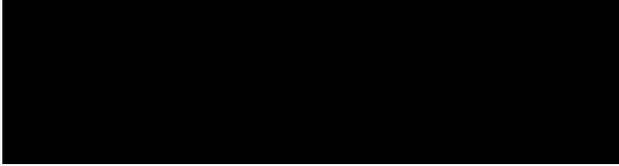




**U.S. Citizenship
and Immigration
Services**

B4



FILE: [REDACTED] OFFICE: TEXAS SERVICE CENTER Date: **DEC 01 2009**
SRC 08 012 59345

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.

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

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 Texas corporation that seeks to employ the beneficiary as its 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.

The director denied the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer; and 2) the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage.

On appeal, the petitioner disputes both grounds for denial and subsequently provides additional evidence in the form of the foreign entity's minutes of meeting accompanied by an English language translation.

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 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 provided its articles of incorporation, which stated that the petitioner is authorized to issue 10 million shares of its stock. The petitioner also provided the minutes of an organizational meeting, which took place on August 28, 2002. The latter document included an ownership breakdown, which indicated that [REDACTED] purchased 520,000 shares for \$520 and [REDACTED] and [REDACTED] each purchased 240,000 shares for \$240. With regard to the foreign entity's ownership, the petitioner provided a document entitled "Extraordinary General assembly of Shareholders," which indicated that the foreign entity issued a total of 35,000 shares of its stock. According to the list of that company's shareholders, [REDACTED] was issued 35,400 of the foreign entity's Series A stock.¹

On February 13, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide evidence to establish that it and the beneficiary's foreign employer are commonly owned and controlled. The petitioner was told that the supporting documentation must include a detailed list of owners establishing exactly who owns each entity and the percentage held by each shareholder.

In response, the petitioner provided a letter dated March 13, 2008 in which the petitioner stated that [REDACTED] and [REDACTED], together, own the majority of the shares issued by the U.S. and foreign entities. In a separate letter, also dated March 13, 2008, the petitioner reiterated the ownership breakdowns that were previously provided in support of the Form I-140. The petitioner also resubmitted the supporting documents with regard to both entities.

On October 21, 2008, the director issued a decision denying the petition based, in part, on the determination that the petitioner failed to establish that it and the beneficiary's foreign employer are commonly owned and

¹ The AAO notes that the total number of shares issued was indicated as 35,000. It is therefore factually impossible for [REDACTED] to have been issued 35,400, as this number is greater than what was indicated as the total number of shares issued. Although it appears that [REDACTED] is the majority shareholder of the foreign entity's stock, the documentation on record does not clearly establish the exact number of shares he owns.

controlled. The director observed that while each entity has one individual with majority ownership, that individual is not the same for both entities. Rather, [REDACTED] is the majority owner of the foreign entity, while his father, [REDACTED] is the owner of the majority of the shares issued by the U.S. entity.

On appeal, the petitioner asserts that a qualifying relationship exists between the beneficiary's foreign and prospective employers. In support of this assertion, the petitioner points out that [REDACTED] has an ownership interest in and in fact controls both entities. The petitioner contends that there is evidence establishing that an affiliate relationship due to "a reassignment of stock to the family members." The petitioner has since supplemented the record with an additional document and its English language translation. The additional document is evidence of a general shareholder meeting, which took place on June 25, 2008. The document shows that the foreign entity issued 500 shares of Series A stock and 35,000 shares of Series B stock. The breakdown of the Series A stock shows that [REDACTED] owns 400 shares while each of the remaining five shareholders owns 20 shares. The document shows that [REDACTED] owns all 35,000 shares of the Series B stock.

Although the document indicates that the foreign entity issued two types of stock, it is noted that this information was not previously introduced. Rather, the previously submitted document merely indicated that [REDACTED] is the foreign entity's majority shareholder, but neglected to indicate that the entity issued two different series of stock, thus creating what appears to be an inconsistency. 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). Regardless, the document does not alter the director's prior determination, i.e., that the U.S. and foreign entities are not similarly owned and controlled. Rather, the newly submitted document continues to indicate that [REDACTED] is the majority shareholder of the foreign entity, while according to documentation previously submitted, the majority owner of the U.S. entity is [REDACTED]. The AAO further notes that even if the newly submitted document were to contain evidence to establish that the foreign entity is majority owned by [REDACTED] which would establish the existence of a qualifying relationship between the U.S. and foreign entities, the newly submitted document is dated nine months after the Form I-140 was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, any steps taken to create the necessary qualifying relationship after the filing of the Form I-140 would not help in establishing that the petitioner was eligible at the time of filing.

In summary, the documentation on record shows that [REDACTED] is the majority shareholder of the foreign entity, while [REDACTED] is the majority shareholder of the U.S. entity. While the AAO acknowledges, based on the petitioner's assertions, that the two majority shareholders are father and son, **this familial relationship does not constitute a qualifying relationship under the regulations.** 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 the 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 establish that it shares common ownership and control with the foreign entity, the AAO cannot conclude that the necessary qualifying relationship exists. Therefore, this petition cannot be approved.

The second issue in this proceeding is whether the petitioner had the requisite ability to pay the beneficiary's proffered wage at the time the petition was filed.

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.

In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary.

In the present matter, while the petitioner clearly employed the beneficiary since prior to the filing of the Form I-140, the record indicates that the petitioner had no income at the time of filing. Furthermore, the beneficiary's 2006 W-2, which was submitted in support of the Form I-140, indicates that the beneficiary was compensated \$44,000, which is \$4,000 less than the proffered wage. As such, the petitioner has not provided *prima facie* proof of its ability to pay.

Accordingly, the director addressed this documentary deficiency in the RFE by instructing the petitioner to provide 2007 payroll records and evidence of wages paid to the beneficiary in 2007. In response, the petitioner provided a letter dated March 13, 2008 from counsel, who stated that the Mexican company wires money to the petitioner and that the petitioner then uses the wired funds for expenses, including paying the beneficiary's salary. Counsel explained that the petitioner would continue to operate in this manner until the hotel it is currently building opens for business in May 2008. Counsel further pointed out that once the construction for the petitioner's hotel is completed, it will have substantial assets and will earn the petitioner over \$4.5 million annually. Although the petitioner also provided its 2006 tax return, it did not provide evidence to establish its ability to pay the beneficiary's proffered wage in 2007, the year during which the Form I-140 was filed.

Based on the documentation submitted, the director determined that the petitioner did not have the ability to pay the beneficiary's proffered wage at the time the Form I-140 was filed.

On appeal, the petitioner asserts that the director's decision is erroneous and contends that Schedule L of its tax return establishes that the petitioner has sufficient net current assets to pay the beneficiary's proffered wage. The petitioner also states that the director's decision contradicts William Yates' memorandum. The petitioner's arguments, however, are not persuasive.

First, with regard to the petitioner's tax return, the AAO notes that the record has not been supplemented with a 2007 tax return, which would allow for an analysis of the petitioner's financial status at the time of filing. Rather, the most recent tax return the petitioner has submitted is from 2006, which is the year prior to the time the Form I-140 was filed. Second, while the petitioner's 2006 tax return indicates that its net current assets are sufficient to pay the beneficiary's proffered wage, USCIS cannot base a determination of the petitioner's ability to pay on the basis of an isolated review of a single document. Rather, the determination must be made by taking into account the totality of the circumstances, which indicate, in the present matter, that the primary source of the petitioner's funds is derived from the foreign entity that previously employed the beneficiary. Counsel for the petitioner stated as much in her letter of response to the RFE and the petitioner's Form I-140 also corroborated this information by showing zero gross and net income at the time of filing. Based on these factors, it would appear that Schedule L of the petitioner's 2006 tax return did not accurately convey the amount of cash reserves that were being held by the petitioner, as the petitioner apparently obtained its cash reserves from the foreign entity rather than from any business transactions.

Additionally, with regard to the petitioner's reference to a William Yates memorandum, the AAO notes that USCIS memoranda merely articulate internal guidelines for service personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)).

In summary, the record lacks sufficient evidence to establish that the petitioner had the ability to pay the beneficiary's proffered wage at the time the Form I-140 was filed. Therefore, on the basis of this second independent ground for ineligibility, this petition cannot be approved.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer. Similarly, the regulation at 8 C.F.R. § 204.5(j)(5) requires that the petitioner provide a detailed description of the beneficiary's proposed employment to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. In the present matter, the petitioner stated in its initial support letter that the beneficiary has and would continue to supervise company personnel and oversee day-to-day operations, including making hiring and firing decisions and implementing company policies.

In response to the RFE, the petitioner provided a general percentage breakdown indicating that 89% of the beneficiary's time would be spent directing, overseeing, and coordinating operations of the company and supervising personnel. Despite the director's express request, the petitioner failed to specify the beneficiary's actual daily job duties and, instead, merely restated the overly broad job description provided earlier. The petitioner was equally vague with regard to the job description of the beneficiary's prior employment, claiming that 80% of the beneficiary's time was spent directing, overseeing, and coordinating functions of the accounting department. The AAO notes that reciting the beneficiary's vague job responsibilities or broadcast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties, as the actual duties themselves will 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). In the present

matter, the information provided by the petitioner fails to establish what specific job duties the beneficiary carried out on a daily basis during the course of his employment abroad and what specific job duties he would carry out on a daily basis during the course of his proposed employment in the United States. Without this crucial information, the AAO cannot determine that the beneficiary has been or would be employed in a qualifying managerial or executive capacity. Therefore, on the basis of these two additional independent grounds this petition cannot be approved.

Lastly, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must 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." As stated above, counsel for the petitioner previously stated in the letter of response to the RFE that the petitioner would not commence operations until the completion of construction of its hotel, which was expected to take place in May 2008. It is noted, however, that the petition was filed in September 2007. The petitioner therefore has the burden of establishing, per regulation, that it was doing business as of September 2006. While the petitioner has provided invoices associated with the construction of its hotel, such documents merely establish the petitioner's intent to do business at some point in the future, or upon completion of construction. There is no evidence to establish that the petitioner was actually engaged in construction projects and generating revenue during the 12-month period prior to the filing of the Form I-140. Therefore, on the basis of this additional ground, this petition cannot be approved.

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 grounds of 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.