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

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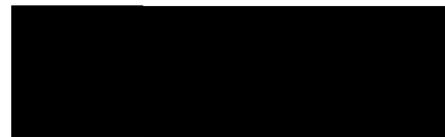
DATE: DEC 27 2011 OFFICE: TEXAS SERVICE CENTER



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, with a fee of \$630. 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 petitioner subsequently filed a timely motion to reopen, which the director denied in a comprehensive decision dated January 30, 2006. The petitioner then appealed the matter to the Administrative Appeals Office (AAO). Instead of forwarding the matter to the AAO to be treated as an appeal, the director issued a decision on March 16, 2006, rejecting the petitioner's appeal as untimely filed. In a follow-up service motion to reopen dated February 5, 2010, the director withdrew the March 16, 2006 decision, concluding that the appeal was improperly rejected, and forwarded the matter to the AAO. The appeal will be dismissed.

As a preliminary matter, it is noted that, regardless of the timely or untimely filing of an appeal, the service center does not have jurisdiction over any matter that deals with an appeal of an adverse service center decision. 8 C.F.R. § 103.3(2)(iv). Therefore, even in matters concerning the untimely filing of an appeal, the AAO, not the director, maintains jurisdiction over the appellate matter. That being said, in the February 5, 2010 motion to reopen the director expressly determined that the petitioner's appeal was not untimely, thus indicating that this matter merits full consideration of the petitioner's eligibility. Accordingly, the AAO will address all factors that are relevant to the issue of the petitioner's eligibility for the immigration benefit sought.

The petitioner is a Florida corporation that seeks to employ the beneficiary as its general 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 initially denied the petition based on the determination that the petitioner failed to establish that the petitioner meets the regulatory requirement described at 8 C.F.R. § 204.5(j)(3)(i)(C), which states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. The director later affirmed the original denial and the underlying basis in the January 30, 2006 decision.

On appeal, counsel challenged the director's decision, claiming that a qualifying relationship does exist between the petitioner and the beneficiary's foreign employer. Counsel indicated that an appellate brief would be submitted specifically explaining the basis for withdrawing the director's adverse decision. The record shows that an appellate brief was in fact submitted and will be fully addressed in the decision below.

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 beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." See generally § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); see also 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

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 submitted a statement dated October 22, 2004. Although the petitioner was referred to as the subsidiary of the beneficiary's foreign employer, a full explanation with an ownership breakdown of each entity was not expressly provided in the statement. Among the supporting documents that accompanied the Form I-140, the petitioner provided a foreign document with a certified English translation, which stated that ownership of the foreign entity, [REDACTED] was evenly divided among two individuals—the beneficiary and [REDACTED]—with each individual

owning 700 shares of the foreign entity's stock. The petitioner also provided a copy of its Articles of Incorporation, executed on July 22 and filed with the State of Florida on July 25, 1996, in which Article Four identified the beneficiary as owner of 100% of the petitioner's stock.

On May 3, 2005, the director issued a request for additional evidence (RFE) in which the petitioner was instructed to provide further documentation establishing the existence of a qualifying relationship between the petitioner and the foreign entity where the beneficiary was previously employed.

In response, counsel submitted a statement dated July 20, 2005 in which he indicated that the foreign entity owns 51% of the U.S. petitioner and that the beneficiary owns the remaining 49%. In support of counsel's statement, the petitioner provided stock certificate nos. 2 and 3, both undated, issuing 51 and 49 out of 100 shares of its stock to [REDACTED] and the beneficiary, respectively.

On July 29, 2005, the director issued the first of two decisions denying the petition based on the petitioner's failure to establish the existence of a qualifying relationship with the beneficiary's foreign employer. In her decision, the director relies on the petitioner's Articles of Incorporation, which named the beneficiary sole owner of the petitioning entity, and on the ownership described in the foreign document, which indicated that the beneficiary had only a 50% ownership interest in the foreign entity.

In response, counsel provided a statement dated August 25, 2005 in which he explained that the petitioner issued 350 shares of voting class stock and 350 shares of non-voting class and that the voting shares were all issued to the foreign entity, thus giving the foreign entity control over the petitioner despite the appearance of split ownership between the beneficiary and the foreign entity due to the issuance of the same number of shares. In support of counsel's statement, the petitioner provided a copy of a document titled "Shareholder and Ownership Agreement Between [the petitioner] and All of the Shareholders." The execution date of the agreement was shown as July 25, 1996, the date the petitioner filed its Articles of Incorporation. As previously indicated in counsel's statement, the ownership agreement identified two classes of stock—voting and non-voting—and two shareholders—the foreign entity and the beneficiary—where the foreign entity was shown as owner of the voting shares while the beneficiary was shown as owner of the non-voting shares.

On January 30, 2006, the director issued a second adverse decision in which she pointed out the anomalies in the previously submitted documents. Namely, the director referred to the fact that neither of the submitted stock certificates were dated and further commented on the discrepancies between information provided in the petitioner's Articles of Incorporation, the stock certificates, and the shareholder agreement that the petitioner submitted in response to the director's first adverse decision. The director properly cited relevant case law, which places the evidentiary burden on the petitioner to resolve any inconsistencies in the record by providing independent objective evidence that establishes where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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 the United States and foreign entities. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Assoc. Comm'r 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.

Counsel argued on appeal that the record adequately documents the beneficiary's ownership of 50% of the foreign entity and 100% of the U.S. entity. Counsel's argument, however, fails to overcome the director's adverse findings regarding the issue of the petitioner's qualifying relationship.

As discussed in the director's January 30, 2006 decision, the petitioner has provided inconsistent evidence regarding its ownership. While Schedule E of the petitioner's 2003 tax return and Article Four in the Articles of Incorporation both identify the beneficiary as 100% owner of the petitioner's stock, neither the petitioner's two undated stock certificates—nos. 2 and 3—nor the petitioner's stockholder agreement from July 25, 1996 corroborate the information conveyed in the previously named documents. In fact, the petitioner's stockholder agreement is not only inconsistent with regard to the ownership distribution, but it also is entirely inconsistent with the original Articles of Incorporation with regard to the number of shares that the petitioner is authorized to issue. Namely, the latter document indicates that the petitioner is only authorized to issue 100 shares of its stock. The stockholder agreement, however, indicates that the petitioner issued a total of 700 shares and further indicates that the petitioner had two different classes of stock—voting and non-voting—a factor not discussed in the Articles of Incorporation. The petitioner's stock certificates are also inconsistent with the Articles of Incorporation in that the latter indicates that the beneficiary is the sole stockholder, while the stock certificates indicate that the beneficiary is not only not the sole stockholder but is also the minority owner with the foreign entity owning more than 50% of the petitioner's stock.

In light of the above inconsistencies, the AAO simply cannot concede to counsel's claim regarding the beneficiary's 100% ownership of the petitioning entity. While it is true that some of the submitted documents do indicate that the beneficiary is the petitioner's sole stockholder, there are just as many documents that contradict this claim. The petitioner has not supplemented the record with any documentation to reconcile or resolve these inconsistencies regarding facts that are highly relevant to the petitioner's eligibility. *See Matter of Ho*, 19 I&N Dec. at 591-92.

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). Anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after USCIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. As noted above, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence pertaining to the petitioner's ownership, which directly affects its alleged qualifying relationship with the foreign entity, is not credible. Accordingly, the petitioner has not established its eligibility for the requested immigrant visa classification and on the basis of this conclusion the instant petition cannot be approved.

Furthermore, while not previously addressed in the director's decision, the record does not support the finding that the petitioner, at the time of filing, adequately established that the beneficiary would be employed in a qualifying managerial or executive capacity. While the AAO finds that the job descriptions provided by the petitioner both initially in support of the petition and subsequently in response to the RFE were overly generalized, both the descriptions and the facts provided regarding the petitioner's support staff at the time of

filing the petition lead the AAO to conclude that the beneficiary was most likely allocating the primary portion of his time to non-qualifying operational 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 the 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. Here, the AAO finds that the petitioner has failed to establish that the petitioner was ready and able to employ the beneficiary in a managerial or executive capacity at the time the petition was filed.

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.