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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B4

[redacted]

DATE: AUG 13 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

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 in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** 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, 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 that 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.

In support of the Form I-140 the petitioner submitted a statement dated December 22, 2009, which contained relevant information pertaining to the petitioner's eligibility, including descriptions of the beneficiary's positions with the foreign and U.S. employers and an explanation of the basis for the petitioner's claimed qualifying relationship with the foreign entity. The petitioner also provided supporting evidence in the form of IRS and corporate documents as well as organizational charts pertaining to the petitioner and the beneficiary's foreign employer.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for additional evidence (RFE), dated May 28, 2010, informing the petitioner of various evidentiary deficiencies. The director instructed the petitioner to provide evidence pertaining to the beneficiary's proposed employment with the U.S. entity as well as the petitioner's various corporate and financial documents, which would help to determine whether the petitioner has a qualifying relationship with the beneficiary's foreign employer and whether the petitioner has the ability to pay the beneficiary's proffered wage.

The petitioner provided a response, which included a statement dated June 28, 2010 containing a list of the beneficiary's proposed responsibilities and the corresponding percentage of the beneficiary's time devoted to them. The petitioner also provided evidence pertaining to its ownership.

After reviewing the record, the director concluded that the petitioner failed to establish its eligibility and therefore issued a decision dated December 3, 2010 denying the petition. Specifically, the director concluded that the petitioner failed to submit sufficient evidence showing that (1) a qualifying relationship exists between the petitioner and the claimed parent entity; (2) the beneficiary's proposed employment with the U.S. entity would be in a qualifying managerial or executive capacity; and (3) the petitioner has the ability to pay the beneficiary's proffered wage of $90,000 annually.

On appeal, counsel submits a brief statement in which she disputes the director's conclusion with regard to the issues cited in Nos. 1 and 3 above. With regard to bank documents showing fund transfers, counsel asserts that the director failed to properly review the documents, which she contends identified the originating source of the funds. With regard to the petitioner's ability to pay, counsel asks the AAO to review the tax returns submitted on appeal as evidence of the wages paid to the beneficiary.

Finally, with regard to the issue of managerial or executive capacity of the beneficiary's proposed employment, the AAO notes that counsel does not dispute the director's adverse finding. Therefore, the petitioner effectively concedes that it failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The two remaining issues—the petitioner's ability to pay and its qualifying relationship with the beneficiary's foreign employer—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 to be addressed in this proceeding is whether the petitioner has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or that the two entities are related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "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 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 (Assoc. Comm'r 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 regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence may include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

In support of its claimed parent-subsidiary relationship between the beneficiary's foreign and proposed employers, the petitioner initially submitted an undated stock certificate identifying the beneficiary's foreign employer as owner of all 100 authorized shares of the petitioner's stock. Later, in response to the RFE, the petitioner provided a number of bank statements from 2008 and 2009, all containing evidence of international fund transfers that originated from Deutsche Bank.

The AAO finds that these documents are not of probative value for two reasons. First, there is no evidence that any of the fund transfers were in any way associated with the date of transfer of the petitioner's stock, particularly because the petitioner provided an incomplete stock certificate, which does not contain the date of the alleged stock transfer. That being said, the fact that the record contains evidence of multiple fund transfers throughout two different calendar years strongly indicates that the funds were not intended for the purpose of compensating the petitioner for transfer of its stock.

Second, contrary to counsel's claim on appeal, none of the bank statements specifically identify the party that ordered the transfer of funds. In other words, while the statements identify the banking institution where the fund transfer originated, none identify the actual transferring party. 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 light of the above, the AAO finds that the petitioner has failed to provide sufficient evidence to establish that the foreign entity, where the beneficiary was previously employed, is owner of the petitioner's stock as claimed. On the basis of this second adverse finding, the instant petition cannot be approved.

Turning now to the issue of the petitioner's ability to pay, 8 C.F.R. § 204.5(g)(2) states the following, in pertinent part:

> Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The record shows that the Form I-140 in the present matter was filed on February 9, 2010, thus establishing this priority date as the point of reference in determining whether the petitioner meets the regulatory criteria discussed above.

While the petitioner is not legally required to pay the beneficiary the proffered wage at the time the petition is filed, if the petitioner were to provide documentary evidence showing that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence would be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. The AAO further notes that any evidence of wages paid to the beneficiary prior to the date the petition was filed would be deemed deficient, as the regulatory criteria clearly indicates that the ability to pay must be established at the time the petition is filed, i.e., the priority date. *Id.*

While the petitioner has provided its 2009 tax return, which indicates that the beneficiary was paid a salary that was much greater than the proffered wage, this document is not relevant in the present matter, as the petitioner's Form I-140 was filed in 2010. As the petitioner has provided no other documentation that meets the above regulatory criteria, the AAO finds that the petitioner has failed to establish it meets the eligibility criteria discussed at 8 C.F.R. § 204.5(g)(2) and the petition must be denied on this basis as well.

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.