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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

[redacted]

DATE: MAY 17 2011 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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 West Virginia corporation that seeks to employ the beneficiary as its president/operations 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 two independent grounds of ineligibility. First, the director concluded that the petitioner failed to establish that the beneficiary would be employed in the United States within a managerial or executive capacity and second, the petitioner failed to establish that it and the beneficiary's foreign employer have a qualifying relationship.

On appeal, counsel disputes the director's decision, asserting that the director failed to issue a request for evidence (RFE) or a notice of intent to deny (NOID), which he claims would have allowed the petitioner the opportunity to address any deficiencies and establish eligibility. Counsel's appellate brief will be fully addressed in the discussion 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 first issue in this proceeding is whether the petitioner submitted sufficient evidence to establish that the beneficiary 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 beneficiary, in his capacity as president of the petitioning entity, submitted a letter dated July 10, 2008 in which the following list of the beneficiary's job responsibilities was included:

- Directing all activities concerning [the petitioner], specifically the operations and business, the corporate planning, as well as the goals and policies of [the petitioner];
- Responsibility for business development, sales and marketing, financing and recruitment;

- Developing and managing marketing plans for [the petitioner], including directing personnel to research market conditions of other restaurants in local, regional, or national areas;

- Directing the gathering of data on other specialty restaurants and analyzing prices, sales and methods of marketing; and

- Directing the company to insure the daily operations of [the petitioner] adequately supports the organizational structure as a whole.

Also included as a supporting document was the petitioner's organizational chart in which the beneficiary is depicted at the top of the hierarchy as the organization's president followed by a manager/chef, who is depicted as supervising three waiters and a cook.

On August 21, 2009, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. The director noted that no job description was provided for the beneficiary's subordinate, thus precluding the director from being able to conclude that the subordinate employee is a supervisor or manager. The director determined that, while the beneficiary may be performing some managerial duties, the petitioner did not provide sufficient evidence to establish that the primary portion of the beneficiary's time would be allocated to managerial- or executive-level tasks.

On appeal, counsel asserts that the director violated service policy by failing to issue either an RFE or a NOID prior to issuing the denial. Counsel's appellate brief also includes job descriptions of all of the petitioner's employees. Counsel asserts that the beneficiary's subordinate—the manager/chef—is charged with managing the restaurant and the employees who perform the menial tasks required to run the operation.

The AAO finds that counsel's arguments are not persuasive in overcoming the basis for denial.

First, with regard to the issuance of an RFE or NOID, the AAO notes that 8 C.F.R. § 103.2(b)(8), the section that includes provisions for the issuance of an RFE or NOID, expressly states that the director has absolute discretionary authority in deciding whether or not to issue either notice.[1] Thus, contrary to counsel's understanding, the director was authorized by regulation to exercise his option to deny the petition without issuing either an RFE or a NOID.

Second, with regard to the beneficiary's employment capacity with the U.S. entity, the AAO notes that in examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the beneficiary's proposed job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law also places great emphasis on the value of a detailed job description, holding 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).

[1] Effective June 18, 2007, this section of Title 8 of the Code of Federal Regulations was amended, giving the director the discretionary authority to determine whether or not an RFE or NOID would be issued prior to an adverse decision.

In the present matter, the description of the beneficiary's proposed employment is overly vague and thus fails to effectively convey a meaningful understanding of the specific tasks the beneficiary would perform on a daily basis. While counsel provides job descriptions for all of the restaurant employees, asserting that the business is adequately staffed such that the beneficiary is relieved from having to carry out the tasks associated directly with food preparation and food services, an adequate job description for the beneficiary is nevertheless required by regulation. *See* 8 C.F.R. § 204.5(j)(5). The AAO cannot assume that the beneficiary will primarily perform qualifying managerial- or executive-level tasks merely on the basis of the job duties that other employees within the petitioning organization are performing.

The beneficiary's job description indicates that he is responsible for business development, sales and marketing, and financing. However, the petitioner has not attributed any actual tasks to explain how the beneficiary would carry out these broad job responsibilities and to clarify who, if not the beneficiary, is performing the sales- and marketing-related tasks. Similarly, while the beneficiary also previously indicated that he would "[d]irect [the] gathering of data," he did not clarify who, other than the beneficiary, would be available within the petitioner's organization to actually perform the data gathering tasks. This lack of information is particularly troubling given that the employee job descriptions provided in counsel's brief do not attribute any sales, marketing, or data gathering tasks to any of the petitioner's employees. The fact that the beneficiary broadly states that he would "direct" various key administrative functions is simply insufficient without a detailed account of the precise underlying tasks he would perform in the course of carrying out his directorial role.

In summary, the AAO finds that the record lacks key information that is essential for the purpose of determining whether the beneficiary would be employed at the petitioning entity in a qualifying managerial or executive capacity. While the AAO does not dispute the beneficiary's position with the petitioner's organizational hierarchy or the discretionary authority that is inherent to his position, these elements do not establish that the primary portion of the beneficiary's time would be allocated to performing qualifying managerial- or executive-level tasks. As noted above, these elements must be considered in light of the beneficiary's actual daily job duties. The fact that an individual manages a small business and/or assumes a managerial or executive position title does not necessarily establish that the beneficiary is eligible for classification as a multinational manager or executive under section 203(b)(1)(C) of the Act. Here, due to the lack of adequate information specifying the beneficiary's actual job duties in his proposed position with the U.S. entity, the AAO cannot conclude that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this initial reason, the petition may not be approved.

The other 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 that the two entities are 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 the present matter, the beneficiary maintains the claim that his proposed employer in the United States and his employer abroad are affiliates by virtue of their claimed common majority ownership by the same individual. The evidence submitted to support the claimed ownership of the petitioning entity included a shareholder agreement dated April 28, 2007, showing [redacted] transfer of 510 shares, or 51% of his ownership interest in the petitioning entity, to the beneficiary. The petitioner also provided stock certificate No. 3, transferring the remaining 490 of the petitioner's authorized shares to [redacted], the petitioner's claimed original owner. Although the petitioner also provided a document showing that stock certificate No. 2, which purportedly issued all 1,000 of the petitioner's authorized shares, had been canceled, the actual stock certificate No. 2 had not been submitted, nor was any explanation provided to establish the issuance and/or cancellation of stock certificate No. 1.

Additionally, the petitioner provided a copy of a promissory note, also dated April 28, 2007, establishing the beneficiary's debt obligation of $76,500 in exchange for the petitioner's transfer of 510 shares to be owned by the beneficiary. The terms of the note indicated that the beneficiary was obligated to complete his payment of the promised amount by April 28, 2008 and that failure to comply with such terms would result in the shares reverting back to [redacted], who was identified as the lender. The promissory note was accompanied by a second promissory note document in which [redacted] claimed that he received $100,000 from the petitioner during the first week of June 2007. Mr. [redacted] indicated that the funds were transferred from an account that was held by [redacted], whom the petitioner's organizational chart identified as the manager/chef. No explanation was provided to clarify why the amount that was allegedly transferred to Mr. [redacted] exceeded the purchase price by $23,500 or why the funds were transferred from an account that did not belong to the beneficiary. In other words, if the funds used to purchase an ownership interest in the petitioning entity originated from someone other than the beneficiary, it is unclear how the beneficiary can then be deemed as owner of the acquired shares.

Furthermore, the record shows that the petitioner's IRS Form 1120S for 2007, Schedule K-1, Part II, identified [redacted] as the sole shareholder owning 100% of the petitioner's stock. 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).

With regard to the ownership of the foreign entity, the petitioner provided four valuation reports, all dated July 7, 2008, assessing the values of various foreign business assets. While the beneficiary was named as an owner in all four reports, none of the reports specifically identified the beneficiary's foreign employer as the property whose value was being assessed. Furthermore, the beneficiary's specific ownership interest was not quantified in any of the documents.

In the August 21, 2009 denial, the director concluded that the petitioner's submissions were insufficient to establish the existence of a qualifying relationship between the petitioner and the beneficiary's foreign employer. The director focused on the fact that the promissory note submitted with regard to the beneficiary's purchase of the petitioner's stock was only signed by the selling/lending party, i.e., Mr. [redacted], not by the beneficiary. The director also noted that no evidence was submitted to establish the actual transfer of funds by the beneficiary in payment for the alleged ownership of the petitioner's stock and pointed out that the documents memorializing the transfers of stock that belongs to a U.S. entity were dated four months prior to the beneficiary's U.S. arrival.

On appeal, counsel disputes the director's findings, asserting that the promissory notes and stock certificates previously submitted were sufficient to establish the beneficiary's ownership of the petitioning entity. Again, the AAO finds counsel's argument to be unpersuasive in overcoming the second ground cited in the director's denial. 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)). It is further noted that 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). Thus, without evidence supporting counsel's claims, counsel's mere disagreement with the director's findings is insufficient for the purpose of establishing that the petitioner has satisfied the initial filing requirement discussed at 8 C.F.R. § 204.5(j)(3)(i)(C).

As observed by the AAO during its independent review of the petitioner's submissions, the record lacks sufficient evidence establishing who owns the foreign entity that employed the beneficiary prior to his arrival in the United States. Moreover, the record contains deficient and inconsistent documentation with regard to the ownership of the foreign entity.

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 indicated in the above discussion, the petitioner has failed to provide sufficient evidence to establish that the petitioner and the beneficiary's foreign employer were commonly owned and controlled at the time the Form I-140 was filed. Therefore, on the basis of this additional finding, the instant 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.