

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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

PUBLIC COPY

B4

FILE: [REDACTED] OFFICE: TEXAS SERVICE CENTER Date: MAR 31 2009  
SRC 06 077 51328

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:

[REDACTED]

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).

John F. Grissom  
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 Texas corporation engaged in the business of providing security guard services. It seeks to employ the beneficiary as its training and development 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 the conclusion that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's employer abroad. The AAO concurs with the director's conclusion. However, the AAO hereby withdraws the director's underlying analysis, which was based on an incorrect definition of the term "affiliate." *See* 8 C.F.R. § 204.5(j)(2). A full discussion of the director's decision and the basis for the AAO's current findings is provided below.

On appeal, counsel disputes the director's conclusions, asserting that [REDACTED] majority ownership of the U.S. and foreign entities is sufficient to establish that the two entities are affiliates. Counsel also asserts that a brief would be submitted within 30 days of filing the appeal. It is noted that the appeal was filed on September 13, 2006 and that counsel submitted a letter inquiring about the status of the petitioner's appeal as recently as November 2008. This record of proceeding has not been supplemented with any further submissions. Therefore, this record will be considered complete and the current decision will be rendered on the basis of the record as presently constituted.

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.

The primary issue in this proceeding is whether the petitioner has a qualifying relationship with a foreign entity.

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 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.

In the present matter, the petitioner provided the following documents to establish a qualifying relationship with the beneficiary's employer abroad:

- 1) A copy of the petitioner's certificate of incorporation.
- 2) A copy of the petitioner's articles of incorporation. Article Four indicates that the petitioner is authorized to issue 10,000 shares of its common stock with a par value of one dollar per share.
- 3) Copies of two stock certificates issued by the petitioner on April 3, 1997, purporting to issue 450 of its authorized shares to [REDACTED] and 550 of its authorized

shares to [REDACTED]. It is noted that the photocopies of these stock certificates are unclear and do not show the number of either certificate.

- 4) A foreign document entitled, "[REDACTED]," sequentially numbered from [REDACTED] through [REDACTED]. This document's location is identified with a volume and page number. Although it appears that all of the submitted pages are located in the same volume, not all of the pages pertaining to this series of documents were submitted. Namely, pages 24-28, 30, 32, 34, and 36-37 were submitted.
- 5) Partial translation of the above for pages 24-26.
- 6) The petitioner's 2003 and 2004 federal tax returns, each containing Schedules E and L. Schedule E in each tax return indicates that [REDACTED] and [REDACTED] each owns 50% of the petitioner's common stock and Schedule L, No. 22(b) of each tax return shows that the petitioner received \$10,000 in exchange for issuance of common stock.

On March 17, 2006, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a statement discussing who owns and controls the U.S. and foreign entities as well as documentation corroborating the claimed ownership scheme.

In response, the petitioner provided an additional foreign document and its translation indicating that the beneficiary and [REDACTED] authorized the formation of the foreign entity in San Salvador on October 13, 1998. Copies of the documents described in Nos. 1-4 above were also resubmitted. Additionally, the petitioner provided what appears to be a stock certificate issued by the foreign entity and its translation.

On August 15, 2006, the director issued a decision denying the petition, focusing the underlying analysis on the fact that the foreign and U.S. entities are not owned by identical groups of individuals. In reviewing the director's decision, the AAO finds that the director placed undue emphasis on the minority owners and failed to consider who owns the majority of the shares of each entity. In the present matter, the petitioner maintains the claim that [REDACTED] owns 99.5% of the foreign entity and 55% of the foreign entity. If the petitioner were to submit evidence to support this claim, such a distribution of ownership, where the same individual owns and controls the majority of the shares of each entity, would be sufficient to establish the existence of a qualifying relationship. *See* 8 C.F.R. § 204.5(j)(2). It is noted that 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)). In the present matter, a thorough and comprehensive review of the record indicates that the petitioner has not provided sufficient and credible evidence to corroborate its claim.

First, with regard to the translations of foreign documents enumerated above, the regulation at 8 C.F.R. § 103.2(b)(3) states the following:

Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

In the present matter, none of the translations are accompanied by the requisite translator certifications assuring the completeness and accuracy of the translations themselves as well as the translator's own competency. Therefore, as the petitioner failed to provide translations that meet the above regulatory requirement, the deficient documents cannot be considered when making a determination as to the petitioner's common ownership and control with a foreign entity.

Additionally, a number of anomalies were observed in some of the remaining documents. Namely, the petitioner's articles of incorporation and the two stock certificates are inconsistent with the information conveyed in Schedules E and L of the petitioner's 2003 and 2004 tax returns, as described in Nos. 2, 3, and 6, respectively. While the petitioner's articles of incorporation indicate that its stock is valued at a par value of one dollar per share and while the accompanying stock certificates show that only 1,000 shares had been issued, Schedule L, No. 22(b) of the petitioner's tax returns show that the petitioner received \$10,000 in exchange for issuance of its common stock. While the petitioner is authorized to issue 10,000 shares, as indicated in Article Four of the articles of incorporation, the stock certificates that the petitioner submitted indicate that only 1,000 shares were issued, which should result in only \$1,000 being received rather than the \$10,000 indicated in Schedule L.

Furthermore, Schedule E shows that [REDACTED] and [REDACTED] each owns 50% of the petitioner's common shares. However, this information is neither consistent with the petitioner's claims nor with the stock certificates submitted to establish ownership of the petitioning entity

The AAO notes that 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 present matter, such evidence has not been submitted. Therefore, the AAO cannot conclude that the petitioner has established the existence of a qualifying relationship between itself and the beneficiary's foreign employer and the appeal must be dismissed on this basis.

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. In the instant matter, the director specifically addressed this issue in the RFE by instructing the petitioner to provide a detailed analysis of the beneficiary's daily activities during his employment abroad. In response, the petitioner provided a translated corporate document that describes the functions of the beneficiary's shareholder-elected position. However, the wording of the document is confusing and lacks sufficient clarification about the beneficiary's job duties. While the petitioner generally

indicates that the beneficiary's discretionary authority fits the definition of managerial or executive capacity, there is no information about the beneficiary's specific daily tasks. Without this information, the AAO cannot conclude that the beneficiary primarily performed job duties within a qualifying managerial or executive capacity.

This brings the AAO to the second issue, which is key to the petitioner's eligibility, but was not previously addressed in the director's decision. Namely, 8 C.F.R. § 204.5(j)(5) requires the petitioner to provide a job offer, indicating that the beneficiary is to be employed in the United States in a managerial or executive capacity and clearly describing the duties the beneficiary would perform. Again, this issue was addressed in the RFE, where the director asked the petitioner to specify the beneficiary's proposed job duties and to assign the percentage of time to be devoted to each duty. In response, the petitioner provided a letter dated June 8, 2006, which included the following statement:

[The beneficiary's] contribution in percentage to the corporation is based on 19% of the overall service delivered. His duties are distributed amongst [o]perations 6%, [p]ayroll [i]nput 5%, [r]ecruitment 3%, [s]upervision 3%, and [s]ales 2%. These percentages represent Dallas as 19% percent [sic] of the corporation operations.

While the above statement attempts to quantify the beneficiary's contribution to the overall corporate entity, it fails to specify actual job duties the beneficiary would perform on a daily basis and how much of his time would be devoted to specific tasks. Rather, the job description categorizes the beneficiary's job into five areas of concentration, but fails to explain what underlying job duties the beneficiary would perform in relation to those broad categories. Case law has firmly established that it is the actual duties themselves that reveal the true nature of the beneficiary's 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). As the petitioner has failed to provide this highly relevant and crucial information, the AAO cannot conclude that the beneficiary's time would be primarily devoted to duties within a qualifying managerial or executive capacity.

The final issue that the AAO would like to address is the petitioner's failure to establish that it was and continues to be a qualifying multinational entity. As defined above in 8 C.F.R. § 204.5(j)(2), a multinational entity is one that, through its affiliate or subsidiary, conducts business in two or more countries, one of which is the United States. Thus, even if the petitioner were able to establish that it had a qualifying relationship with the beneficiary's foreign employer, the petitioner must also establish that it continues to do business abroad through a foreign affiliate or subsidiary. In the present matter, the only evidence of the foreign entity's business transactions is limited to a handful of invoices dated "01/06.2005." Therefore, the petitioner has failed to establish: 1) that the foreign entity was still doing business in January 2006 when the Form I-140 was filed; and 2) that the foreign entity continued to do business beyond the date of filing. Based on these findings, the AAO cannot conclude that the petitioner is a multinational entity and the petition must be denied on this additional basis.

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.

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.