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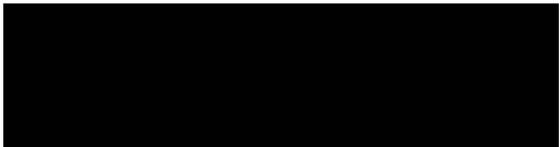


FILE: LIN 05 045 51368 Office: NEBRASKA SERVICE CENTER Date: JUL 10 2006

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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.

  
Robert P. Wiemann, 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 a limited liability company operating as a silicon metal supplier. It seeks to employ the beneficiary as its executive director. 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 determined that the petitioner failed to establish that it has a qualifying relationship with a foreign entity and denied the petition.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

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 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 support of the Form I-140, the petitioner submitted a statement dated November 18, 2004 claiming that the beneficiary's foreign employer and the U.S. petitioner are affiliates by virtue of the beneficiary's majority ownership and control over both entities. More specifically, the petitioner indicated that the beneficiary owns 89% of the foreign entity and 50% of the petitioning entity. The petitioner provided the following documentation in support of its claim:

1. The petitioner's Articles of Organization indicating that the petitioner was organized under the laws of the state of Michigan in December of 1998.
2. The petitioner's operating agreement, effective December 21, 1998. Page 11 of the agreement contained a breakdown of capital contribution and the profit/loss distribution. It is noted that while the profit was shared equally by the beneficiary and his partner, the partner contributed 51% of the initial contribution and assumed 80% of the company's loss.
3. A document indicating a state error in not filing the petitioner's Articles of Organization. The document is dated March 4, 2003 and acknowledges that the petitioner would be treated as a limited liability company as of December 21, 1998, as previously intended by the petitioner.
4. A filing endorsement document dated March 5, 2003 acknowledging receipt of the petitioner's Articles of Organization.
5. Schedule K-1 of the petitioner's 2003 partnership tax return showing that the petitioner's profit and loss sharing as well as the capital contribution are equally split between the beneficiary and his partner.

On March 22, 2005, the director issued a request for additional evidence (RFE) based on the conflicting information he found with regard to the beneficiary's ownership interest in the petitioning entity. Namely, the director pointed out that the petitioner's original claim that it is 50% owned by the beneficiary is contradicted by the petitioner's own operating agreement, which indicates that the beneficiary only owns 49% of the entity. The petitioner was asked to provide documentation of any changes to the ownership structure as well as evidence to document that the beneficiary actually has control over the petitioner.

The petitioner responded with a statement dated June 1, 2005. The petitioner explained that its profit sharing scheme where each partner shares equally in the profits signifies the intent of both partners "to maintain an essentially equal share of ownership over the long-term life of the [petitioner]." The petitioner also submitted excerpts from its 2002, 2003, and 2004 partnership tax returns. The excerpts are titled "Reconciliation of Partners' Capital Accounts" and indicate that the beneficiary and his partner, May Engineering Co., are equal contributors to the petitioner's capital.

On August 15, 2005, the director denied the petition based on the conclusion that the evidence of record does not support the petitioner's claim that it is equally owned by the beneficiary and his partner. As the petitioner has claimed to be an affiliate of the beneficiary's foreign employer by virtue of the beneficiary's ownership, failure to establish that the beneficiary owns and controls the petitioning entity resulted in the director's determination that a qualifying relationship does not exist.

On appeal, counsel asserts that the beneficiary's equal sharing in the petitioner's profits qualifies him as an equal owner and in fact conveys the intent that the beneficiary also shares in the petitioner's ownership. Counsel also explained the reasons for not having included the equal ownership in the initial operating agreement. However, 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)). Thus, regardless of any valid reasons for the initial distribution of ownership as provided in the petitioner's operating agreement, the record lacks any evidence to suggest that the petitioner has since altered the initial ownership scheme. Furthermore, while the petitioner has provided documentation to indicate that it has claimed equal capital contribution in its 2002, 2003, and 2004 tax returns, these claims are in direct conflict with the petitioner's operating agreement. 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). In the instant matter, the petitioner does not explain or reconcile the conflicting information.

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 the petitioner has failed to provide adequate documentation establishing that the beneficiary owns and controls the foreign and U.S. entities, the AAO cannot conclude that it has the requisite qualifying relationship as mandated by 8 C.F.R. § 204.5(j)(3)(i)(C).

Beyond the director's decision, the regulations require a detailed description of the beneficiary's daily job duties in order to determine whether the beneficiary would be employed in an executive or managerial capacity. *See* 8 C.F.R. § 204.5(j)(5). While the petitioner in the instant matter provided a description of the beneficiary's job responsibilities, the record remains unclear as to what the actual duties the beneficiary would perform on a daily basis. Specifics are clearly an important indication of whether a beneficiary's duties are

primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). The petitioner must establish that the beneficiary would primarily perform duties of a managerial or executive nature. As the record does not specify actual duties, the AAO cannot conclude that the beneficiary would be employed in a managerial or executive capacity.

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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground for ineligibility discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown 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 at 1043, *aff'd*, 345 F.3d 683.

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.