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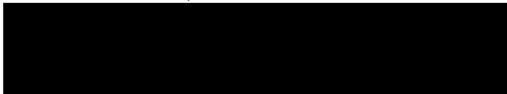


Office: TEXAS SERVICE CENTER Date: MAY 03 2007

SRC 05 228 50740

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, 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 was organized in the State of Florida as a limited liability company. It is engaged in the manufacture and distribution of ice cream and seeks to employ the beneficiary as its president and general 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 failed to establish that it has a qualifying relationship with the beneficiary's foreign employer and denied the petition.

On appeal, counsel submits additional documents to address the director's adverse finding.

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 a foreign entity.

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 documentation, which included the following:

1. The petitioner's Articles of Organization, dated June 27, 2000. The document states that the petitioner would be a member-managed company and names a single member.
2. The petitioner's Articles of Amendment to the Articles of Incorporation.¹ This document names the five managing members of the petitioning company.
3. Membership certificates nos. 1-5, naming each member and that member's respective ownership interest. The beneficiary's ownership is reflected on certificate no. 2 and shows that he owns 51% of the petitioner.
4. The petitioner's 2004 partnership tax return including Schedule K-1, which identifies only four owners and their respective ownership interests. The beneficiary is shown as have a 56.67% share of the company's profits and losses.

The director concluded that the petitioner failed to establish that its relationship with the beneficiary's foreign employer fits one of the definitions cited in 8 C.F.R. § 204.5(j)(2). More specifically, the director found that the foreign entity is owned 60%/40% by the beneficiary and one other individual respectively and that the petitioner is owned by five members. The director concluded that based on the ownership breakdowns of the foreign and U.S. entities, the two companies are not similarly owned and controlled. Based on this conclusion, the director ultimately determined that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's claimed foreign employer.

While the AAO concurs in the director's ultimate determination, the director's underlying analysis is erroneous. More specifically, the director primarily focuses on the fact that the foreign entity is owned by only two individuals, while the U.S. petitioner, according to the documentation submitted, is owned by

¹ It is unclear why this document refers to the petitioner's Articles of Incorporation (which applies to a corporate entity) rather than the Articles of Organization, as the petitioner has submitted evidence to clearly establish its organization as a limited liability company, not as a corporation. This discrepancy is not explained in the record.

multiple individuals. Such an analysis would only be warranted where there is no claimed majority owner of both entities. In this case, based on the membership certificates issued by the petitioner and the foreign entity's translated ownership documents, each entity appears to be majority owned by the beneficiary, which suggests an affiliate relationship.

However, despite the director's oversight as to the alternate definition of an affiliate relationship, the record contains a considerable inconsistency, which precludes a favorable determination. More specifically, even though the record as a whole appears to suggest that the petitioner is majority owned by the beneficiary, the ownership breakdown described in the petitioner's five membership certificates, which identify a total of five members including the beneficiary's 51% interest, are inconsistent with Schedule K-1 of the petitioner's 2004 partnership tax return, which identifies only four members and indicates that the beneficiary ownership interest is 56.67%. 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, while both sets of ownership breakdowns suggest that the beneficiary is the majority owner of the U.S. petitioner, the AAO cannot overlook the inconsistency discussed above. It is noted that the petitioner has not provided any documentation to suggest that a change in ownership occurred between June of 2002, when the membership certificates were issued, and 2004, the date of the relevant partnership tax return. The AAO further notes that on appeal, counsel maintains that the beneficiary owns 51% of the petitioning entity and fails to even acknowledge the information found in Schedule K-1 of the 2004 partnership return.

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)). In the present matter, the petitioner has failed to provide documentation to reconcile the two distinct ownership breakdowns, thereby casting doubt as to the entire claimed qualifying relationship. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). As such, the petitioner has failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

Additionally, the record supports a finding of ineligibility based on additional grounds that were not previously addressed in the director's decision. More specifically, the record does not contain sufficient evidence and information to establish that the beneficiary would be employed by the U.S. petitioner in a managerial or executive capacity.

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). 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). As such, an accurate determination of the beneficiary's employment capacity requires a thorough description of the duties to be performed by the beneficiary on a daily basis. In the instant matter, the petitioner's letter dated July 20, 2005 provides a general overview of the beneficiary's responsibilities. While those responsibilities as well as the beneficiary's position within the petitioner's

hierarchy suggest that the beneficiary has ultimate decision-making authority, the petitioner has not provided a detailed description of the beneficiary's daily job duties sufficient to determine what specific tasks are part of his routine day on the job. The record also lacks sufficient information to establish whom the petitioner employed within its hierarchy to perform the daily operational tasks at the time the Form I-140 was filed. In addition to the beneficiary's proposed job duties, the petitioner must establish that it was adequately staffed at the time of filing such that the beneficiary would be relieved from having to primarily perform non-qualifying duties. Such evidence is not a part of the petitioner's record. Therefore, the AAO cannot find, based on the evidence of record, that the beneficiary would be primarily employed in a managerial or executive capacity.

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 ground of ineligibility discussed above, 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 *Spencer Enterprises, Inc. v. United States*, 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.