by the foreign entity and, therefore, could not have been employed in a managerial or executive capacity.

On appeal, counsel asserts that the accountant's letter clearly establishes that the beneficiary took a monetary draw in addition to collecting a partnership distribution. While this may be true, the fact remains that the beneficiary's name does not appear on any of the foreign entity's submitted payroll registers. Therefore, there is no evidence to confirm that the beneficiary was being paid as an employee of the overseas entity. The fact that the beneficiary had been drawing money and collecting a partnership distribution only confirms that the beneficiary has invested money as a partner in a business, and further indicates that the beneficiary has profited from his investment. However, this relationship between the beneficiary and the foreign entity may be similar to a stockholder and a company in which the stockholder has invested where the stockholder collects a dividend from his/her investment, but does not necessarily work for the company whose stock he/she has purchased. Thus, while the beneficiary may have been employed abroad by Sagar Traders, his tax returns and his partnership are not conclusive proof of such employment, particularly in light of the fact that the beneficiary's name does not appear on any of the submitted payroll registers.

Furthermore, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant case, the petitioner indicated that the beneficiary spent most of his time reviewing company operations, analyzing and interpreting information, making long and short-term financial and operational plans, and reviewing contracts. While this description suggests that the beneficiary may have had a high degree of discretionary authority, it fails to specifically convey an understanding of what tasks the beneficiary primarily performed. Reciting the beneficiary's vague job responsibilities or broadly cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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). Such crucial specifics are missing in the instant

matter. Based on the evidence of record, the AAO cannot determine whether the beneficiary actually worked for the foreign entity as claimed, and if so, whether his purported employment involved primarily performing qualifying managerial or executive duties. Therefore, based on this additional insufficiency, this petition cannot be approved.

Regarding the beneficiary's proposed employment in the United States, the petitioner provided the following list of the beneficiary's prospective duties:

1. Oversee and run operations;
2. Manage its administrative operations with full authority over marketing and personnel;
3. Develop, formulate, establish and implement plans for long term growth, set policies, goals and objectives;
4. Oversee and manage financial operations;
5. Communicate details of transactions with the parent company on a regular basis and coordinate growth and development while receiving very limited supervision or direction from the oversees [sic] parent company;
6. Plan direct and coordinate company activities in relation to operations, sales and business organization;
7. Develop long-term company goals and objectives.

In the request for additional evidence, the director instructed the petitioner to submit various quarterly tax returns, as well as a detailed description of the beneficiary's duties in the United States. The petitioner was also asked to describe the support staff that carries out the duties managed and directed by the beneficiary, and to provide a percentage breakdown of the specific duties the beneficiary performs on a weekly or daily basis.

In response, the petitioner stated that Pooja Hospitality, Inc., D/B/A Super 8 Motel is the only business it is currently managing, but indicated its intention to expand. The petitioner stated that Pooja Hospitality currently employs 20 individuals. In regard to the beneficiary's duties, the petitioner stated that as vice president of the petitioner, the beneficiary is responsible for all of Pooja Hospitality's financial activities, including planning for future marketing and expenditures. The petitioner stated that the beneficiary also fills the role of general manager of the Super 8 Motel and claimed that in this capacity, the beneficiary "negotiates and reviews contracts with vendors and credit card companies, creates marketing and promotional policies and coordinates and supervises a staff of 18." The petitioner provided the following breakdown of the beneficiary's specific duties:

- 15% Overseeing the effectiveness of staff and coordinating the schedule of staff
- 15% Developing marketing and sales promotions

- 15% Negotiating and reviewing contracts with vendors
- 15% Reviewing financial reports and budgets to evaluate efficiency and profits
- 10% Creation of future business plans to promote the continued growth of the business.
- 5% Meetings with travel bureau groups, social groups and business groups to engage in promotional correspondence
- 10% Communicating details of operations with the parent company
- 10% Resolving customer Service issues which cannot be settle by the front desk staff or Assistance [sic] Manager
- 5% Inspecting the hotel to assure that it meets [s]tate and local regulations of cleanliness

In the denial, the director noted that the beneficiary appears to be the petitioner's sole employee and concluded that based on the evidence of record, the beneficiary is an executive in name only. The director continued, stating that the beneficiary's duties primarily involve providing services to the petitioner's only client, Pooja Hospitality, but not to the petitioner itself. The director noted that the petitioner essentially acts as a holding company for Pooja Hospitality.

On appeal, counsel agrees that Pooja Hospitality is the petitioner's only client, but claims that the petitioner "is currently actively involved in marketing, economic and demographic research for the establishment and management of additional hotels and motels, of which one is anticipated to open shortly." The petitioner fails, however, to specify who is actually doing the marketing, economic and demographic research, in light of the petitioner's inability to establish that it has employees aside from the beneficiary. Although the petitioner provided the requested quarterly tax returns, the returns were not accompanied by quarterly wage statements, which specifically name the employees that were paid during any given quarter. As such, the AAO has no choice but to assume that as the petitioner's sole employee, the beneficiary actually performs all of the petitioner's daily operational tasks. Furthermore, regardless of the petitioner's claim that it anticipates further expansion of its business, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the AAO cannot consider the petitioner's future projections in determining its eligibility for the benefit sought.

As previously stated, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant matter, the petitioner provided a lengthy list of duties that suggest that the beneficiary's duties are all directly related to working for the petitioner's only client, Pooja Hospitality. The only employees are those working directly for the Super Motel 8, not for the petitioner. The petitioner itself lacks the necessary support staff, or any staff for that matter, in order to relieve the beneficiary from performing nonqualifying tasks. The submitted evidence suggests that the beneficiary is the only employee of a holding company, whose only source of income is its operation of another entity that is partly owned and operated by the beneficiary. However, duties performed by the beneficiary, including handling customer relations, marketing, overseeing non-professional staff, and inspecting the motel for cleanliness are not qualifying duties. Yet, they are the duties

that the beneficiary primarily performs. It is noted that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N at 604 (Comm. 1988). In the instant case, the beneficiary is such an employee. Therefore, based on this additional ground, the instant petition cannot be approved.

Beyond the decision of the director, the petitioner has failed to establish that it has been engaged in the regular, systematic and continuous course of business for one year prior to the filing of the petition. See 8 C.F.R. § 204.5(j)(3)(i)(D). As stated above, the petitioner appears to be a holding company whose only purpose in the United States is to operate Poojah Hospitality. There is no evidence in the record that would establish that the petitioner has been engaged in providing management and professional services to small businesses on a regular and continuous basis.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO 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 *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional reasons provided in the paragraph above this petition cannot be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.