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

(b)(6)

DATE: JAN 11 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
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:

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,

Ron Rosenberg
Acting 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 business that seeks to employ the beneficiary in the United States as its wholesale 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 November 17, 2009, which contained relevant information pertaining to the beneficiary's employment abroad and with the petitioning entity. The petitioner also provided a copy of its 2009 annual report.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for evidence (RFE) dated April 20, 2010 informing the petitioner of various evidentiary deficiencies. In an effort to establish whether the petitioner has a qualifying relationship with the beneficiary's employer abroad, the director requested documents pertaining to the petitioner's ownership and ownership of the beneficiary's foreign employer.

The petitioner's response included the following documents: (1) five stock certificates issued by the petitioner naming five individual owners each holding 20% of the petitioner's stock; (2) a letter dated May 19, 2010 from the president of the foreign entity, stating that in Miami loaned the petitioner money based on its parent-subsidiary relationship with the Portuguese entity; (3) a bank loan document; (4) bank documents showing the petitioner's loan balance for 2008, 2009, and for the first four months of 2010; (5) a letter dated February 19, 2007 on the foreign company's letterhead discussing the plan to open a U.S. entity whose projected ownership would include (the beneficiary) each projected to own 25% of the U.S. entity; (6) a letter dated May 19, 2010 from stating that the foreign entity does not issue stock certificates; (7) the foreign entity's articles of incorporation accompanied by an English translation; (8) a May 12, 2010 letter from listing the foreign entity's four owners and their respective ownership shares; and (9) a flow chart showing the head foreign entity– –as 100% owner of two U.S. entities (and the beneficiary's foreign employer. The flow chart depicts as the main parent entity with the following ownership breakdown: 60% owned by 20% owned by 10% owned by and the remaining 10% owned by

After considering the petitioner's response, the director determined that the petitioner failed to establish that it and the beneficiary's foreign employer have a qualifying relationship and therefore denied the petition in a decision dated September 14, 2011.

On appeal, counsel disputes the director's decision, asserting that the "family members function as one" despite the different ownership breakdowns from one company to another. Counsel further states that the beneficiary is entrusted to run the petitioner as a member company of the whose interests the beneficiary is authorized to represent. Counsel suggests that the petitioner is a subsidiary of the based on "unique corporate structure" giving it control of the petitioning entity.

The AAO finds that counsel's assertions are unpersuasive and fail to establish that a qualifying relationship exists between the petitioner and [redacted] the beneficiary's employer abroad.

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.

As indicated above, the primary issue in this proceeding is whether the petitioner has a qualifying relationship with the entity that employed the beneficiary abroad. 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 record contains inconsistent and conflicting documents regarding the ownership of the foreign and U.S. entities. In support of the appeal, the petitioner provided a document entitled which lists six entities that are claimed to be part of the including the beneficiary's employer abroad. The ownership breakdown of as shown in this document indicates that each owns 40% of the foreign entity while each owns 10%. The petitioner also provides a separate document listing two offshore companies and three U.S. entities, including the petitioner, in which the petitioner's ownership breakdown shows that the same four individuals who own the foreign entity also own the petitioning entity with each individual holding a 25% ownership interest.

As noted in the director's decision, the ownership documents that the petitioner originally submitted in support of the appeal included a total of five membership certificates indicating that the petitioner was owned by five people, including and the four individuals mentioned above, with each individual possessing a 20% ownership interest. The AAO further notes that article four of the petitioner's articles of organization indicates that the petitioner was to be managed by and the two managing members. Additionally, Schedule K-1 of the petitioner's IRS Form 1065 corroborates the information conveyed in the petitioner's membership certificates in that the tax return names the same five individuals with the 20% ownership as indicated in the originally issued membership certificates. This evidence is significantly different from the petitioner's original plan, as articulated in a letter dated February 19, 2007, which indicates that the petitioner was to be owned by four individuals— and —with each individual owning 25% of the petitioning entity. More importantly, the evidence is also inconsistent with the most recent claim made on appeal, which, like the information conveyed in the February 19, 2007 letter, indicates that the petitioner is owned by four rather than five individuals.

Turning now to the ownership of the foreign entity, the AAO finds that the record contains further inconsistencies. In light of the petitioner's initial supporting statement dated December 17, 2009 in which the petitioner indicated that the beneficiary was employed abroad at , the relevant ownership

[1] Review of the petitioner's 2008, IRS Form 1065 partnership tax return indicates that Marco Antonio Gomes Pereira Simoes is the same as Marco Gomes, the name used in the petitioner's articles of organization, which names Marco Gomes as one of two managing members, and Marco Antonio Simoes, the name used in the petitioner's membership certificate no. 5.

information to be discussed herein will pertain to this entity, which is among various other entities that fall under the heading of the [redacted]

The foreign entity's commercial registry certificate, recorded on March 16, 2004, lists numerous additional owners with varying ownership interests in addition to the four individuals claimed to be the current owners of the U.S. entity. The document indicates that in addition to [redacted] and [redacted], the foreign entity's shareholders also include [redacted] and [redacted] Although the document indicates that an additional capital infusion resulted in the issuance of additional shares, thus giving [redacted] and [redacted] additional shares and adding [redacted] and [redacted] as shareholders, the document certainly does not establish that [redacted] and [redacted] were the foreign entity's only four shareholders as was indicated in the May 12, 2010 statement and the flow chart which were submitted in response to the RFE.

Moreover, the 2010 statement and the flow chart are inconsistent with the most recent claims made on appeal. Specifically, while the RFE submissions indicate that [redacted] and [redacted] own 60%, 20%, 10%, and 10% of the foreign entity, respectively, the petitioner claims on appeal that [redacted] and [redacted] own 40%, 40%, 10%, and 10%, respectively.

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 (Assoc. Comm. 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.

Additionally, 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).

The documents and claims pertaining to the ownership of the beneficiary's foreign employer and U.S. petitioner are inconsistent and fail to establish precisely who owns and controls either entity. Moreover, even if the AAO were to rely entirely on the claims made in the petitioner's supplemental submissions on appeal, such documents also fail to establish that the common degree of ownership between the beneficiary's U.S. and foreign employers rises to the level of either a parent-subsidiary or an affiliate relationship despite any claims the petitioner may have previously made. Pursuant to subsection (B) of the above definition of the term "affiliate," both entities must be owned and controlled by the same group of individuals such that each individual owns and controls approximately the same share or proportion of each entity. Applying this definition to the ownership breakdowns provided on appeal, while the petitioner is purportedly equally owned by four individuals with each individual having a 25% ownership interest, the ownership breakdown of the foreign entity indicates that two of the members own 40% each while the two remaining members own 10%. It cannot be deemed that owning 40% of one entity while only owning 25% of the other is "approximately the

same" much like owing 25% cannot be deemed to be "approximately the same" as owning 10% of a related entity.

While counsel claims that the "family members function as one, with same goals and purpose," the familial relationship that exists among the members/shareholders of the two entities does not constitute a qualifying relationship under the regulations.

In light of the findings discussed above, the AAO concludes that the petitioner has failed to provide sufficient reliable evidence establishing that it has a qualifying relationship with the beneficiary's foreign employer. Therefore, the instant petition cannot be approved.

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.