



U.S. Citizenship
and Immigration
Services

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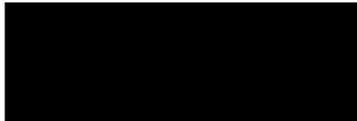
OFFICE: NEBRASKA SERVICE CENTER

Date DEC 09 2009

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 or reopen, 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, Nebraska Service Center. The petitioner subsequently filed an appeal, which was rejected as untimely filed per 8 C.F.R. § 103.3(a)(2)(v)(B)(1). However, per 8 C.F.R. § 103.3(a)(2)(v)(B)(2), the director determined that the petitioner's submissions fit the requirements of a motion and issued a new decision denying the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation that seeks to employ the beneficiary as its comptroller general. 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 the existence of a qualifying relationship between itself and the beneficiary's foreign employer, Kentucky Pizza, C.A. (Venezuela), and denied the petition on that basis.

On appeal, counsel disputes the director's conclusion, asserting that the record contains "substantial and sufficient evidence" to establish the existence of the requisite qualifying relationship between the beneficiary's foreign and U.S. employers. Counsel claims that the foreign entity and the petitioner had a parent-subsidiary relationship at the time of filing.

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 primary issue in this proceeding is whether, at the time the Form I-140 was filed, the petitioner had 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"). There are multiple entities involved in the present petition: [REDACTED]

[REDACTED] the beneficiary's foreign employer; [REDACTED]

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 the present matter, the record shows that the petitioner submitted no supporting evidence when the Form I-140 was filed on October 27, 2006. Accordingly, the director issued a request for evidence on August 18, 2007, instructing the petitioner to provide documentation showing that the foreign and U.S. entities share common ownership and control. The director listed examples of documents the petitioner could submit to establish the requisite qualifying relationship.

In response, the petitioner submitted several restaurant fliers and an undated and unsigned letter stating that evidence of the petitioner's qualifying relationship with the beneficiary's foreign employer was submitted in support of the Form I-140 filed in the present matter and in support of the nonimmigrant Form I-129 that was previously filed. The petitioner claimed that the requisite documentation "is part of the [r]ecord in this case."

In the decision dated March 13, 2008, the director determined that the petitioner failed to submit evidence to establish that the U.S. petitioner shares a business relationship with Papa John's Pizza, as claimed, or that the

Papa John's Pizza has ownership interest in any foreign entities, particularly the foreign entity that purportedly owns the petitioner. Additionally, with regard to the petitioner's reference to a previously filed and approved nonimmigrant Form I-129, the director notified the petitioner that the instant Form I-140 must be adjudicated on its own merits, as the director would not re-adjudicate a previously filed petition.

On motion, the director issued a second decision dated April 20, 2009 in which he again determined that the petitioner failed to submit evidence to establish that a qualifying relationship exists between the beneficiary's foreign and proposed employers.

On appeal from that decision, the petitioner submitted a letter dated May 18, 2009 in which [REDACTED] in his capacity as president of the foreign entity, certified that the petitioner has been the subsidiary of the foreign entity since 2001. [REDACTED] emphasizes that he is the president of both [REDACTED] and [REDACTED] but submits no evidence on appeal in support of this claim. Instead, the petitioner submits on appeal a copy of a document entitled "Short Form Franchise Agreement," establishing the petitioner's business relationship with [REDACTED]. The AAO notes that the record also contains a document entitled "Short Form License Agreement," establishing the foreign entity's business relationship with [REDACTED]. It is noted that while the franchise and licensing agreements establish that the petitioner and the foreign entity each has a relationship with [REDACTED] neither document establishes that the two entities share common ownership.

Upon review, the petitioner's assertions are not persuasive. 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. See 8 C.F.R. § 204.5(j)(2); see also *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *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, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. 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.*, 19 I&N Dec. 362. Without full disclosure of all relevant documents, United States Citizenship and Immigration Services (USCIS) is unable to determine the elements of ownership and control.

Documentary evidence is particularly crucial in the present matter where the record is inconsistent as to the specific type of qualifying relationship the petitioner claims to have with the beneficiary's foreign employer. Namely, while counsel claims on appeal that the petitioner is a subsidiary of the foreign entity, other

documents refer to the two entities as affiliates.¹ 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 AAO acknowledges that either an affiliate or a parent-subsidiary relationship constitutes a qualifying relationship in that both indicate the existence of common ownership and control, the fact that the petitioner has made inconsistent claims regarding its ownership gives the AAO further cause to question the reliability of either of the claims being presented.

Despite the conflicting claims regarding the relationship between the two entities, the AAO notes that the record of proceeding contains evidence to suggest that a qualifying relationship does not exist. In support of the petitioner's motion to reopen, filed on December 9, 2008, the petitioner submitted copies of corporate documents for itself and for [REDACTED]

With respect to the petitioning company, [REDACTED], the petitioner submitted the Certificate of Incorporation showing that it was organized under the laws of Puerto Rico on October 25, 2001. The petitioner also submitted an untranslated copy of the [REDACTED] dated October 29, 2001.² In section 6, titled "Suscripcion de Acciones" or "Stock Subscription," the document states that the common stock of the corporation is subscribed and allocated among the following shareholders:

[REDACTED] 51 shares
[REDACTED] 9 shares

According to this evidence, the petitioner is owned in the majority by [REDACTED]

With respect to [REDACTED] the petitioner submitted a translated copy of the [REDACTED] of the Judiciary Circumscription of the [REDACTED] August 20, 1998. According to Chapter II, "[REDACTED] the capital of [REDACTED] C.A. is fully subscribed and allocated among the following shareholders:

[REDACTED] 6,000 Shares
[REDACTED] 2,000 Shares
[REDACTED] 1,000 Shares
[REDACTED] 1,000 Shares

According to this document, the beneficiary's overseas employer is owned in the majority by [REDACTED]

¹ See exhibit 16 in part three of four.

² The petitioner is obligated to submit certified translations of all evidence that is in a foreign language. See 8 C.F.R. § 103.2(b)(3). While the majority of the evidence in the record is translated, the petitioner failed to translate this specific corporate document.

Accordingly, there is no evidence that a common individual or entity owns stock in both corporations, thereby creating an affiliate relationship. Nor is there any evidence that one of the two corporations owns a majority interest in the other, thereby creating a parent-subsidiary relationship. Instead the evidence clearly indicates that the two companies are not related through ownership. 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)).

Although the petitioner submitted a "[redacted] establishing the petitioner's business relationship with [redacted] and a "Short Form License Agreement," establishing the foreign entity's business relationship with [redacted] either of these documents demonstrates that the petitioner and the foreign employer maintain a qualifying relationship through common ownership and control. An association between a foreign and U.S. entity based on a contractual agreement is insufficient to establish a qualifying relationship. Both a franchise agreement and a license typically require that the franchising organization comply with the franchisor's restrictions, without actual ownership and control of the franchise organization.

Both legacy Immigration and Naturalization Service (INS) and USCIS have long held that this type of contractual relationship will not create a qualifying relationship under the Act. *See Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970) (finding that no qualifying relationship exists where the association between two companies was based on a license and royalty agreement that was subject to termination since the relationship was "purely contractual").

Finally, with respect to the petitioner's previous petitions, the director correctly noted that these are separate records of proceeding. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). If a director requests additional evidence that the petitioner may have submitted in conjunction with a separate nonimmigrant petition filing, the petitioner is, nevertheless, obligated to submit the requested evidence, as the record of the nonimmigrant proceeding is not combined with the record of the immigrant proceeding.

Despite any number of previously approved petitions, 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, 8 U.S.C. § 1361.

The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

As the record contains contradictory statements, and otherwise lacks sufficient evidence, the AAO is unable to determine that the beneficiary's foreign employer and the petitioner are commonly owned. Without the element of common ownership, it cannot be concluded that the requisite qualifying relationship exists between the two entities.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.