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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 31 2009
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IN RE: Petitioner:
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:

[redacted]
RALEIGH, NC 27622-1383

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner filed a motion to reopen seeking to overcome the director's findings. The director granted the motion, but affirmed his prior decision denying the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a North Carolina corporation claiming to be a private investment company. The petitioner seeks to employ the beneficiary as its president and chief financial officer. 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's initial denial of the petition was based on three independent grounds of ineligibility: 1) the petitioner failed to establish a qualifying relationship with the beneficiary's foreign employer; 2) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 3) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity. In support of his conclusion, the director provided a comprehensive analysis of the record accompanied by a detailed discussion of the specific findings that resulted in the denial of the petition.

On motion, counsel addressed the director's findings with regard to the first and third grounds for ineligibility by submitting additional evidence. Counsel also disputed the director's findings with regard to the second ground for ineligibility.

The director reviewed counsel's brief and the petitioner's supporting documents and concluded that the petitioner failed to overcome the grounds for the original denial. Accordingly, the director affirmed his prior adverse decision.

On appeal, counsel asserts that the director failed to give proper weight and consideration to the letter of explanation from the petitioner's accountant, who explained the reason for the petitioner's tax filing as a sub-chapter S corporation. Counsel also disputes the director's findings with regard to the beneficiary's employment capacity during his employment abroad and his proposed employment with the U.S. petitioner. Each of these issues will be fully addressed in the discussion below.

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 first issue in this proceeding is whether the petitioner successfully established 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;
>
> * * *
>
> *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 the present matter, the director found that the petitioner failed to establish the existence of a qualifying relationship, basing his finding primarily on the existence of considerable inconsistencies in the submitted documentation with regard to the petitioner's ownership. More specifically, in the initial denial the director noted that while the petitioner initially claimed that it is majority owned by the beneficiary's foreign employer and submitted a stock ledger reflecting the foreign entity's ownership of 100 shares of the petitioning entity, the petitioner's federal tax return for 2005

indicated that the U.S. entity is wholly owned by the beneficiary. The director went on to conclude that Schedule N, which was submitted in response to the request for additional evidence (RFE), was irrelevant to the issue of the petitioner's ownership and therefore did not resolve the cited inconsistency. The director then discussed the petitioner's 2006 tax return, which failed to reconcile the previously stated inconsistency, as it also listed the beneficiary as the petitioner's owner.

Counsel attempted to resolve the above inconsistency on motion by submitting a letter dated January 11, 2008 from [redacted], the petitioner's accountant, who maintained the petitioner's claim that [redacted] of India, the beneficiary's foreign employer, is the petitioner's sole shareholder. [redacted] explained that the beneficiary has acted in good faith by filing tax returns and paying taxes on behalf of the petitioner's shareholder. These statements seemingly overlook the fact that the petitioner's tax returns identify the beneficiary as the company's sole owner and that this claim is entirely inconsistent with the documentation identifying the foreign entity as the sole owner. Accordingly, the AAO concurs with the director's finding that the third party statement from the petitioner's accountant is not objective evidence and therefore fails to reconcile the considerable inconsistency regarding the petitioner's ownership.

On appeal, counsel contends that the director improperly found that no additional evidence was submitted. The AAO notes, however, that counsel failed to properly paraphrase the director's finding which was that "no additional *objective* evidence" was submitted. (Emphasis added). In other words, the director focused on the fact that [redacted] is merely a third party acting on behalf of the petitioner. Thus, [redacted] statements are no more objective than the statements submitted by counsel. It is noted that the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Similarly, Mr. [redacted] statements cannot be deemed objective evidence.

Moreover, lack of objective evidence aside, [redacted] statements seemingly suggest that there is a justifiable business purpose for claiming the beneficiary as the petitioner's sole owner despite the fact that its real owner is a foreign entity. Thus, instead of resolving the inconsistency, Mr. [redacted] statements merely perpetuate it with the underlying suggestion that the petitioner must claim the beneficiary as its sole owner in order to file its tax returns as a sub-chapter S corporation. *See* Internal Revenue Code, § 1361(b)(1999) establishing that a corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. The AAO further points out that the beneficiary's ownership of the petitioner would not establish the lack of a qualifying relationship when considered in the context of the regulatory definition of the term *affiliate*. *See* 8 C.F.R. § 204.5(j)(2). However, the petitioner has failed to resolve the obvious anomaly it created by providing documents showing inherently inconsistent ownership schemes. As such U.S. Citizenship and Immigration Services (USCIS) is led to question the reliability of both claims. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In light of the above, the AAO concludes that the petitioner failed to establish that it has a qualifying relationship with the foreign entity.

The next two issues in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary was employed abroad and whether he would be employed in the United States 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 the initial denial, dated December 18, 2007, the director acknowledged that the beneficiary was depicted at the top of the foreign entity's organizational hierarchy where he oversaw professional and supervisory-level employees. However, the director determined that the percentage breakdown of

the beneficiary's job duties abroad failed to establish that the beneficiary primarily performed job duties within a qualifying capacity. Specifically, the director found that several portions of the job description cited non-qualifying job duties, while other portions of the job description failed to define specific tasks.

With regard to the beneficiary's proposed employment, the director noted that neither of the petitioner's convenience stores scheduled more than one employee to work during either store's hours of operation, thereby indicating that the store managers perform the same clerical and cashier duties as the other employees, regardless of their managerial position titles. The director further observed that the petitioner's Form 941 quarterly tax return for the fourth quarter of 2006 shows that only four employees were paid. The director ultimately concluded that the petitioner failed to establish its ability to support a managerial or executive position.

On motion, counsel specifically enumerated the job duties he found to be within a qualifying managerial or executive capacity, which amounted to 62% of the beneficiary's time. Counsel also pointed to the beneficiary's top placement within the foreign entity's organizational hierarchy, despite the fact that the director previously acknowledged this factor and did not find it sufficient to overcome the adverse finding.

With regard to the beneficiary's proposed employment, counsel pointed to the position evaluations obtained from two different evaluators. Counsel also focused on USCIS's prior approval of the petitioner's L-1A nonimmigrant petition, indicating that such approval should guide the director in making his determination in the present matter.

In response to counsel's assertions regarding the beneficiary's position with the foreign entity, the director found that counsel merely reiterated information that had been previously provided, but failed to provide additional detail or address the director's adverse findings. The director determined that the third party evaluations of the beneficiary's proposed employment failed to overcome the adverse findings because they cannot be deemed sufficient evidence and are not supported by the evidence of record. The director found that the petitioner's submissions fail to demonstrate how its reasonable needs would support a primarily managerial or executive position.

On appeal, counsel disagrees with the director's finding, asserting that the director failed to take proper notice of the statements provided in support of the motion. Counsel's assertion, however, is entirely without merit. In reviewing the director's comments, it is clear that the director took proper notice of the foreign entity's organizational hierarchy and the beneficiary's placement therein. However, the director found that further information was required with regard to the job duties the beneficiary performed during his employment abroad. In fact, in the original denial, the director restated the foreign job description in its entirety and expressly cited job duties he found to be non-qualifying. The director questioned the nature of the beneficiary's marketing-related job duties in light of the foreign entity's lack of a marketing employee. The director also commented on the lack of sufficient detail regarding the job duties associated with the beneficiary's supervision of engineers and the overall construction progress. Despite these specific findings, counsel failed to provide any further insight into the portions of the job description that the director previously found to be lacking in detail. Instead of clarifying information that the director properly perceived as being overly generalized, counsel merely restated previously submitted information and now claims that the

director's finding is inconsistent with the evidence of record. The AAO disagrees. The director provided the petitioner with numerous opportunities to supplement the record with information regarding the beneficiary's specific job duties during his employment abroad. Not only did the director provide sufficient commentary regarding the information initially submitted, but the director also explained how counsel's subsequent responses were deficient. There is no evidence that the director erred in his interpretation of the petitioner's or counsel's submissions.

Lastly, with regard to the beneficiary's proposed employment with the U.S. entity, counsel vehemently disputes the director's dismissal of the third party evaluations, explaining how at least one of the evaluations presented sound reasoning as to why the beneficiary's proposed employment should be deemed managerial or executive. The AAO notes that it may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

In the present matter, the petitioner has provided an evaluation from a third party without any indication that such party has knowledge of and considered the following relevant factors: 1) the relevant statutory definition for managerial or executive capacity; 2) the beneficiary's job duties in light of the petitioner's personnel structure at the time the Form I-140 was filed; and 3) the director's analysis of all of the above. In fact, according to the professional evaluation report issued by American Evaluation and Translation Services, Inc., the nature of the petitioner's business is to act as a holding company that locates existing U.S. businesses for investment purposes. There is no indication that the evaluator was even aware that the U.S. petitioner currently owns and operates two convenience stores and that these convenience stores are currently the petitioner's primary source of revenue generation.

The AAO further notes that while the petitioner claimed eight employees in Part 5, Item 2 of the Form I-140, its quarterly tax return for the fourth quarter of 2006 (during which the Form I-140 was filed) shows that the petitioner paid only four employees, one of which was presumably the beneficiary himself. 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). Not only has the petitioner failed to reconcile the inconsistency, but it has failed to explain how it would have been capable of relieving the beneficiary from having to primarily perform non-qualifying tasks when it employed only three individuals other than the beneficiary at the time of filing. As the evaluator appears to have been unaware of relevant information regarding the nature of the petitioner's current business activities and the petitioner's overall lack of sufficient relief personnel, the accuracy of the overall evaluation is called into question. Therefore, counsel's continued reliance on a third party evaluation, which the director properly found to be unacceptable, is detrimental to her attempt in overcoming the director's adverse finding.

Furthermore, counsel's continued reference to the petitioner's prior approval of an L-1A nonimmigrant visa on behalf of the beneficiary is equally detrimental to the petitioner's case primarily because the director expressly addressed this issue and provided sound reasoning to

explain the difference between an L-1A new office petition and the current Form I-140 petition seeking to employ the beneficiary in the United States on a permanent basis. First, the director properly pointed out that the petitioner's subsequent request to extend the beneficiary's period of temporary employment by filing a second Form I-129 was denied. Second, the director explained that the regulations pertaining to the immigrant visa petition filed herein are different from the regulations pertaining to L-1A nonimmigrant petitions, despite the similarities in the definitions for managerial and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act. Third, the director clearly noted that USCIS is under no obligation to approve a visa petition if eligibility had not been established simply based on prior approvals, which may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Counsel's insistence in raising the same failed arguments leaves the AAO to wonder whether the director's discussions were given adequate consideration. Finally, counsel's undue emphasis on the adverse financial effects to the petitioner in light of the director's adverse decision leads the AAO to question whether counsel is sufficiently informed as to the relevant regulatory requirements, which must be met in order for the petition to warrant approval. The AAO does not have the discretion to approve a petition where the regulatory requirements have not been met. Any loss to the petitioner in the event of a denied petition is irrelevant to the overall issue of the petitioner's eligibility.

In summary, counsel has failed to properly address the director's adverse findings regarding the three grounds cited in the original denial. Despite being presented with numerous opportunities to supplement the record with documentation and information clarifying the deficiencies cited by the director, counsel has presented documentation and arguments that fail to properly dispel the director's concerns and establish the petitioner's eligibility. Therefore, based on all three grounds originally cited in the director's decision, 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 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003).

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.