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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



B4

FILE: [REDACTED] OFFICE: TEXAS SERVICE CENTER Date: MAR 04 2011  
SRC 08 130 52128

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: SELF-REPRESENTED

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

The petitioner is a Florida corporation that seeks to employ the beneficiary as its commercial and marketing manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director denied the petition based on three 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 its ability to pay the beneficiary's proffered wage; and 3) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, Edison Cunha submits a statement and appellate brief on behalf of the petitioner, asserting that the denial represents an abuse of discretion.

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. 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) 3(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 a letter dated March 11, 2008, which was submitted in support of the Form I-140, Mr. [REDACTED] stated that the petitioner is the subsidiary in a parent-subsidiary relationship with the beneficiary's foreign employer. Supporting documents included the petitioner's 2007 tax return and the Schedule K statement in which [REDACTED] was identified as the petitioner's sole owner. Also provided in support of the petition was a translation of the foreign entity's amendment of articles of incorporation, which showed that of the 21,000 shares of issued stock, 20,996 shares of stock were issued to [REDACTED] and one additional share was issued to each of four individuals none of whom was Mr. Cunha.

On September 16, 2008, the director issued a request for evidence (RFE) instructing the petitioner to provide, in part, evidence establishing the ownership and control of the U.S. petitioner and the beneficiary's foreign employer.

In response, the petitioner's articles of incorporation were provided. Article 6, Subsection 1 states that the petitioner is authorized to issue 7,500 shares of stock with a par value of one dollar per share. The petitioner also resubmitted foreign documents pertaining to the foreign entity, including the foreign entity's amendment of articles of incorporation.

The director reviewed the petitioner's submissions and determined that the petitioner failed to establish that the prospective U.S. employer, i.e., the petitioning entity, and the beneficiary's foreign employer, are similarly owned and controlled and thus do not have a qualifying relationship. Accordingly, the director denied the petition in a decision dated May 19, 2009.

On appeal, [REDACTED] submits a brief on the petitioner's behalf restating the regulatory definitions of affiliate and subsidiary and reiterating the claim that the petitioner and the beneficiary's foreign employer are affiliate entities. [REDACTED] calls the AAO's attention to the previously submitted amendment of the foreign entity's articles of incorporation and asserts that the qualifying relationship between the beneficiary's proposed and foreign employers is implied by virtue of the petitioner having access to the foreign entity's "important documents." [REDACTED] argument, however, is entirely without merit.

First, [REDACTED] has no reason to expect U.S. Citizenship and Immigration Services (USCIS) to simply draw inferences and make favorable conclusions regarding the petitioner's eligibility when no evidence has been submitted to support the assertions being made. 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)). Second, the evidence of record actually contradicts the assertions being made as to the alleged qualifying relationship between the beneficiary's foreign and proposed employers. As previously noted, the foreign entity's amendment of articles of incorporation indicates that the majority of the foreign entity's outstanding shares were issued to a Brazilian entity whose relationship to the U.S. petitioner has not been established. The petitioner, however, has been shown as being wholly owned by [REDACTED] who was not identified either as a majority or minority shareholder of the entity that employed the beneficiary abroad.

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, it is unclear which part of the ownership schemes of the beneficiary's two employers establish that the entities are commonly owned and controlled. To the contrary, based on the evidence submitted, the record shows that there is no commonality in the ownership and control of the beneficiary's two employers. Therefore, on the basis of this initial conclusion, the AAO finds that the petitioner does not meet the eligibility requirement specified at 8 C.F.R. § 204.5(j)(3)(i)(C) and is therefore ineligible for the immigration benefit sought.

The second issue in this proceeding is whether the petitioner established that it has the ability to pay the beneficiary's proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states the following, in pertinent part:

Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by

documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary.

In the present matter, the petitioner has provided a photocopied IRS Form 1099 purportedly issued to the beneficiary for work performed in 2008. The form indicates that the beneficiary was compensated \$43,500 in 2008, the year during which the petitioner filed the Form I-140. Although [REDACTED] claims on appeal that this amount represents the petitioner's ability to pay the proffered wage, this claim is unfounded and is inconsistent with the claim that the proffered wage in this matter is \$52,000. According to the Form 1099 that was submitted on appeal, the beneficiary appears to have been paid approximately \$8,500 less than the proffered wage. Furthermore, it appears that [REDACTED] claims that the wages the beneficiary was paid in 2008 account for the time period commencing in March 2008, thus indicating that the wage amount may not represent the full 12-month period. However, this claim must be corroborated with supporting documentary evidence, which is not present in the petitioner's record. *Matter of Soffici*, 22 I&N Dec. at 165. As such, the Form 1099 cannot be considered as *prima facie* proof of the petitioner's ability to pay the beneficiary's proffered wage.

As an alternate means of determining the petitioner's ability to pay, the AAO examines the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. As the record does not include the petitioner's tax return or an audited financial statement for 2008, the AAO cannot conduct an analysis of the petitioner's net current income. Therefore, the AAO cannot conclude that the petitioner submitted sufficient evidence of its ability to pay the beneficiary's proffered wage at the time of filing.

The remaining issue in this proceeding is whether the petitioner would employ the beneficiary 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.

support letter dated March 11, 2008, the following description of the beneficiary's proposed employment was provided:

He will be responsible for the supervision of the entire office, setting the work standards and general guidelines for each assignment, also planning effective schedules, that will meet our client's objectives and deadlines, ensuring repeat and long-term business relationships, setting new guidelines which will lead the company to new fields, and being alert to new developments in the marketplace, based on all the international marketing experience he carries. Furthermore, he will identify new markets for penetration and act as liaison with collaborators assuring that these markets are accessed. He will have full authority to implement marketing directions for the partner company.

also provided the following time distribution for the proposed position:

- Directing the ongoing development of new projects for the U.S. subsidiary, 40%;
- Establishing appropriate contact and business relationships with clients, manufactures, and others, reviewing terms and negotiating most favorable deals for the U.S. subsidiary, 40%;
- Managing and directing marketing efforts in emerging markets, 20%[.]

In the September 16, 2008 RFE, the director instructed the petitioner to provide evidence of its staffing, including the number of employees, a job description and educational level for each employee, and a description of the petitioner's personnel and management structure.

The petitioner's response included a statement from dated October 2, 2008 in which he stated that the beneficiary will be responsible for hiring, training, and firing all employees and for implementing policies and developing strategies to improve the business and to meet profit goals. stated that the proposed position is managerial and will involve "negotiations of contracts to provide for services, customs processing, international taxation, purchases, sales pricing, banking insurance and credit terms and its

employees." [REDACTED] further indicated that the beneficiary would be relieved from having to perform "the daily tasks of running the departments" by other employees. However, none of the other company employees were specifically discussed in terms of position titles, job descriptions, or educational levels.

The petitioner provided supplemental material addressing the RFE in a letter that was dated March 9, 2009. The letter contained a variety of information all of which had been previously submitted in the initial support letter and in the earlier response to the RFE. The petitioner provided the same job description and repeated the percentage breakdown, focusing on the beneficiary's heightened degree of discretionary authority over personnel issues, i.e., hiring, training, and firing, as well as policy concerns and the setting of goals to ensure growth in profits. The petitioner also added that the beneficiary's U.S. employment would require contacting potential clients, maintaining ongoing communication with existing clients, defining and executing sales plans and promotions, delegating assignments to subordinate employees, conducting sales presentations, negotiating the terms of sales contracts, investigating and evaluating business opportunities with new clients, and conveying marketing information to sales and engineering staff. The letter also emphasized the beneficiary's qualifications, including his knowledge of three languages, his professional experience, and his increased skill level, which resulted from work performed for the foreign entity. Again, although the letter made numerous references to subordinate staff, no one was specifically mentioned by name or by position title and no evidence was provided to show whom the petitioner employed at the time of filing.

Accordingly, the director determined that the petitioner failed to establish that the beneficiary's prospective employment would be within a managerial or executive capacity. The director noted that when a petitioner is presented with a limited number of employees, it is reasonable to question that petitioner's ability to relieve the beneficiary from having to allocate the primary portion of his time to performing non-qualifying operational tasks.

On appeal, while Mr. [REDACTED] disputes the director's conclusion, he provides no specific information about any subordinate staff that the petitioner may have employed at the time the Form I-140 was filed nor any further clarification explaining how the petitioner's organizational hierarchy at the time of filing was able to support the beneficiary in a managerial or executive capacity. Instead, [REDACTED] paraphrases the statutory definition of managerial capacity and asserts that the director failed to review the supplemental letter that was provided in response to the RFE. [REDACTED] provides neither evidence of the director's alleged oversight nor does he explain what facts specifically led to such an allegation.

After conducting an independent analysis of the petitioner's supporting evidence, the AAO finds that none of the submissions, either alone or collectively, support a favorable finding with regard to the beneficiary's employment capacity in his proposed position. Rather, the latest job description that was submitted in the supplemental letter dated March 9, 2009 identified numerous non-qualifying job duties, including marketing, sales, and contract negotiation. Although instructed to provide information regarding the petitioner's organizational hierarchy, [REDACTED] failed to comply with this request, thus leaving the director without any means of establishing who was available to relieve the beneficiary from having to perform the petitioner's daily operational tasks. The petitioner provided no evidence of any support personnel despite the mention of sales and engineering departments. When these deficiencies are considered in totality, the AAO can only conclude that the petitioner was ill-equipped to support a managerial or executive capacity employee. The record simply lacks any evidence that the petitioner either had the need or the ability to employ an individual whose time would be primarily allocated to performing tasks within a managerial or executive capacity.

Therefore, the petitioner has failed to overcome the third ground that served as a basis for the director's adverse decision.

Furthermore, the record lacks sufficient evidence to establish that the petitioner meets the provisions specified at 8 C.F.R. § 204.5(j)(3)(i)(A), which states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to filing the Form I-140. In the instant matter, the record lacks sufficient information about the beneficiary's job duties and placement within the foreign entity's organizational structure to enable the AAO to conclude that the beneficiary was employed abroad 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.