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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

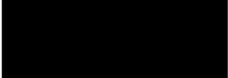


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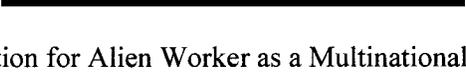
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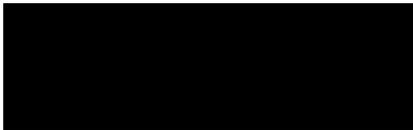
FILE:  OFFICE: NEBRASKA SERVICE CENTER

Date: NOV 16 2010

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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 Delaware corporation that seeks to employ the beneficiary as its director of field operations. 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 concluded that the petitioner does not have a qualifying relationship with the beneficiary's foreign employer and denied the petition on that basis.

On appeal, counsel disputes the director's conclusion, asserting that even though the U.S. entity is no longer owned by the foreign entity that previously employed the beneficiary, it is still controlled by that entity.

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 the petitioner has a qualifying relationship with the foreign entity that previously employed the beneficiary.

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 a letter dated May 21, 2007, which was submitted in support of the Form I-140, the financial director of [REDACTED] stated that the beneficiary was employed by [REDACTED] from March 1999 until January 18, 2006 and further indicated that this entity and the petitioner are affiliates. Although the specific nature of the affiliate relationship was not described, the financial director stated that the foreign entity is licensed to use the petitioner's name, monitoring hardware, reporting software, and all related intellectual property.

On January 15, 2009, the director issued a request for evidence (RFE) instructing the petitioner to provide, *inter alia*, evidence to establish that a qualifying relationship exists between the U.S. entity and the foreign entity that previously employed the beneficiary.

In response, counsel submitted a letter dated March 17, 2009 in which he referenced and provided a copy of the letter dated October 30, 2001 from [REDACTED] the beneficiary's prior U.S. employer, discussing [REDACTED] affiliate relationship with [REDACTED] the beneficiary's foreign employer. The letter made no mention of the petitioner or the petitioner's relationship with the beneficiary's foreign employer. The letter stated only that [REDACTED] formed [REDACTED], a holding company, which owned [REDACTED] the U.S. entity that previously employed the beneficiary during his status in the United States as an L-1A nonimmigrant. The petitioner provided ownership documents establishing [REDACTED] as [REDACTED] direct owner; [REDACTED] Declaration of Trust," showing that [REDACTED] is authorized to issue 100,000 shares of its stock; and [REDACTED] list of shareholders, showing the beneficiary as a minority stockholder owning 1,327 shares out of a total of 97,000 issued shares. The petitioner also provided its 2007 tax return with Federal Statement #4 where the beneficiary is identified as sole owner of the petitioning entity.

On May 4, 2009, the director denied the petition based on the finding that the petitioner does not have a qualifying relationship with the beneficiary's foreign employer. The director noted that, while the record contains documents showing that the beneficiary was a minority shareholder of the foreign entity that previously employed him, there is no evidence that the beneficiary owned and controlled that foreign entity at the time the Form I-140 was filed. As the beneficiary was not shown to be a majority shareholder of the foreign entity at the time of filing, the director determined that the U.S. petitioner, which the beneficiary wholly owns, and the beneficiary's foreign employer do not share the degree of common ownership that is required for a qualifying relationship to exist.

On appeal, counsel asserts that while the petitioner had been previously owned by [REDACTED] Limited, the beneficiary took over ownership of the petitioning entity when all outstanding shares were transferred to him by written agreement, which was executed on September 30, 2006. A copy of the agreement was among the supporting documents submitted on appeal. Counsel asserts that, regardless of [REDACTED] agreement to transfer its ownership interest in the U.S. petitioner to the beneficiary, an affiliate relationship nevertheless exists between the petitioner and [REDACTED]. Counsel's assertion is not in accordance with the regulatory definition for affiliate pursuant to 8 C.F.R. § 204.5(j)(2) and therefore fails to overcome the director's adverse finding.

As a threshold matter, the AAO notes that without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Additionally, 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). Here, the record does not support the assertion that a qualifying relationship existed between the beneficiary's U.S. and foreign employers at the time the petition was filed on November 20, 2007.

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 beneficiary has full ownership and control over the U.S. entity, while maintaining only a minority ownership of the foreign entity, whose ownership is dispersed among seventeen individuals with no one individual maintaining a majority ownership interest. Thus, according to the ownership breakdown of the beneficiary's foreign employer and the current ownership scheme of the U.S. employer, the record does not indicate that the two entities are either owned and controlled by the same parent or individual or that they are owned and controlled by the same group of individuals with each individual owning and controlling approximately the same proportion of each entity. Accordingly, the record shows that the beneficiary's U.S. and foreign employers do not have a qualifying relationship and the petition cannot be approved on that basis.

Additionally, while not addressed in the director's decision, the record does not establish that the beneficiary would be employed by the U.S. entity in a qualifying managerial or executive capacity. The petitioner's Form I-140 shows that the beneficiary had two employees at the time of filing. However, the petitioner's organizational chart, which the petitioner submitted in response to the RFE, identified a total of nine positions, three of which were shown as being outsourced while the rest of the positions were presumably claimed as in-house employees. Although it is conceivable that the petitioner may have grown in size from the time the Form I-140 was filed to the time of the petitioner's RFE response, the AAO questions how the

petitioner was able to relieve the beneficiary from having to primarily perform non-qualifying tasks with only the two employees it had at the time of filing the petition.

Furthermore, while the petitioner was expressly instructed to list the specific day-to-day job duties the beneficiary would perform in his proposed position and to assign a percentage of time to each job duty, the submitted job description did not include the requested time allocations, thus precluding the AAO from being able to determine how much of the beneficiary's time would be allocated to non-qualifying tasks. While the AAO acknowledges that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to his/her proposed position. 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. at 604. The record in the present matter does not establish that the beneficiary would primarily perform tasks within a qualifying managerial or executive capacity.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(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.

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.