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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

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FILE: [redacted] OFFICE: NEBRASKA SERVICE CENTER Date: OCT 0 5 2009

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IN RE: Petitioner: [redacted]
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:

[redacted]

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).

for

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a limited liability company organized in the State of Delaware. It seeks to employ the beneficiary as its director of regulator compliance. 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 denied the petition based on the determination that the petitioner failed to establish that it had a qualifying relationship with the beneficiary's foreign employer at the time of filing the Form I-140.

On appeal, counsel disputes the denial, arguing that the director misinterpreted a business transaction which transferred economic interests associated with the petitioner's common stock to a third party. Counsel points out that the voting rights with regard to management of the petitioner remain with the original voting subsidiary entities.

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.

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 primary issue in this proceeding is whether the petitioner has a qualifying relationship with the beneficiary's foreign employer. In a decision dated September 11, 2008, the director concluded that the requisite qualifying relationship did not exist at the time of filing, basing his finding primarily on the parent entity's March 2006 sale of Western Bingo Supplies, Inc. and Video King Gaming Systems, Inc., its two wholly-owned direct subsidiaries, which together maintained a 50% ownership interest in the petitioning entity. The director seemingly found that a successor-in-interest scenario was created wherein the parent entity, i.e., BK Entertainment, Inc. (BKE), sold its interests in the two wholly-owned subsidiary entities that served as the common link in the ownership and control of the beneficiary's U.S. and foreign employers. The director concluded that "such a scenario does not lead to a positive finding of a qualifying relationship."[1]

While the AAO concurs with the director's overall finding with regard to the petitioner's failure to establish the existence of the requisite qualifying relationship at the time of filing, the underlying analysis that served as the basis for the finding is inherently flawed. First, the director erred in concluding that a successor-in-interest scheme would preclude the existence of a qualifying relationship. A successor-in-interest is a party that obtains and continues to retain the same rights as those of the original ownership. *See Black's Law Dictionary* 998 (Abridged 6th Ed., West 1991). The conveyance of ownership by BKE to another entity would not disturb the previously established ownership scheme among BKE's subsidiaries. More specifically, BKE's indirect ownership of the petitioner and the beneficiary's foreign employer passes directly to the purchaser of BKE's ownership interests. In the present matter, the record contains a purchase agreement dated March 13, 2006 showing Contrarian Funds, LLC's intent to purchase all the outstanding shares of BKE's two wholly-owned subsidiaries. Such a purchase would indirectly bestow upon Contrarian Funds all of the ownership and control interests previously held by BKE, regardless of the separate terms aiming to preclude Contrarian Funds from being able to control the management of the petitioning entity. Execution of the purchase agreement would make Contrarian Funds BKE's successor-in-interest with the same indirect ownership of the beneficiary's foreign and U.S. employers. Contrary to the director's finding, BKE's sale of its ownership interests to Contrarian Funds would not sever a previously established qualifying relationship, assuming the qualifying relationship had in fact been

[1] *See* page 3, paragraph one of the director's September 11, 2008 decision.

established. Counsel's argument that control over the U.S. entity did not pass to Contrarian Funds is therefore irrelevant, as the director's underlying reasoning that counsel's argument is meant to address is inherently flawed.

Notwithstanding the AAO's finding above, 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.

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 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. 362. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

In the present matter, the AAO cannot make a determination as to the common ownership and control, as the record lacks sufficient evidence establishing who owns and controls the petitioning entity. The record shows that when the petitioner was initially formed, 80% of its stock was issued to Video King Gaming Systems, Inc. (VKGS) and the remaining 20% was issued to Western Bingo Supplies, Inc. (WBS), both entities being wholly-owned subsidiaries of BKE. According to statements offered in the support letter dated February 26, 2007, BKE subsequently sold 50% of the petitioner's stock to Nogales Investor VK Holding, Inc. (Nogales), leaving VKGS with 40% and WBS with 10% of the petitioner's stock. In support of this claim, the petitioner provided the following documentation:

1. A document entitled "Contribution Agreement" dated January 28, 2005. The agreement indicated that the petitioner planned to issue 3,600 shares of its common stock to VKGS and 900 shares of its common stock to WBS.

2. Certificate Ns. 1 and 2 showing the petitioner's issue of 3,600 and 900 shares, respectively to VKGS and WBS on January 28, 2005.

3. A document entitled "Amended and Restated Note Purchase Agreement" dated January 28, 2005. The agreement indicates that Nogales' bridge loan to the petitioner in the amount of $8 million would automatically convert into 4500 shares

of Series A Convertible Preferred Stock, representing 50% of the petitioner's outstanding shares of capital stock.

4. Certificate No. 3 showing the petitioner's issue of 4,500 shares of Class A Preferred Shares/Units. The certificate is dated November 1, 2005.

Although the petitioner claims that Nogales owns 50% of the petitioner's stock while VKGS owns 40% and WBS owns 10%, the above documents are insufficient to support the petitioner's claim. The petitioner has provided no stock ledger or minutes of meeting to establish the number of outstanding shares offered. Therefore, it is unclear whether anyone other than the three entities discussed herein have ownership interest in the petitioning entity. The petitioner also fails to provide documentation establishing the difference, if any, between Nogales's Class A Preferred shares and the common stock issued to VKGS and WBS with regard to the ownership and control of the company. While Article VII, section 3 of the petitioner's bylaws states that if one or more class of stock is issued, the special rights, limitations and/or restrictions of the particular stock of class "shall be set in full or summarized on the face or back of the certificate which the company shall issue to represent such class or series of stock." In the present matter, the petitioner failed to issue or failed to provide stock certificates that are in compliance with its own bylaws. While the petitioner clearly issued a different class of stock to Nogales than it did to VKGS and WBS, respectively, it failed to specify any special rights, limitations, and/or restrictions that distinguish Nogales's Preferred Class A stock from the common stock issued to the other two entities. There is also no explanation for the lag time between the January 28, 2005 agreement discussing the issuance of 4,500 shares of stock to Nogales and November 1, 2005 when the stock was ultimately issued. In light of these ambiguities, the AAO cannot establish who owns and controls the petitioner. Without this highly relevant information, the AAO cannot conclude that the beneficiary's U.S. and foreign employers share common ownership and control, which are the requisite elements of a qualifying relationship. For this reason the petition cannot be approved.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision. Specifically, 8 C.F.R. § 204.5(j)(3)(i)(B) 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 his entry to the United States as a nonimmigrant to work for the same employer. Additionally, 8 C.F.R. § 204.5(j)(5) requires that the petitioner establish that the beneficiary's proposed employment would be within a qualifying managerial or executive capacity.

In response to the June 26, 2008 request for evidence, the petitioner provided a percentage breakdown used to describe the beneficiary's job duties and responsibilities in his foreign and U.S. positions. However, both lists contain job duties that are indicative of operational tasks, including consulting with regulatory and legislative bodies regarding gaming operations and equipment and advising third parties on issues concerning product development. Based on the percentage breakdown of the beneficiary's foreign employment, it appears that the beneficiary spent approximately 30% of his time executing his consulting and advising duties and another 20% of his time explaining product features by creating workshops and seminars and attending trade shows. Based on the percentage breakdown of the beneficiary's proposed employment, it appears that the beneficiary would spend 26% consulting and advising senior management and jurisdictional

regulatory bodies; 10% creating a means to monitor sales orders and delivery mechanisms for gaming software; a total of 8% representing the gaming industry at workshops, seminars, and trade shows; 5% researching jurisdictional regulatory requirements; and another 5% on customer relations issues. Thus, at least 50% of the beneficiary's time abroad and at least 54% of his time in the proposed position has been and would be attributed to job duties that cannot be deemed managerial or executive. It is noted that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In summary, the petitioner has failed to establish that the beneficiary's employment abroad and his proposed employment in the United States has been and would be comprised primarily of managerial or executive level tasks. As such, the AAO cannot conclude that the beneficiary has been and would be employed in a qualifying 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 grounds 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.