identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

B4

[redacted]

FILE: [redacted] OFFICE: [redacted] Date: SEP 30 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner claims to be a corporate entity that seeks to employ the beneficiary as its technical services 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 concluded that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer and denied the petition on that basis.

On appeal, counsel disputes the director's conclusion and submits a brief statement and additional documentation in an effort to establish the petitioner's eligibility.

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.

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 a letter dated June 15, 2006, the general financial manager of [redacted], the beneficiary's foreign employer, stated that the petitioner owns 16% of [redacted] capital stock and has effective control over the foreign entity. The petitioner also submitted a translation of an incomplete foreign document titled "6th Certificate of Amendment of Certificate of Incorporation of Entrepreneurial Limited Liability Company" and an excerpt of an untranslated foreign language document.

After evaluating the documents submitted by the petitioner in support of the Form I-140, the director determined that further documentation was needed to determine the petitioner's eligibility. Accordingly, the director issued a request for evidence (RFE) dated January 12, 2009, instructing the petitioner to submit, *inter alia*, documentary evidence to establish that a qualifying relationship exists between it and the beneficiary's foreign employer given the petitioner's claim that it owns 16% of the foreign entity. The director asked the petitioner to provide articles of incorporation, financial statements, and/or evidence of ownership of all outstanding stock for both entities in order to establish common ownership and control between the petitioner and the beneficiary's foreign employer.

In response, the petitioner provided what appears to be the foreign entity's translated balance sheet dated December 2008 listing three individuals as the partners of that entity; the petitioning entity's consolidated annual reports for 2005-06, 2006-07, and 2007-08; and the original and certified English language translation of the foreign entity's July 2008 eighth amendment to the restated certificate of incorporation naming the U.S. petitioner as one of four members of the foreign entity and showing a share distribution scheme that entitled an equal number of shares to each of the foreign entity's four members.

In a decision dated April 24, 2009, the director denied the petition, concluding that the petitioner failed to provide sufficient evidence to establish that it and the beneficiary's foreign employer have a qualifying relationship as required by 8 C.F.R. § 204.5(j)(3)(i)(C). The director determined that the evidence submitted

indicates that the petitioner and three individuals are equal partners, each owning 25% of the foreign entity.[1] The director noted that the petitioner did not provide evidence to establish that the U.S. petitioner maintains "effective control" of the foreign entity and further stated that the record lacks documentation establishing the shareholder makeup of the U.S. entity. Lastly, the director properly pointed out that the petitioner's three annual reports are condensed and do not establish the company's ownership.

On appeal, counsel for the petitioner reiterates the petitioner's claim regarding its ownership share and effective control of the foreign entity and offers the sworn declaration of the petitioner's area director of marketing as corroborating evidence. Additionally, as an example of the petitioner's "effective control" of the foreign entity, counsel points out that the foreign entity buys all of its semen from the petitioner and further notes that the petitioner sends its key personnel to the foreign entity, free of charge, to consult the foreign entity and assist with sales and marketing.

After reviewing the record, the AAO finds that neither the supporting documentation nor counsel's statements are persuasive in establishing that the petitioner owns and controls the beneficiary's foreign employer. Although the AAO acknowledges the sworn statement submitted on appeal, the third party attestation is little more than an affirmation of the petitioner's claim and cannot be deemed corroborating evidence. 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, while the record includes evidence that establishes the petitioner as 25% owner of the foreign entity, there is no indication that the petitioner effectively controls the foreign entity. Contrary to counsel's assertions, the U.S. and foreign entities' business relationship does not establish the degree of control the petitioner may have over the foreign entity. 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. The petitioner has failed to establish that it has satisfied either the ownership or control prerequisite to establish that it has a qualifying relationship with the beneficiary's foreign employer. Therefore, based on this determination, the instant petition cannot be approved.

Furthermore, while not addressed in the director's decision, the AAO is not precluded from issuing additional adverse findings with regard to the eligibility requirements specified at 8 C.F.R. § 204.5(j). More specifically, the AAO finds that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity, a criterion that is specified at 8 C.F.R. § 204.5(j)(3)(i)(B), or

[1] The AAO notes that in discussing the foreign entity's ownership, the director stated that "the beneficiary's foreign employer is an equal partner . . . in the foreign corporation." It is apparent that the director's reference to "the beneficiary's foreign employer" was a typographical error, as the director clearly intended to discuss the petitioner's, rather than the foreign entity's, ownership share in the foreign entity. This inadvertent error is merely noted for the record and does not affect the overall outcome in this proceeding.

that the beneficiary would be employed by the U.S. entity within a qualifying managerial or executive capacity, a criterion that is specified at 8 C.F.R. § 204.5(j)(5).

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 the present matter, the job descriptions of the beneficiary's foreign and U.S. positions indicate that the primary portion of the beneficiary's time has been and would be spent performing key operational tasks, such as providing genetic evaluations and breeding recommendations and representing each entity at industry events to promote the entities' services. While the AAO does not dispute that the beneficiary has and would continue to carry out essential tasks within each entity, the petitioner has failed to establish that the primary portion of the beneficiary's time with the foreign and U.S. entities has been and would spent performing duties of a qualifying nature.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the two additional grounds of ineligibility discussed above, this petition cannot be approved.

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.