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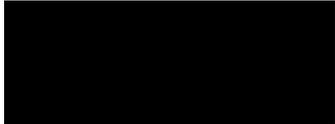
U.S. Department of Homeland Security
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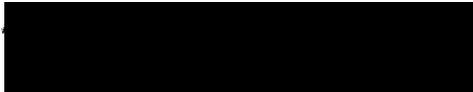
Office: TEXAS SERVICE CENTER

Date: JUN 01 2005

IN RE:

Petitioner:

Beneficiary:



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 Director, Texas Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Texas in October 2000. It exports auto parts. It seeks to employ the beneficiary as its purchasing manager. 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 determined that the petitioner had not established a qualifying relationship between the petitioner and the foreign entity.

On appeal, counsel for the petitioner asserts the petitioner submitted evidence demonstrating that the foreign entity both owns and controls the petitioner.

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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The issue to be considered in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. See section 203(b)(1)(C) of the Act.

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.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

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.

The petitioner avers that the beneficiary's foreign employer owns a 50 percent interest in the petitioner, the president of the petitioner, [REDACTED] owns a 40 percent interest in the petitioner, and, the beneficiary owns a 10 percent interest in the petitioner. The petitioner provided: (1) its by-laws signed October 10, 2000; (2) stock certificates one through three, all signed October 30, 2001 showing 500,000 shares had been issued to the foreign entity in this matter, 400,000 shares had been issued to the individual identified as the petitioner's president, and 100,000 shares had been issued to the beneficiary in this matter; and, (3) minutes of the annual meeting of shareholders dated October 30, 2001 listing the shareholders and their number of shares corresponding to the stock certificates issued. The petitioner also provided evidence that the foreign entity is 99 percent owned by [REDACTED]

In response to the director's July 15, 2004 request for evidence, the petitioner's president submitted an undated statement detailing the relationship between the U.S. petitioner and the beneficiary's foreign employer. In the statement, the petitioner's president indicated that the U.S. petitioner is "controlled" by its president.

The director determined that the president's statement that she controlled the petitioner undermined the foreign entity's control of the petitioner; thus a subsidiary relationship could not be established.

On appeal, counsel for the petitioner points out that the petitioner's by-laws establish that the petitioner's president is subject to the petitioner's board of directors and that the board of directors is elected by the shareholders. Counsel asserts that the foreign entity not only owns a 50 percent interest in the petitioner but also controls the petitioner because it holds the majority of shares issued. Counsel also submits a clarifying statement from the petitioner's president wherein she explains that her previous statement regarding her control of the petitioner referred to the management of the day-to-day affairs and operations of the company.

Counsel's assertion is not persuasive. The record contains discrepancies regarding the ownership of the petitioner and does not contain evidence that the foreign entity paid for the shares issued to it. The petitioner has provided its Internal Revenue Service (IRS) Forms 1120 for 2002 and 2003. Both IRS Forms 1120 on Schedule K, Line 5, show that at the end of the tax year, an individual, partnership, corporation, estate or trust owned directly or indirectly 51 percent of the petitioner. The petitioner does not provide any attachment to the IRS Forms 1120 identifying the 51 percent owner.

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 the 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. The petitioner states that the foreign entity owns 50 percent of the petitioner, but the IRS Forms 1120 show that an individual, partnership, corporation, estate or trust owned directly or indirectly 51 percent. 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).

Moreover, although the director did not request evidence that the foreign entity had paid for the shares issued to it, the record does not contain evidence substantiating that the foreign entity provided money or other consideration in exchange for the issuance of stock. As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Evidence of this nature would include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

In this matter, the record does not contain sufficient consistent evidence to overcome the director's determination on this issue. The petitioner's IRS Forms 1120, are incomplete and contain information on Schedule K, Line 5, that does not comport with the petitioner's claims regarding its ownership. The record does not contain evidence that the foreign entity paid for its interest in the petitioner. Without consistent

evidence that the foreign entity has a viable, controlling interest in the petitioner, the AAO will not overturn the director's decision on this issue. The director's decision will be affirmed.

Beyond the decision of the director, the petitioner has not established that the beneficiary's position for the petitioner is managerial or executive.

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.

The petitioner, on the Form I-140, Immigrant Petition for Alien Worker, filed June 17, 2003 stated that it employed three people. The petitioner identified these individuals as the president, the beneficiary's position which is identified as vice-president on the petitioner's organizational chart and as purchasing manager on the petition, and a logistical coordinator and salesperson. However, the evidence in the record does not substantiate that the individual identified as the logistical coordinator and salesperson was employed full-time. The record contains evidence that this individual was paid approximately \$2,000 in 2003.

The petitioner described the beneficiary's duties as managing all purchasing decisions, obtaining merchandise, determining which commodities or services are best for the company, choosing suppliers, negotiating prices and terms, evaluating suppliers, and awarding contracts. The petitioner also indicated that the beneficiary exercised discretionary decision-making in carrying out these duties. The petitioner further indicated that the beneficiary, as purchasing manager, controlled an integral function.

However, the petitioner in this matter has only provided evidence that the beneficiary performs the day-to-day operational tasks associated with the duties of a purchasing agent. 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 Dec. 593, 604 (Comm. 1988). The petitioner has not provided evidence that the petitioner employs sufficient personnel to relieve the beneficiary from primarily performing the purchasing and market research duties. 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)).

The petitioner's indication that the beneficiary controlled an integral function is not sufficient to establish that the beneficiary manages an essential function. The term "essential function" is not defined by statute or regulation. However, if a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job description that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. As observed above, 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. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Likewise, the petitioner's description of the beneficiary's position as purchasing manager for the foreign entity is not comprehensive. The record does not contain sufficient evidence that the beneficiary's position for the foreign entity comprised primarily managerial or executive duties.

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).

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner or her duties for the foreign entity comprise primarily executive or managerial duties.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish that it has been doing business for one year prior to filing the petition on June 17, 2003 as required by the regulation at 8 C.F.R. § 204.5(j)(3)(i)(D). The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Doing Business* means 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." The petitioner has submitted evidence of doing business only since February 2003.

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).

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.