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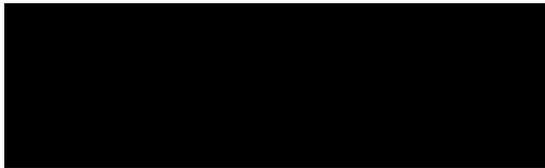
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



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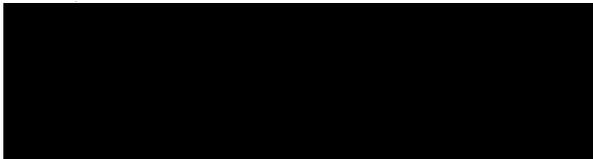


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: SEP 29 2005
WAC 03 172 50336

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

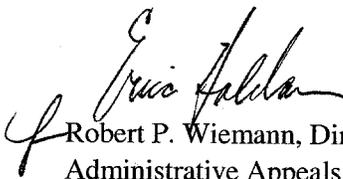
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 Director, California Service Center, denied the employment-based petition. The petitioner subsequently filed an appeal with the Administrative Appeals Office (AAO), which the AAO dismissed in a decision dated March 2, 2005. The matter is now before the AAO on a motion to reopen. The AAO will grant the motion and affirm the previous decisions of the director and the AAO.

The petitioner filed the instant petition seeking to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Arizona that is operating as an employment agency. The petitioner seeks to employ the beneficiary as its general manager.

The director denied the petition concluding that the petitioner had not demonstrated that the United States entity is a subsidiary or an affiliate of the foreign employer as required in the Act at section 203(b)(1)(C). In an appeal filed on April 28, 2004, counsel contended that a parent-subsidiary relationship exists between the foreign and United States organizations as the foreign entity owns 51% of the petitioner's issued stock. Counsel submitted the petitioner's stock transfer ledger as evidence of the foreign entity's stock ownership in the United States corporation.

In a decision dated March 2, 2005, the AAO determined that a qualifying parent-subsidiary relationship did not exist between the two entities. The AAO stated that the petitioner had failed to provide clear and consistent evidence that the foreign entity is a majority shareholder of the petitioning entity, and noted that the petitioner had not furnished a stock certificate identifying the foreign company as a shareholder. The AAO also addressed several inconsistencies in the record, including the actual number of shares authorized by the petitioner and the amount subsequently issued, as well as the petitioner's reference on its corporate tax return to being owned by an individual shareholder, rather than the foreign corporation. The AAO also concluded that the petitioner had not demonstrated that the beneficiary had been employed abroad or would be employed in the United States in a primarily managerial or executive capacity.

On motion, counsel maintains that a qualifying parent-subsidiary relationship exists between the foreign and United States organizations. In a letter submitted in support of the appeal, counsel claims that the AAO failed to fully appreciate the documentary evidence previously presented. Counsel submits a stock certificate identifying the foreign company as the owner of 51,000 shares of the petitioner's stock. Counsel also offers copies of the petitioner's corporate stock ledger, which were previously provided for the record. Counsel further claims that the beneficiary would be employed in a primarily managerial or executive capacity and submits a "Confirmation of Job Offer" given to the beneficiary from the petitioner's president and chief executive officer as evidence of the beneficiary's employment capacity.

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 or 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 regulation at 8 C.F.R. § 103.5(a)(2) provides that a motion to reopen "must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The AAO will consider the issue of whether the petitioner established the existence of a qualifying relationship between the foreign and United States entities.

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 support of the present motion, counsel submits a letter dated March 31, 2005, confirming the petitioner's "former position on the existence of [a qualifying relationship]" and contesting Citizenship and Immigration Services' (CIS) review of the record. Counsel states that the petitioner's corporate stock ledger and stock certificates demonstrate that the foreign entity owns 51% of the United States company. Counsel submits a copy of stock certificate number four, dated September 22, 1994, naming the foreign entity as the owner of 51,000 shares of the petitioner's issued stock.

Counsel addresses the information reported on the petitioner's corporate tax return, in which the petitioner indicated that "Armando Cabrera" was the majority shareholder of the petitioning entity.¹ Counsel attempts to explain the inconsistency by stating that "Armando Cabrera" owns 65 percent and 20 percent of the stock issued by the foreign and the United States entities, respectively. Counsel states that Mr. Cabrera's stock ownership in both organizations as well as his position as president and chief executive officer of both companies "have created the confusion in oftentimes mistakenly referring to [the foreign entity] and Armando Cabrera as one and the same."

Counsel contends that despite the inconsistencies addressed by the director and the AAO, the petitioner's "ownership and organizational make up is easily distinguishable and verifiable." Counsel further requests that the AAO consider the two previous approvals of the petitioner's L-1A nonimmigrant petitions filed for the benefit of the instant beneficiary. Counsel notes that essentially the same documents were submitted with the prior petitions as were provided in the instant matter.

Upon review, counsel has not established the existence of the purported parent-subsidary relationship between the foreign and United States entities. 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 Dec. at 595.

Other than a stock certificate naming the foreign entity as the owner of 51,000 shares of stock, counsel has not offered documentary evidence explaining the numerous inconsistencies pertaining to the ownership of the petitioning entity that were raised by the AAO in its March 2, 2005 decision. Specifically, the AAO noted the following discrepancies in the evidence offered by the petitioner on appeal: (1) four of the six stock certificates identify stock issuances from a California corporation, not the petitioner, which is incorporated in Arizona; (2) the two stock certificates issued by the petitioning entity account for only 30,000 of its purported 110,000 shares of issued stock; (3) the petitioner provided copies of stock certificates one and three only; (4) the petitioner did not clarify its stock issuance date of September 1994 with its date of establishment in February 2000; and (5) Schedules E and K and the appended Statement five of the petitioner's 2001 and 2002 federal tax returns identify "Armando Cabrera" rather than the foreign entity as the majority shareholder of the petitioner's stock. The AAO also observed that the allocations of ownership interests offered by the petitioner amount to 110 percent, thereby raising doubt as to the correct ownership interests, and further noted that the petitioner, consequently, issued an unauthorized amount of 10,000 shares of stock. In response to these findings, counsel claims the existence of a "distinguishable and verifiable" parent-subsidary relationship based on the submitted stock certificate naming the foreign entity as a shareholder.

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

¹ The AAO noted in its March 2, 2005 decision that Schedules E and K and the appended Statement five of the petitioner's 2001 and 2002 federal tax returns identify "Armando Cabrera" rather than the foreign entity as the majority shareholder of the petitioner's stock.

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 Dec. at 364-365. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The stock certificate offered by counsel on motion is inconclusive, and therefore, does establish that the foreign entity has ownership and control of the petitioning organization. The record contains stock certificates one and three, while the stock certificate presently submitted by counsel is identified as number four. The petitioner claims on appeal to have a total of seven shareholders. As noted in the AAO's previous decision, the petitioner has not provided copies of each of the stock certificates issued. Twenty-nine thousand shares of stock remain unrepresented by a stock certificate. This information is essential to confirming the purported ownership in the petitioning entity, particularly because the petitioner's representations with regard to stock distributions amount to an unauthorized issuance of 10,000 shares of stock. Without a copy of each issued stock certificate, the AAO cannot verify the company's ownership. 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). The AAO notes that although requested by the director in his December 22, 2003 Notice of Action, the petitioner failed to provide the referenced stock certificate. The petitioner also neglected to provide the stock certificate on appeal, and submits it for the first time on motion. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In addition, the submitted stock ledger indicates that stock certificate number four was issued to "Francisco Cabanilla" on March 1, 2000. Counsel has not reconciled this previous stock issuance with the stock certificate number four presently submitted with the appeal. This unexplained discrepancy is crucial to establishing the true ownership of the United States company. Also, the petitioner still has not addressed the issuance of stock certificates dated in 1994 for a company incorporated in 2000. 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, counsel does not provide on motion a sufficient explanation of the inconsistent ownership interests identified on the petitioner's 2001 and 2002 federal tax returns. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Simply asserting "confusion" in the petitioner's ownership does not qualify as independent and objective evidence. The petitioner should have provided copies of its amended certified tax returns reflecting its correct ownership. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). 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.

The AAO acknowledges the prior approvals of two of the petitioner's L-1A nonimmigrant petitions referenced by counsel on motion. It must be noted, however, that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after CIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In this case, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of the petitioner's eligibility is not credible. Accordingly, the petitioner has not established its eligibility for the requested immigrant visa classification. The petition was properly denied by the director and the AAO. Accordingly, the AAO will affirm the previous decisions of the director and the AAO.

The AAO will address the additional issue of whether the beneficiary would be employed in the United States in a primarily 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

On motion, counsel submits a "Confirmation of Job Offer" for the beneficiary, which briefly outlines the following job duties to be performed by the beneficiary as the company's general manager:

[E]stablish and manage company policies; oversee and manage company business operations; develop sales/marketing plans and company products; manage company finances; hire, fire and manage company staff.

Counsel states in his March 31, 2005 letter that the denial of the petition based on employment capacity "has been overcome" by the information contained in the above-referenced job offer, as well as the job description appended to Form I-140.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The AAO notes that both the director and the AAO had properly considered the "Confirmation of Job Offer" in its review of the instant petition, as it was previously submitted by the petitioner in its March 11, 2004 response to the director's request for evidence. The petitioner has not offered any new documentary evidence demonstrating the beneficiary's employment in a primarily managerial or executive capacity. Again, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. at 188-89 n.6; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Consequently, the AAO cannot conclude that the beneficiary would be employed in a primarily managerial or executive capacity. The AAO will affirm the previous decisions of the director and the AAO.

Based on the foregoing discussion, the petition was properly denied by the director based on the petitioner's failure to establish the existence of a qualifying relationship between the foreign and United States entities, or that the beneficiary would be employed in a primarily qualifying capacity. Accordingly, the immigrant visa petition is denied.

The petition will be denied for the above-stated reasons, with each considered as an independent and alternative basis for denial. 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. Accordingly, the decisions of the director and AAO will be affirmed.

ORDER: The decision of the AAO dated March 2, 2005 is affirmed.