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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: JUL 26 2012 OFFICE: NEBRASKA SERVICE CENTER [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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Arizona corporation that seeks to employ the beneficiary as its sales executive. 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 several of the beneficiary's pay statements, the beneficiary's résumé, and the beneficiary's Form G-325A, Biographic Information.

The director reviewed the petitioner's submissions and determined that they were not sufficient to establish the petitioner's eligibility. The director therefore issued a request for evidence (RFE) dated April 5, 2010 informing the petitioner of numerous evidentiary deficiencies and allowing the petitioner the opportunity to supplement the record with evidence of its eligibility. The director requested evidence and information pertaining to the beneficiary's employment abroad, his proposed employment with the U.S. entity, and the petitioner's qualifying relationship with a qualifying foreign entity,

The petitioner provided a response, which included evidence documenting the foreign entity's finances and corporate existence, a foreign and translated organizational chart, a job description for a U.S. sales position, the beneficiary's paystubs reflecting his employment for the petitioning entity in 2009 and 2010, and the beneficiary's paystubs reflecting his employment for Porticultura Industrializada, S.A. de C.V. in 2007.

After reviewing the record, the director concluded that the petitioner failed to establish eligibility. The director therefore issued a decision dated August 18, 2010 denying the petition based on the petitioner's failure to submit evidence of (1) the beneficiary's qualifying employment abroad in a qualifying capacity; (2) the petitioner's qualifying relationship with the beneficiary's foreign employer; (3) the beneficiary's U.S. employment in a qualifying capacity; and (4) the petitioner doing business for one year prior to filing the petition.

On appeal, counsel submits a statement disputing the director's findings accompanied by additional documentation pertaining to the petitioner's corporate status and ownership as well as the beneficiary's employment abroad.

The AAO finds that neither counsel's statements nor the petitioner's supporting documents are sufficient to overcome the director's denial. The discussion below will provide an analysis of the relevant requirements and the shortcomings in the record that led to the AAO's decision.

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 two issues to be addressed in this proceeding pertain to the beneficiary's foreign and U.S. employment.

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.

Turning first to the beneficiary's employment abroad, the petitioner must establish that (1) the beneficiary was employed abroad for at least one out of the three years prior to his entry to the United States; (2) the beneficiary's requisite period of employment was in a qualifying managerial or executive capacity; and (3) the foreign employment took place at a qualifying entity that is either a branch of the petitioning entity or has a parent-subsidiary or an affiliate relationship with the petitioning entity. Section 203(b)(1)(C); *see also* 8 C.F.R. §§ 204.5(j)(3)(i)(B) and (C).

In denying the petition, the director properly observed that neither the initial supporting evidence nor the evidence that was subsequently submitted in response to the RFE established that the beneficiary was employed abroad by [redacted], as claimed by the petitioner. The director pointed out that in the beneficiary's Form G-325A, Biographic Information, the beneficiary stated that he was employed by [redacted] from July 1999 until May 2005 in the position of planning and procurement manager and again from December 2006 until May 2007 in export sales. However, this information is inconsistent with the paystubs that were provided in the RFE response, which indicate that the beneficiary was employed abroad by [redacted] throughout all of 2007. 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).

Although the petitioner provides a statement from [redacted] administrative manager, who claimed that the beneficiary was employed by [redacted] from 1999-2008, the petitioner has not provided any independent objective evidence to corroborate this claim or to explain the beneficiary's employment abroad by [redacted] throughout all of 2007, as the previously submitted paystubs indicate. Simply providing a self-serving statement from [redacted] employee cannot be deemed sufficient to overcome the factual inconsistency in the record. 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)). Therefore, the AAO finds that the petitioner has failed to establish that the beneficiary was employed abroad by SASA Mexico, the petitioner's claimed parent entity.

Even if the petitioner were to establish that the beneficiary was employed at [redacted] for the statutorily requisite time period as the petitioner now claims, the AAO finds that the job description provided on appeal does not establish that the beneficiary's job duties abroad were primarily within a qualifying managerial or

executive capacity. While the AAO acknowledges that no beneficiary is required to allocate his time exclusively to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary performed or would perform are only incidental to the position in question. 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).

The job description submitted on appeal indicates that the beneficiary's employment abroad included the following non-qualifying job duties: performing sales tasks, conducting market research, negotiating contracts, contacting potential clients, developing new products, and promoting company products. Therefore, even if the beneficiary was employed at [redacted] during the statutorily requisite time period, AAO cannot conclude that the foreign employment would have been comprised primarily of job duties within a qualifying managerial or executive capacity.

Turning to the beneficiary's proposed employment with the petitioning entity, the AAO will focus on the job description the petitioner provided in response to the RFE. *See* 8 C.F.R. § 204.5(j)(5). Published case law supports the pivotal role of a clearly defined job description, as 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). The job description indicates that the beneficiary would perform the same non-qualifying job duties for the U.S. entity that he previously performed during his alleged employment with [redacted] In other words, the beneficiary's proposed employment appears to primarily focus on providing sales-related services to the petitioner's existing and potential clients. As such, the AAO cannot conclude that the primary portion of the beneficiary's time with the petitioning entity would be spent performing tasks of a qualifying nature.

The AAO will now address the petitioner's ownership and control in order to determine 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.

Precedent case law adheres to the above regulatory provisions in its focus on ownership and control as 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; *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 record is clear as to the independent corporate existence of both the U.S. and foreign entities in question. The only evidence the petitioner provided to support the claim that it is a subsidiary of [redacted] is a copy of the petitioner's 2009 corporate tax return, where Schedule G identified [redacted] as the petitioner's sole owner. The petitioner's tax return is a mere reflection of its own claim and thus requires corroborating evidence to support the truth of the matter. Corroborating evidence may be submitted in the form of a corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings establishing 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. As the petitioner in the present matter failed to submit relevant corroborating evidence to establish its ownership and control, the AAO cannot conclude that the petitioner has a qualifying relationship with [redacted], the beneficiary's alleged foreign employer.

Finally, the AAO will address the director's fourth adverse finding—that the petitioner does not meet the provisions of 8 C.F.R. § 204.5(j)(3)(i)(D), which requires the petitioner to establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

The Form I-140 in the present matter was filed on January 4, 2010. Based on this filing date, the petitioner must establish that it has been engaged in the regular, systematic, and continuous provision of goods and/or services since January 4, 2009. The petitioner provided copies of the beneficiary's paystubs going as far back as May 15, 2009, but merely showing that the beneficiary was being compensated prior to the filing of the petition is not sufficient to show that the petitioner was engaged in the business of exporting cattle on a regular, systematic, and continuous basis.

In light of the considerable deficiencies that have been catalogued above, the AAO finds that the petitioner has failed to establish eligibility for the immigration benefit sought herein and 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.