



U.S. Citizenship
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FILE:



Office: TEXAS SERVICE CENTER

Date:

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Petitioner:

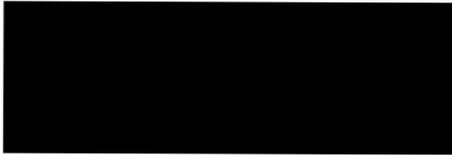


Beneficiary:

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, Chief
Administrative Appeals Office

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

The petitioner is a Florida corporation claiming to be engaged in the distribution and retail of various clothing. It seeks to employ the beneficiary as its president. 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 failed to establish that it has a qualifying relationship with the beneficiary's foreign employer and denied the petition.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his 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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 primary issue in this proceeding is whether the petitioner has a qualifying relationship with the beneficiary's foreign employer as claimed.

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.

In support of the Form I-140, the petitioner provided a statement dated June 2, 2005 in which it stated that it is a wholly owned subsidiary of Ramark Industria e Comercio, Ltda., the beneficiary's foreign employer, located in Brazil. In support of this claim the petitioner provided the following documentation:

1. The petitioner's Articles of Incorporation of which Article III states that the petitioner is authorized to issue 5,000 shares at a par value of \$1.00 per share.
2. Documentation verifying the filing of the petitioner's Articles of Incorporation indicating that the petitioner was incorporated in the State of Florida on July 27, 2001.
3. The petitioner's federal tax return for 2004 with all of the attached schedules.
4. Stock certificate No. 1 issued by the petitioner to Ramark Industria e Comercio, Ltda. showing that 5,000 shares of the petitioner's stock were issued on September 3, 2001.

On December 8, 2005, the director issued a notice of intent to deny (NOID) based on a discrepancy observed in the petitioner's 2004 tax return, which cast doubt on the petitioner's claimed ownership. Namely, the director noted that Schedule E of the petitioner's submitted tax return shows that the beneficiary, rather than the beneficiary's foreign employer, is the owner of the petitioner's issued stock. The director deemed this to be a significant inconsistency with the petitioner's original ownership claim and instructed the petitioner to provide further documentation reconciling the apparent conflict.

In response, the petitioner provided a letter dated March 3, 2005 claiming that Schedule E of the 2004 tax return was filled out in error and that the petitioner has no paid officers. The petitioner also provided the following documentation:

1. Another copy of the petitioner's Articles of Incorporation and stock certificate No. 1 reiterating the information discussed in Nos. 1 and 4 above, respectively.

2. A Windows screen in the Portuguese language.¹
3. The foreign entity's wire transfer request and its English translation indicating that [REDACTED] sought to transfer \$4,500 to the U.S. petitioner. The request notice is dated November 13, 2001.
4. The petitioner's transaction receipt showing that two deposits were made into the petitioner's bank accounts on November 13, 2001. The first sum was for \$2,500 and the second sum was for \$4,500.
5. Minutes of meeting dated January 9, 2002 identifying the petitioner as the wholly owned subsidiary of Ramark Industria e Comercio, Ltda.
6. Minutes of the petitioner's board meetings dated January 6, 2004, January 5, 2005, and January 3, 2006. [REDACTED] is named as the petitioner's parent company in each set of minutes.
7. The petitioner's stock ledger indicating that a single stock certificate (certificate No. 1) was issued in the amount of 5,000 shares, which were transferred to [REDACTED]. The second page of the ledger indicates that the stock certificate was issued on September 3, 2001 and indicated that the value of the issued stock was \$5,000.
8. The petitioner's altered 2004 federal tax return in which Schedule E is left blank.

On March 13, 2006, the director denied the petition based on the conclusion that the petitioner provided inconsistent documentation to support the claim regarding its ownership. The director specifically commented on Schedule E of the petitioner's initially submitted 2004 tax return in which the beneficiary was named as the owner. The director also commented on the petitioner's submission of the altered 2004 tax return and noted that the petitioner failed to provide evidence of its purported request for a certified copy of the corrected tax return.

On appeal, counsel explains that the information initially provided in Schedule E of the petitioner's 2004 tax return was the result of an error made by a newly hired employee who filled out the Form 1120. In support of this claim, counsel refers to the certified amended tax return submitted by the petitioner on appeal.

While the newly submitted documentation addresses the single discrepancy cited in the director's denial, the record shows additional discrepancies, which preclude a favorable finding. Namely, the record contains numerous documents showing that the petitioner was authorized and did in fact issue 5000 shares of its stock. Both the stock ledger and Article III of the petitioner's Articles of Incorporation indicate that the par value of the petitioner's stock is \$1.00 per share. Accordingly, the issuance of 5,000 shares should net \$5,000. However, Schedule L, Item 22(b) of the tax return in question indicates that the petitioner received only \$500 in exchange for its issued stock. Furthermore, despite the information provided in the petitioner's stock

¹ Because the petitioner failed to submit a certified translation of the foreign Windows screen, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

certificate and stock ledger, both of which indicate that 5,000 shares of stock were issued to [REDACTED] the record shows that the purported parent entity transferred a total of \$7,000 to the petitioner. The amount transferred is inconsistent with the amount that is claimed to represent the par value of petitioner's stock.

Finally, the petitioner's stock ledger and stock certificate both indicate that the stock was transferred to the foreign entity on September 3, 2001, which is two months prior to the foreign entity's transfer of \$7,000 to the U.S. petitioner's bank account. In light of the discrepancy between the value of the shares transferred and the actual amount transferred as well as the discrepancy between the date of stock issuance and the date of the fund transfer, the AAO cannot conclude that the \$7,000 transfer was used for the purpose of purchasing the petitioner's stock. 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). In the instant matter, the petitioner neither acknowledges nor provides documentation to resolve these considerable inconsistencies.

Accordingly, the director improperly concluded that a qualifying relationship undoubtedly existed from the time of the petitioner's incorporation until 2003. To the contrary, the documentation submitted by the petitioner is inconsistent with regard to the value of the petitioner's stock and the amount of funds the petitioner actually received in exchange therefore.

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. Based on the documentation provided, the AAO cannot conclude with any degree of certainty that the purported parent entity paid for 5,000 shares of the petitioner's stock as claimed. Therefore, the petitioner has failed to establish the existence of a qualifying relationship with the beneficiary's foreign employer.

Furthermore, the record supports a finding of ineligibility based on additional grounds that were not previously addressed in the director's decision.

More specifically, 8 C.F.R. § 204.5(j)(3)(i)(A) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to filing the Form I-140. Similarly, 8 C.F.R. § 204.5(j)(5) requires the submission of a job offer, which should include a detailed account of the duties to be performed by the beneficiary in his/her position with the U.S. petitioner. In the instant matter, neither the description of the beneficiary's foreign position nor the description of her prospective position with the U.S. petitioner clearly identify any of the duties performed abroad or duties she would perform in the United States. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. 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). As the petitioner has failed to provide this required information, the AAO cannot

determine whether the beneficiary was employed in a qualifying capacity abroad or whether the petitioner would employ her in a qualifying capacity in the United States.

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 grounds of ineligibility discussed in the above paragraph, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See* [REDACTED] 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.