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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:

SRC 08 148 52664

Office: TEXAS SERVICE CENTER

Date:

NOV 30 2009

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:

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the immigrant petition seeking to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The petitioner, a Florida limited liability company, states that it is engaged in real estate investment. It seeks to employ the beneficiary as its secretary, treasurer and chief financial officer.

On November 18, 2008, the director denied the petition determining that the petitioner failed to establish that a qualifying relationship exists between the beneficiary's foreign employer and the U.S. petitioner.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that an affiliate relationship exists between the two entities because the same two individuals together own the majority of the shares of both companies. Counsel submits a brief and additional evidence in support of this assertion.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

At issue in this proceeding is whether the petitioner has established that it 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 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.

In a letter dated March 21, 2008, submitted with the Form I-140, the vice president and CEO of the petitioner stated that, prior to her transfer to the United States, the beneficiary was a director of [REDACTED], a Venezuelan corporation. The petitioner further claimed that the U.S. company and the beneficiary's foreign employer are affiliates because both are majority owned and controlled by the same individuals.

The petitioner stated that the foreign entity is 69% owned by [REDACTED] and 28% owned by the beneficiary. The petitioner submitted a copy of the original and English translation of: (1) the foreign company's articles of incorporation dated August 26, 1999; (2) the minutes of a shareholders meeting

held in January 2002 regarding the company's name change; and (3) the minutes of the company's shareholders meeting held on September 20, 2005 authorizing the sale of shares of the company by two of its previous shareholders to [REDACTED] and the beneficiary, resulting in the following distribution of shares among the company's shareholders as of that date:

- [REDACTED] 139,562 shares
- [The beneficiary] 57,563 shares
- [REDACTED] 2,875 shares

With respect to ownership of the U.S. company, the petitioner submitted the following documentation: (1) the company's operating agreement, dated January 2, 2002, schedule A of which lists [REDACTED] the beneficiary, and [REDACTED] as initial members of the company, each having one-third ownership in the company, and (2) the company's IRS Form 1065, U.S. Return of Partnership Income, for the years 2005 and 2006, reporting the three members' shares of profit, loss and capital in the company as 33.33% each for those years.

In denying the petition, the director determined that, based on the record, the United States company and the foreign employer do not qualify as affiliates as that term is defined in the regulations. The director noted the record shows that two individuals holding shares in both companies do not own approximately the same share or proportion of each entity as the regulations require.

On appeal, counsel asserts that the director erred in considering only the percentage owned by [REDACTED] and the beneficiary in the two companies and not the control of the companies or the fact that the beneficiary remains a director of the foreign entity. Counsel claims that [REDACTED] and the beneficiary together own the majority of each company and, as owners and directors of the foreign entity and managing partners of the U.S. company, make all decisions pertaining to the companies unanimously and have always done so. In support of this claim counsel submits notarized letters dated January 5, 2009 from both individuals, each certifying that they make all decisions unanimously with respect to both companies, as counsel claims.

Upon review, the AAO concurs with the director's conclusion that the petitioner has failed to establish that a qualifying relationship between the petitioner and the beneficiary's foreign employer existed at the time the petition was filed.

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, in addition to stock certificates, 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., supra.*

To establish eligibility in this case, it must be shown that the foreign employer and the petitioner share common ownership and control. Control may be *de jure* by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be *de facto* by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. Here, the foreign entity has a majority shareholder, [REDACTED] who has *de jure* control of the company based on her majority ownership of a 69 percent interest in the company. The petitioner has not provided sufficient evidence that [REDACTED] has relinquished this control or that she equally shares control of the company with the beneficiary, a minority shareholder.

The U.S. company, by contrast, is owned by three individuals in equal proportions, with no one person exercising *de jure* control over the company. While the petitioner submits affidavits from the beneficiary and [REDACTED] on appeal indicating that they jointly control both companies, these affidavits do not carry the evidentiary weight of a proxy agreement. A proxy agreement is a legal contract that allows one individual to act as a substitute and vote the shares of another shareholder. *See Black's Law Dictionary* 1241 (7th Ed. 1999). The agreement of two individuals to vote shares in concert does not rise to the level of a proxy agreement that would give one individual control over the voting rights of a majority of the issued shares.

Therefore, the record clearly indicates that the petitioning enterprise does not maintain a qualifying "affiliate" relationship with the overseas company. The evidence indicates that three individuals own the foreign company, with one shareholder maintaining a majority interest in the company. The record further indicates that three individuals own the petitioning entity in the United States in equal proportions. The two companies have only two common shareholders and no common majority shareholder. Accordingly, the two entities are not "owned and controlled by the *same group of individuals*, each individual owning controlling approximately the same share or proportion of each entity. . . ." 8 C.F.R. § 204.5(j)(2)(emphasis added). In addition, there is no parent entity with ownership and control of both companies that would qualify the two as affiliates.

Although counsel claims that the petitioning company and the overseas company are majority owned by two sisters, this familial relationship does not constitute a qualifying relationship under the regulations. Notwithstanding the affidavits submitted by the beneficiary and her sister on appeal, no probative documentary evidence such as voting proxies or agreements demonstrating that these two individuals are legally bound to vote in concert and together maintain a controlling interest in *both* companies. Without such documentary evidence, the petitioner has not established that these two individuals together legally control both entities.

Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations. For this reason, the petition will be denied.

Beyond the decision of the director, the AAO finds the petitioner has failed to demonstrate that the beneficiary would be employed in the United States in a primarily managerial or executive capacity as those terms are defined at section 101(a)(44)(A) of the Act.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In addition, it should be noted that the definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In the March 21, 2008 letter, the petitioner indicated that the beneficiary's job responsibilities as secretary, treasurer, and chief financial officer of the U.S. company include "maintaining corporate records"; "retaining custody of all corporate funds and financial records"; "maintaining full and accurate accounts of receipts and disbursements"; "recording the minutes of all meetings of the partners and Board of Directors"; "sending all notices of meetings, and perform such additional duties as directed by the President or Board of Directors"; "directing the collection of monthly assessments, rental income, deposits and payment of insurance premiums, mortgage, taxes, construction costs, and operating expenses"; and "preparing detailed budget and financial reports for properties." The majority of these tasks appear to be administrative and accounting duties that would not be considered managerial or executive in nature. An employee who "primarily" performs the tasks necessary to produce a product or to provide services or other non-qualifying tasks 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 Int'l.*, 19 I&N Dec. at 604.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the

organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

The beneficiary's job duties, as described by the petitioner, are not indicative of an employee who is primarily focused on the broad goals and policies of the organization. The fact that the beneficiary is a shareholder of the organization is insufficient to establish the beneficiary's employment in an executive capacity. 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 petitioner has not established that the beneficiary is primarily engaged in directing and controlling a subordinate staff comprised of professional, managerial or supervisory employees, nor has it indicated that she is charged with managing an essential function of the petitioning organization. *See* section 101(a)(44)(A) of the Act. Therefore, the AAO is not persuaded that the beneficiary would be employed in a primarily managerial capacity.

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)). Absent further evidence, the AAO cannot conclude that the petitioner has any employee other than the beneficiary. In light of these deficiencies, the AAO finds that the petitioner has failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. For this additional reason, the petition will be denied.

Furthermore, the petitioner has also failed to establish that the beneficiary was employed by the foreign entity in a managerial or executive capacity prior to her transfer to the United States.

The petitioner claimed in its March 2008 letter that "within the three years preceding the filing of this L-1A petition [*sic*], [the beneficiary] has served continuously for at least one year as a Director of Flexonet." However, while the record contains documentary evidence of the beneficiary's minority ownership interest in the foreign entity, the record contains minimal information regarding her job duties as director. The petitioner stated that the beneficiary "manages Flexonet with the President and other Directors," "participates in the appointment of the company's managers and assigns responsibilities," and "works with the president to direct, plan and implement policies and activities of Flexonet to ensure the company's productivity." This description provides little insight into what the beneficiary primarily did on a day-to-day basis as a director of the foreign entity. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed

description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. Again, the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Accordingly, the evidence of record is insufficient to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. For this additional reason, the petition will be denied.

Finally, the AAO acknowledges that USCIS has previously approved an L-1A petition filed by the petitioner on behalf of the instant beneficiary. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103. Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Despite the previously approved petition, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act. Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous nonimmigrant petition approval by denying the instant petition.

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). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows 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 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.