

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: NEBRASKA SERVICE CENTER

Date:

MAY 07 2010

LIN 07 035 51251

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
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 Texas corporation engaged in the sale and installation of various glass products. The petitioner seeks to employ the beneficiary as its president. 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 four independent grounds of ineligibility: 1) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer; 2) the petitioner failed to establish that the foreign entity is still doing business or continues to exist; 3) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 4) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusion and submits a brief in which he questions the level of care with which the director reviewed the record prior to making the decision to deny the petition.

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 a letter dated November 3, 2006 in which it referred to itself as "a subsidiary of the [REDACTED]". The petitioner further explained that the [REDACTED] entity has over 50% ownership of the U.S. entity. To substantiate this claim, the petitioner provided stock certificate No. 1, dated September 12, 2003, indicating that [REDACTED], the foreign entity, was issued 51% of the petitioner's shares. The petitioner also provided an IRS Form 1120S for 2004 and for 2005. Both tax returns included a Schedule K-1 in which [REDACTED] was identified as 51% shareholder of the petitioner's stock. The petitioner was identified as the owner of the remaining 49% of its own stock.

On August 8, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to submit, *inter alia*, evidence clarifying the confusion associated with the assumed name certificates that were submitted in support of the petition. The petitioner was also asked to provide its stock ledger to establish that it had a qualifying relationship with the petitioner at the time of filing.

In response, counsel submitted a letter dated September 17, 2007 in which he explained that there were two separate entities that were issued assumed name certificates. Counsel claimed that one certificate was issued to the petitioner and the other was issued to [REDACTED] and identified the beneficiary as its owner. The petitioner did not provide the requested stock ledger nor did counsel provide an explanation stating why the requested document was not submitted. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In a decision dated January 17, 2008, the director concluded that the petitioner failed to establish that it had a qualifying relationship with the beneficiary's foreign employer and used this conclusion as the first basis for denial of the petition. The director reviewed the information conveyed in the stock certificate that was submitted in response to the RFE and pointed out that the petitioner failed to provide the requested stock ledger or any other evidence of a qualifying relationship with the foreign entity. The director expressly stated that the stock certificate alone is not sufficient to establish the existence of a qualifying relationship.

On appeal, counsel explained that a stock ledger was not submitted because the petitioner is a closely held corporation and was therefore under no obligation to maintain a stock ledger. Counsel's explanation, however, does not satisfy the regulatory requirements for a qualifying relationship per 8 C.F.R. § 204.5(j)(3)(i)(C). It is often the case that immigration regulations that pertain to various types of visa petitions impose more documentary requirements than state statutes. However, a petitioner is not relieved of the burden of having to establish eligibility under relevant immigration statutes and regulations merely by establishing that it has satisfied state requirements.

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, 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. 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, the only evidence submitted to corroborate the petitioner's claimed ownership is a single stock certificate, which failed to state the exact number of shares the petitioner claims to have issued. Such evidence is insufficient to meet the provisions of 8 C.F.R. § 204.5(j)(3)(i)(C). Therefore, on the basis of this conclusion, the instant petition cannot be approved.

Another issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that it meets the definition of *multinational*, which requires the petitioner to show that it conducts business in two or more countries, one of which is the United States. 8 C.F.R. § 204.5(j)(2). In the RFE, the director pointed out that the most recent submissions that show the foreign entity's business transactions date back to 2005. The director instructed the petitioner to provide evidence that the foreign entity was doing business at the time the Form I-140 was filed. As indicated above, the petitioner responded to various portions of the director's inquiry. However, the petitioner did not address the matter discussed herein, which deals primarily with whether or not the foreign entity was operational and doing business at the time of filing.

Accordingly, the director's denial properly noted that the petitioner failed to provide evidence to show that the foreign entity is still in existence. Although the director associated the multinational requirement with the requirement for a qualifying relationship, the AAO notes that these are two separate issues. Thus, even if the petitioner were to establish that it had a qualifying relationship with the beneficiary's foreign employer at the time of filing the petition, the issue of whether that foreign entity was doing business at the time of filing and

continues to do business currently is a separate concern. Here, the petitioner has failed to provide evidence to establish that the foreign entity was operational at the time of filing and is operational at the present time. Therefore, on the basis of this second adverse finding, the instant petition must be denied.

The two remaining issues in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary was employed abroad and whether he would be employed in the United States in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the November 3, 2006 support letter, the petitioner included the following list of the beneficiary's job responsibilities with the foreign entity:

- Direct[ed] and coordinates activities of the organization, formulates and administers company policies.
- Direct[ed] materials[,] procurement production planning[,] and logistics for the business.
- In consultation with the management, [the beneficiary] developed long-range goals and objectives of the company.
- Provide[d] leadership for purchasing, raw material sourcing on an international basis, production planning and scheduling, inventory of raw materials, and finished goods.
- Direct[ed] and coordinate[d] activities of the managers and employees in providing services needed at various locations
- Review[ed] and analyze[d] activities, costs, operations and forecast[ed] data to determine progress toward stated goals and objectives.
- Provide[d] support to the [c]ustomer [s]ervice group, to maximize [the] return on investment in manufacturing and distribution operations, leveraging trading partner relationships and establishing measures of functional excellence.
- Discuss[ed] and report[ed] directly to the managing partner to review achievements and discuss required changes in goals and objectives of the company.
- Coordinate[d] the research of market conditions in local, regional, or international areas to determine potential sales of various hardware products and manufacturers.

The petitioner also provided the foreign entity's organizational chart, which shows a stacked managerial hierarchy comprised of a managing director at the top of the hierarchy, an assistant managing director at the next level in the hierarchy, and the beneficiary as one of two general managers, both of whom are shown as being directly subordinate to the assistant managing director. The beneficiary is shown as overseeing an administrator/bookkeeper, who is shown as overseeing ten employees in the timber department, two sales people in the glass department and five sales people in the hardware department.

With regard to the beneficiary's proposed employment in the United States, the petitioner provided the following list of assigned job responsibilities:

- Directing and coordinating activities of the managers and employees in providing services needed at various locations . . .
- Read blue-prints, perform material takeoffs, price areas of the projects, and procurement of materials

- Reviewing and analyzing activities, costs, operations and forecast data to determine data to determine progress toward stated goals and objectives
- Reviewing achievements and changes in goals and objectives of the company
- Coordinating the research of market conditions in local, regional, or international areas to determine potential sales of various hardware products and manufacturers
- Coordinate shop drawings
- Promoting [the foreign entity]'s business through assistance of support personnel.
- Continuous contact via in person and over the phone with manufacturers, contractors, and architects
- Directing and coordinating financial programs to provide funding for new or continuing operations in order to maximize return on investments and increase productivity.

The petitioner also provided its own organizational chart, which depicts the beneficiary at the top of the hierarchy as the company's president. Directly below the beneficiary is a vice president, followed by a secretary, followed by a manager who oversees an accountant and a site supervisor. The site supervisor oversees the remainder of the staff, which consists of three glass installers, one of whom is a contractor, and two fabricators who are also contractors.

In the RFE, the director instructed the petitioner to provide a more specific description of the beneficiary's foreign and proposed job duties and to assign time constraints to those duties. The director also questioned why the foreign entity's organizational chart shows two managers overseeing a single employee.

In response, counsel explained that the beneficiary's employment abroad involved co-managing, along with the other general manager, four departments—accounting, timber, glass, and hardware. Counsel claimed that each department had a foreman who would provide the beneficiary and/or his co-manager with progress reports and report on personnel and purchasing issues as well as inventory needs. Counsel provided the following time allocation breakdown for the beneficiary's foreign employment: 35% of the beneficiary's time was attributed to conferring with the company's foremen regarding company needs; 25% was attributed to arranging for training of employees to introduce and teach new techniques and new products; 5% was attributed to reviewing and analyzing costs of products, personnel, equipment, production, and sales operations; 10% was attributed to addressing customers' questions; and 15% was attributed to conferring with upper-level management to discuss new products and services. Counsel also stated that the beneficiary "did a great deal of research" on lowering costs and improving customer service. However, no specific amount of time was attributed to the research task. It is therefore presumed that the beneficiary spent the remaining 10% of his time conducting research.

With regard to the beneficiary's proposed employment, counsel stated that the beneficiary performs the following "managerial and executive" tasks and allocated the beneficiary's time as follows: 25% would be attributed to financial and business matters, including paying bills and negotiating with advertisers, inventory providers, and networking groups; 25% of his time would be attributed to product review, including reading

blue prints, performing material takeoffs, reviewing price strategies, and supervising the procurement of material; 15% would be attributed to marketing research, which would include driving around communities to assess investment opportunities and make project proposals to prospective clients; and 15% would be attributed to dealing with manufacturers, contractors, and architects. Counsel also stated that the beneficiary would supervise personnel management, which would include hiring, firing, promoting, and reviewing employee performances and coordinating contract employees through various companies. Again, the petitioner did not assign a specific amount of time to the last element of the prospective job description. It is therefore presumed that the beneficiary would spend the remaining 20% of his time on personnel management.

In the denial, the director concluded that the petitioner failed to provide sufficient detail about the tasks the beneficiary performed abroad and the tasks he would perform during his proposed employment with the U.S. entity. With regard to the foreign employment, the director noted that counsel's statements failed to adequately explain why, if the beneficiary was actually overseeing foremen and a sales manager, the organizational chart showed the beneficiary supervising an employee who performed bookkeeping and administrative services. The director further questioned why neither a foreman nor a sales manager position had been included in the foreign entity's organizational chart. The director concluded that the evidence submitted showed that the foreign entity lacked the organizational complexity to require the services of a managerial or executive employee and that the foreign entity was not shown as having been capable of relieving the beneficiary from primarily performing the non-qualifying tasks of a first-line supervisor. Lastly, the director pointed out the petitioner's failure to comply with the request for evidence of the beneficiary's payroll while employed by the foreign entity.

With regard to the beneficiary's proposed employment, while the director acknowledged that the beneficiary may have discretionary authority over the petitioner's daily operation, he concluded that the beneficiary's time would be primarily allocated to the performance of non-qualifying tasks.

On appeal, counsel disagrees with the director's findings and contends that the beneficiary filled an important position during his employment overseas and would perform executive tasks during his proposed employment with the U.S. entity. Counsel further contends that the beneficiary is responsible for administrative oversight and would delegate all other responsibilities to lower level managers. Counsel asserts that both entities are adequately staffed to relieve the beneficiary from having to primarily perform non-qualifying tasks.

Upon review, the AAO finds counsel's arguments unpersuasive. Regardless of any assertions counsel makes with regard to the foreign entity's organizational hierarchy, the record does not address the valid points the director made with regard to the discrepancies between counsel's explanation in response to the RFE and the organizational chart. If the organizational chart is accurate, it is unclear how or why the foreign entity assigned two managers to oversee the work of a single administrative employee. Counsel also fails to explain why the petitioner failed to identify any foremen as part of the foreign entity's staff. Additionally, the AAO notes that a considerable portion of the beneficiary's time abroad was spent performing non-qualifying tasks, including setting up employee training programs, addressing customer service issues, and conducting research to lower costs and improve customer service. Furthermore, while counsel claimed that the beneficiary supervised the foreign entity's departments through foremen, the petitioner did not establish that the foreign entity employed any foremen and if so, there is no evidence establishing that the foremen can be deemed professional, managerial, or supervisory employees, as no information was provided about their job duties or educational backgrounds.

The AAO finds that the record is similarly lacking in evidence that the beneficiary's proposed employment would be within a qualifying capacity, as the primary portion of his time (according to counsel's time allocations) would be spent performing non-qualifying operational tasks, such as paying bills and negotiating with vendors and advertisers, conducting market research, dealing with manufacturers, and coordinating the work of contract workers. It is noted that an employee who "primarily" performs the tasks necessary to produce a product or to provide services 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

As the service provided by the petitioner is to act as a general contractor and manage and/or oversee sub-contractors, this service and any duties performed by the beneficiary to provide this service would not be deemed to be a qualifying managerial or executive task. Again, it is noted that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See id.* As such, the AAO cannot conclude that the petitioner has established that it would employ the beneficiary in a primarily managerial or executive capacity.

Therefore, the AAO cannot conclude that the petitioner has provided sufficient evidence to establish that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity.

Lastly, while not addressed in the director's discussion, the AAO finds that the petitioner failed to establish that the beneficiary was employed abroad for one year during the relevant three-year period. The regulation at 8 C.F.R. § 204.5(j)(3)(i) states, in part, the following:

- A) If the alien is outside the United States, in the three years preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity[.]

The clear language of the statute indicates that the relevant three year period is that "preceding the time of the alien's application for classification and admission into the United States under this subparagraph." § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). The statute, however, is silent with regard to aliens who have already been admitted to the United States in a nonimmigrant classification. In promulgating the regulations on section 203(b)(1)(C) of the Act, the legacy Immigration and Naturalization Service (INS) concluded that it was not the intent of Congress to exclude L-1A multinational managers or executives who had already been transferred to the United States from this employment-based immigrant classification. Specifically, INS stated the following with regard to the interpretation of the Congressional intent behind the relevant statutory provisions:

The Service does not feel that Congress intended that nonimmigrant managers or executives who have already been transferred to the United States should be excluded from this classification. Therefore, the regulation provides that an alien who has been a manager or executive for one year overseas, during the three years preceding admission as a nonimmigrant manager or executive for a qualifying entity, would qualify.

56 Fed. Reg. 30703, 30705 (July 5, 1991).

In other words, for those aliens who are currently in the United States in L-1A status, the relevant time period mentioned in the statute should be the three-year period preceding the time of the alien's application and admission as (or change of status to) an L-1A multinational managerial or executive classification.

In light of the above and contrary to the assertions of counsel, the beneficiary's December 2003 F-1 entry into the United States, which was not for the purpose of being employed as a manager or executive within the petitioning entity, cannot be the basis for determining the relevant three-year time period during which the beneficiary's employment abroad would be considered.

In the instant matter, the record shows that the petitioner last entered the United States on November 2, 2002 as a B-2 visitor. Thus he did not enter the United States for the purpose of "working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas." Accordingly, the beneficiary does not fit the criterion described in 8 C.F.R. § 204.5(j)(3)(i)(B) and must have his period of employment abroad analyzed under the criterion described at 8 C.F.R. § 204.5(j)(3)(i)(A), which states that the relevant three-year time period is that which falls within the three years prior to the filing of the instant petition. As the instant petition was filed in 2006 and it is well established that the beneficiary was present in the United States between 2003 and 2006, it cannot be concluded that the beneficiary was employed abroad during the relevant three-year time period, regardless of whether or not the petitioner is able to provide evidence of the beneficiary's qualifying employment abroad.

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 of ineligibility discussed above, this petition cannot be approved.

Finally, the AAO notes that the beneficiary's admission and continued stay in the United States is conditioned on the maintenance of the B-2 "nonimmigrant status in which the alien was admitted or to which it was changed under section 248" and compliance "with the conditions" of that status. § 237(a)(1)(C)(i), 8 U.S.C. § 1227(a)(1)(C)(i). In the present matter, the petitioner's Form I-140 indicates that at the time of filing the petition the beneficiary was present in the United States in B-2 status, i.e., a visitor for pleasure. However, the beneficiary has submitted a Form G-325 in which he indicated that he has been employed in the United States since August 2003. Although the record indicates that the beneficiary was granted employment authorization on January 23,

2007 shortly after concurrently filing the instant Form I-140 and a Form I-485, there is no evidence that he was authorized for such employment in August 2003.¹

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 met that burden.

ORDER: The appeal is dismissed.

¹ The receipt number for EAD issuance is LIN0703551314.