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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



U.S. Citizenship
and Immigration
Services

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B4

FILE: [REDACTED] OFFICE: TEXAS SERVICE CENTER Date:

NOV 16 2010

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:

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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Maryland corporation that seeks to employ the beneficiary as its vice 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. Specifically, the director determined that the petitioner failed to establish that it meets the following requirements: 1) the beneficiary was employed abroad in a qualifying managerial or executive capacity; 2) the petitioner would employ the beneficiary in a managerial or executive capacity; 3) a qualifying relationship exists between the petitioner and the beneficiary's foreign employer; and 4) the foreign entity exists and is doing business abroad.

On appeal, counsel disputes the director's conclusions and submits a brief statement addressing the various grounds for denial.

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 two 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 support of the Form I-140, the petitioner submitted a letter dated May 19, 2008 in which the petitioner stated that progress was made in the building of its ski lift and amusement theme park project in the Northwest Frontier Province of Pakistan. The petitioner also provided projected income statements and copies of numerous invoices showing that various equipment was purchased in furtherance of the project. It is noted that the petitioner did not provide a description of the beneficiary's proposed employment.

After reviewing the supporting documents, the director determined that the petitioner did not define the beneficiary's day-to-day job duties with the proposed U.S. entity and therefore failed to establish that the beneficiary would be employed in a qualifying capacity. The director also determined that the petitioner failed to provide any evidence to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

On appeal, counsel points out that the director misspelled the petitioner's company name and contends that such oversight indicates that U.S. Citizenship and Immigration Services (USCIS) did not read any of the supporting documents that establish the existence of the foreign entity. Counsel's argument, however, is without merit. While the director's misspelling of the petitioner's company name is noted for the record, the AAO will not assume that a single typographical error is indicative of the level of care that was used in reviewing the petitioner's submissions. The AAO has conducted its own independent review of the record and finds that the director's conclusions were warranted, particularly in light of the lack of probative and relevant documentation addressing the beneficiary's employment capacity both in his position abroad and in his proposed position with the U.S. entity.

Additionally, counsel claims that the petitioner's Exhibits 1 and 2, which have been submitted in support of the appeal, specify the beneficiary's job duties with the foreign and U.S. entities. However, the documentation at Exhibits 1 and 2 does not include descriptions of the beneficiary's duties with the foreign and U.S. employers. Exhibit 1 contains a document whose title indicates that its contents will address the foreign entity and its management structure. The introductory paragraph of the said document states that the foreign entity is a public limited company that was established in Peshawar on September 11, 2006. The document then lists the company's "directors/sponsors" and includes the following statements with regard to the beneficiary:

He is the youngest brother of the chief executive and is one of the sponsoring directors. He [redacted] in agronomy from [the U]niversity of Peshawar in 1998[. S]ince then he is in his joint family business.

Exhibit 2 contains an organizational chart depicting the personnel structures at the three flour mills and tourism business, all of which are claimed to be within the same group of companies. It is noted that the name [redacted] the same name as that of the beneficiary, is shown as the supervisor of [redacted] as well as the purchasing manager [redacted]. It is unclear, however, whether the beneficiary occupied both of those positions as the chart does not include a separate job description or clarification of the position titles that were included in the organizational chart.

Regardless, a thorough review of all five of the supporting exhibits shows that the beneficiary's current and proposed job descriptions were both included as part of Exhibit 5, not in Exhibits 1 and 2 as counsel erroneously indicated. As a threshold issue in discussing the beneficiary's employment capacity with the U.S. entity, the AAO notes that the petitioner must provide a detailed description of the job duties the beneficiary would perform under an approved petition. *See* 8 C.F.R. § 204.5(j)(5). Merely describing the beneficiary's current job duties does not establish that the duties to be performed under an approved petition would be within a qualifying managerial or executive capacity. Nevertheless, the petitioner's Exhibit 5 includes the following description of the beneficiary's current employment:

- Provided direction and [m]anaged the overseas supervisor team and sales department.

- Organize the overseas meetings with [d]irectors to buy more land according to family park requirements and made [the d]ecision to buy equipment form [REDACTED]
- Attended [a] meeting with [REDACTED] to buy lift equipment.
- Provided direction to [the s]ales dept[.] to [n]egotiate and purchased sheave assemblies from [REDACTED]
- Setup [sic] the dates to [s]hip the two containers to Karachi Pakistan
- Had meeting with [REDACTED] to [f]ind out the best possible dates to [s]hip the [t]wo [b]ull [w]heel . . . and [t]wo [s]pool of [r]ope [B]oth need special shipping equipment and [the beneficiary is] still [researching] to find out the best possible way to ship [them].
- Made decision after getting permission from [the] chief executive of [REDACTED] to pay extra amount for special [e]quipment and provided direction to [the] sales dept[.] . . .
- Organized and [c]hair[ed] the meetings with [REDACTED] along with [the d]irectors of [REDACTED] and Surveyor team to discuss on [sic] ground profile of [the] [REDACTED]

The AAO finds that the above description of the proposed employment does not establish that the beneficiary would primarily perform job duties within a qualifying managerial or executive capacity. First, the AAO notes that the above list of duties is indicative of an entity that has not yet commenced doing business. It is apparent based on the above statements and other documentation on record that the main activity of the U.S. entity has been shipping equipment for a ski lift/amusement theme park which was planned to be built in Pakistan at the time the instant Form I-140 was filed. The above list of duties are indicative of the petitioner's early stage of development wherein the beneficiary is charged with making arrangements to have equipment and materials shipped to ensure the successful building of the ski lift/amusement park. While not expressly discussed in the petitioner's submissions, it is reasonable to assume that once the petitioner's main source of revenue, i.e., the ski lift/amusement park, is up and running, the beneficiary's job duties would likely change from those required to ship equipment to Pakistan to duties that would be required to operate an existing business.

Here, the petitioner has not provided any information to clarify precisely when the beneficiary's role would shift from shipping ski lift equipment to Pakistan to set up a new business there, to someone running an existing business operation in the United States. Moreover, the petitioner has failed to specify exactly what job duties the beneficiary would perform once the new entity develops beyond the initial stage of development. Nor did the petitioner discuss the role of the other person within its organization to determine exactly how the petitioner plans to relieve the beneficiary from having to primarily perform tasks that are not within a qualifying managerial or executive capacity. While the beneficiary's position within the petitioner's organizational hierarchy as well as his discretionary decision-making authority are both relevant factors when assessing his employment capacity, it is noted that the actual duties themselves 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). It is further 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 petitioner has failed to describe what specific job duties the beneficiary would perform under an approved visa petition, the AAO cannot conclude that the beneficiary's time would be primarily allocated to the performance of tasks within a qualifying managerial or executive capacity.

With regard to the beneficiary's employment abroad, the petitioner listed the following duties:

- Helped in [c]reating the feasibility of [REDACTED]
- Provide[d] [s]uggestions and [r]ecommendation[s] to [the] board of [d]irectors for [s]ite selection [o]f [the c]hairlift [t]errain[.]
- Performed and negotiated the purchase contracts of land required for [the] [REDACTED]
- Established the goals and policies of the organization for [the] next 10 years.
- Helped in setting up the budget [p]lan to buy the chairlift [f]rom [the] U[.]S[.]A.
- Provided direction to [the s]urveyor [t]eam, [sic] to create the ground profile [o]f [the l]ift according to [REDACTED]
- Organize[d] and chair[ed] the directors meeting for [the] [REDACTED]
- Helped in exporting the [l]ift shipment from [REDACTED] to [REDACTED] (Pakistan.)
- Provided direction to [the] sales dept[.] to [sic] with [REDACTED] agent to create [the] necessary paper work according to [c]ustom[s] requirement[s] [a]t Karachi port Pakistan.
- Directly managed the supervisor team and sales department.

The AAO finds that the above job duties fail to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. First, as with the beneficiary's U.S. job description, the above job duties are indicative of an individual acting in the context of a start-up business. The petitioner repeatedly referred to the beneficiary's role in planning to buy certain equipment that was needed to complete the chair lift project. These references are confusing, as the chair lift project was earlier noted as part of the U.S. business venture. Without further clarification, the AAO cannot ascertain whether the beneficiary's role in the purchase of equipment was part of his position with the foreign entity or with the U.S. entity. This apparent overlap of job duties between the U.S. and foreign entities precludes the AAO from being able to distinguish the beneficiary's foreign and U.S. positions. The petitioner mentions a sales department, but no explanation

was provided to clarify what exactly the foreign entity was or would be selling. Again, it appears that the source of revenue would be patrons of the ski lift/amusement park that the petitioner and/or the foreign entity have been involved in building. However, as the U.S. petitioner is an entity that is separate from the foreign entity, they must be treated individually. The fact that the beneficiary's job duties overlap to such a large degree makes it virtually impossible to determine which job duties the beneficiary was performing for the foreign entity and which job duties he now performs for the U.S. entity. If, as indicated above, the beneficiary's employment abroad entailed primarily job duties that were performed in order to further the start-up of the U.S. entity, the AAO fails to see how those same job duties can be deemed as pertaining to the beneficiary's employment abroad.

In summary, the petitioner has provided insufficient information to clearly describe the beneficiary's foreign employment. The record does not clearly establish the foreign entity's business activity, nor is there any clarity as to the beneficiary's specific function in relation to the foreign entity's business operations. As stated above, the beneficiary's U.S. and foreign employers have been described as two separate entities and must be treated as such. Here, the beneficiary appears to have been doing the same tasks abroad as he has been doing in the United States and he has been doing those tasks for a single business entity. For all intents and purposes, the beneficiary's efforts have been and continue to be allocated to a single business purpose, which is the start-up operation of a ski lift/amusement park in Northwest Pakistan. Based on the information that has been presented in the present matter, the AAO cannot conclude that the beneficiary was employed abroad or would be employed in the United States within a qualifying managerial or executive capacity.

The third 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 the denial, the director concluded that the petitioner failed to submit any evidence of ownership and control of either a qualifying foreign entity or the U.S. entity. The AAO agrees with the director's finding.

In its May 19, 2008 support letter, the petitioner referred to [REDACTED] as its foreign parent entity. However, the petitioner's 2007 tax return, which was submitted in support of the Form I-140, does not indicate that the petitioner is foreign-owned. Additionally, while the petitioner provided the foreign entity's certificate of incorporation establishing [REDACTED] corporate existence in Pakistan, no documentation was provided establishing that the U.S. and foreign entities are commonly owned and controlled.

On appeal, counsel refers to Exhibit 2 for verification of the claimed qualifying relationship between the petitioner and [REDACTED]. Specifically, the documents at Exhibit 2 include the petitioner's Articles of Incorporation wherein Article X names three shareholders, including the beneficiary, with each individual holding 2,000 shares of the petitioner's common stock. The same information is reiterated in the Articles of Amendment, wherein the fourth amendment describes the same ownership scheme, but shows a change in one of the three shareholders. It is noted that both documents identify the beneficiary as one of the petitioner's three shareholders.

After reviewing these documents in light of the petitioner's claim, the AAO finds that the supporting documents provided fail to corroborate either the petitioner's or counsel's claim regarding the alleged qualifying relationship. First, the AAO notes that both counsel and the petitioner have set forth the claim that the U.S. petitioner is a subsidiary of [REDACTED]. However, this claim is in conflict with the information contained in the petitioner's [REDACTED] and Articles of Amendment, both of which indicate that the petitioning entity is directly owned by three individuals. 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). Here, the petitioner neither acknowledges nor provides evidence to resolve this considerable inconsistency.

Furthermore, even if the petitioner were to claim that it has a more general affiliate relationship with the foreign entity, 8 C.F.R. § 204.5(j)(2) indicates that in order to be deemed affiliates, the U.S. and foreign entities would either have to be two subsidiaries both of which are owned and controlled by the same parent or individual, or they would have to be owned and controlled by the same group of individuals. Regardless, in order to establish that the U.S. petitioner and the foreign entity are affiliates, the petitioner would have to provide adequate evidence establishing who owns the foreign entity. In the present matter, the record lacks evidence establishing the foreign entity's ownership and control, which are the two key 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). Although the petitioner provided two deeds of partnership—one dated July 15, 2003 and another dated May 4, 2003—both documents address the ownership of [REDACTED] General Mills. Regardless of the petitioner's claim that it and the other named entity belong to the same group of companies, the foreign entity's ownership has not been established with the submission of documentary evidence. 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)). The petitioner's mere

claim that it shares common ownership with other foreign entities is insufficient. Moreover, the more recent deed of partnership lists a total of 18 owners. Thus, even if the ownership scheme for [REDACTED] General Mills was the same as that of the foreign entity in question, the petitioner, which is shown as being owned by three individuals in equal parts, and the foreign entity, which is claimed to be owned by 18 different individuals, could not be deemed as being owned by the same group of individuals and therefore would not be deemed affiliates.

Accordingly, as the petitioner has failed to provide adequate and reliable evidence to establish the common ownership and control of the U.S. and foreign entities, the AAO cannot conclude that the two entities have the requisite qualifying relationship as required by 8 C.F.R. § 204.5(j)(3)(i)(C).

The final issue that was addressed in the director's decision was whether the petitioner submitted sufficient evidence to establish the existence and ongoing business activity of the foreign entity.

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 a preliminary concern, the petitioner would have to establish the existence of the foreign entity, as an entity that does not exist clearly cannot be deemed as doing business.

In the present matter, the petitioner provided the foreign entity's photocopied Certificate of Incorporation showing that the foreign entity was established on September 13, 2006. As the petitioner has satisfied the preliminary requirement of establishing the foreign entity's corporate existence, the AAO will next examine the record for evidence of whether the foreign entity was doing business at the time the Form I-140 was filed and continues to do business. Pursuant to the definition of *multinational* at 8 C.F.R. § 204.5(j)(2), in order to be deemed a multinational entity, the petitioner must establish that it conducts business in two or more countries, one of which is the United States, through a foreign affiliate or subsidiary.

In the present matter, the petitioner's initial submissions included: 1) the foreign entity's capital value tax payment receipt with the words "Land Purchase" handwritten at the top of the page; 2) a partial copy of a "Mutation Fee Receipt" as well as additional similar receipts all indicating that three thousand rupees were paid on "9/2/07" by an unidentified payor; 3) an undated bank document showing payment made by the foreign entity; 4) an unidentified photocopied document with no identifiable names or dates; and 5) the foreign entity's projected income statement, cash flow statement, depreciation, money balance, revenue projections, and statements of costs and expenses covering a span of five years.

The AAO notes that the foreign language documents were not accompanied by certified English language translations of the contents of these documents. Therefore, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. With regard to the tax payment receipt described in No. 1 above, there is no evidence that the document in any way pertains to a land purchase as indicated by the handwritten notation at the top of the page. As such, the validity and probative value of this document is dubious at best. Similarly, the AAO questions the probative value of the various mutation fee receipts referenced in No. 2 above, as none of the receipts contained names of any companies or individuals as a point of reference. Lastly, while the information in the five-year projection plans was clearly conveyed, its probative value is also extremely limited, as these plans are mere speculations and are not necessary based on the business activity that had been taking place at the time the Form I-140 was filed.

On appeal, counsel questions the basis of the director's finding that the foreign entity is not doing business. Counsel refers to the submitted tax returns, Articles of Incorporation, shipping receipts, and bills of lading, which he deems as sufficient evidence of the foreign entity's business activity. Counsel's contention, however, is unpersuasive. First, the AAO notes that while corporate tax returns and incorporation documents establish a company's corporate existence, they in no way indicate that a company provides goods and/or services on a "regular, systematic, and continuous" basis.

Next, the AAO will address the petitioner's submissions of handwritten and printed invoices on the foreign entity's letterhead. While these shipping invoices name the foreign entity as the shipper of certain equipment that was being shipped to the U.S. petitioner, the most recent of the shipping receipts was dated March 21, 2008. It is noted, however, that the petition was filed on September 15, 2008. Therefore, the shipping receipts that are dated six months prior to the filing of the petition fail to establish that the foreign entity was doing business as of the date the petition was filed. Additionally, the AAO notes that all of the submitted shipping invoices show the petitioning entity as the recipient of the foreign entity's shipping services. Based on the evidence shown, it is unclear whether the foreign entity was conducting business with any other entities. If not, as the record seems to indicate, it is unclear how the foreign entity can claim that it is doing business in a "regular, systematic, and continuous" manner when its sole client appears to be a start-up operation. In other words, it is not clear that the business needs of a single start-up entity can ensure that the foreign entity would lend its services regularly, systematically, and continuously, per regulatory definition.

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.