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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

PUBLIC COPY

[REDACTED]

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DATE: SEP 01 2011 OFFICE: TEXAS SERVICE CENTER FILE: [REDACTED]

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:

[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 limited liability company that was established in the State of Florida. The petitioner seeks to employ the beneficiary as its managing member. 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, finding the petitioner ineligible based on five independent grounds. The director concluded that the petitioner failed to meet the following eligibility criteria: 1) it failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity; 2) it failed to establish that it has the ability to pay the beneficiary's proffered wage; 3) it failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; 4) it failed to establish that it has a qualifying relationship with the beneficiary's employer abroad; and 5) it failed to establish that it had been doing business in the United States for one year prior to filing the petition. The director also noted inconsistencies between the facts presented in the Form I-140 and annexed supporting evidence and the various responses that were provided by the beneficiary during an interview that took place subsequent to the filing of the instant Form I-140.

On appeal, counsel disputes the director's findings regarding the beneficiary's credibility. It is noted, however, that counsel does not specifically address any of the five grounds of ineligibility that served as the bases 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 that will be addressed in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether sufficient evidence was submitted to establish that the beneficiary was employed abroad and 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, on behalf of the petitioner, submitted a letter dated May 6, 2005 in which he stated that in an effort to expand its business, the petitioner invested in and acquired a 10% ownership interest in an existing business called [REDACTED]. The petitioner provided two charts—one depicting the ownership breakdown of [REDACTED] and another depicting the organizational structure of the same entity.

Additionally, the petitioner provided brief statements regarding the beneficiary's employment abroad and his proposed employment with the U.S. petitioner.

With regard to the beneficiary's employment abroad, the letter indicated that the beneficiary had complete discretionary authority over company policies and procedures and directed the activities of three subordinate managers, including his wife in her position as office manager, his daughter in her position as sales and marketing manager, and a third employee in his capacity as production manager. Although the organizational chart that accompanied the job description indicated that each manager was overseeing "staff," no staff members were specifically identified by name or position title.

It is noted that no job description was provided for the beneficiary's proposed employment. The letter merely indicated that the beneficiary would continue to manage both the foreign and U.S. entities, which would involve supervising and controlling the managerial employees whose positions are directly subordinate to the beneficiary. The beneficiary indicated in the letter that the U.S. entity would be comprised of his daughter as the petitioning entity's administrative manager, her direct subordinate (whose job title was not provided), a sales and marketing manager and his two subordinates, and two construction department heads. In total, the beneficiary named seven employees, not including himself, who he claimed were part of the petitioner's organizational structure. However, a closer review of the organizational chart pertaining to [REDACTED] indicates that the employees the beneficiary listed were part of [REDACTED] organization, which is an entity that is wholly separate from the petitioner itself. As [REDACTED] is not the entity that has filed the instant Form I-140 on behalf of the beneficiary, its organizational structure and any duties the beneficiary performs directly for the benefit of this separate entity are irrelevant for the purpose of determining whether the petitioner meets the relevant statutory and regulatory eligibility requirements. The petitioner provided no evidence establishing who, if anyone, it employed at the time of filing. Therefore, the petitioner's claim at Part 5, Item 2 of the Form I-140, which indicates that the petitioner had four employees at the time of filing, is entirely unsupported. 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)).

In a decision dated May 12, 2010, the director concluded that the petitioner failed to establish that the beneficiary was either employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity. Although the director commented on various inconsistencies that were discovered during the beneficiary's interview with agents of the U.S. State Department, the director's ultimate finding directly addressed a lack of adequate evidence. Specifically, the director found that the petitioner failed to provide credible evidence clarifying its own organizational structure and the organizational structure of the foreign entity. The director explained the relevant role that staffing plays in determining a beneficiary's managerial or executive capacity, noting that an entity's limited support staff gives the director cause to question how the beneficiary can be relieved from having to primarily perform an entity's non-qualifying operational tasks. While it is true that no beneficiary is required to allocate 100% of his time to managerial-

or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to his/her proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). U.S. Citizenship and Immigration Services (USCIS) cannot assume that the beneficiary's foreign and U.S. positions primarily consist of qualifying managerial or executive tasks when the petitioner fails to provide evidence establishing who within these entities carried or carries out the daily operational tasks.

Additionally, with regard to the beneficiary's proposed position with the U.S. entity, the director noted that the petitioner failed to provide specific information that would convey a meaningful understanding of the actual job duties the beneficiary would perform on a daily basis.

On appeal, while counsel generally disputes the director's decision, he does so by attempting to invalidate the State Department's adverse findings regarding the beneficiary's credibility. Counsel does not provide statements expressly addressing the eligibility factors, nor is the record supplemented with any evidence, including valid and credible documentation of the petitioner's organizational structure at the time of filing or the foreign entity's organizational structure at the time of the beneficiary's claimed employment abroad, to refute the director's findings. 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).

In the present matter, no objective evidence has been submitted. As previously stated, counsel's attempt to discredit the validity of the State Department's report is not effective. Contrary to counsel's apparent misconception, the federal rules of evidence do not apply to the current administrative proceeding that seeks to determine the beneficiary's eligibility for the immigration benefit sought herein. While the beneficiary's credibility was indeed subject to doubt based on his prior interview with agents of the State Department, the petitioner was in no way precluded from providing objective evidence to rebuild the beneficiary's credibility and to validate the claims that were put forth in the petitioner's Form I-140.

Additionally, with regard to the director's decision to deny the petition without issuing either a request for evidence or a notice of intent to deny, the AAO notes that the director acted well within the discretionary authority bestowed upon him by the regulation at 8 C.F.R. § 103.2(b)(8). The AAO further notes that the appeal process itself provides the petitioner with the opportunity to supplement the record with new evidence to overcome any adverse findings and prove that the eligibility requirements have been met. As the petitioner has failed to submit such evidence on appeal, the AAO cannot conclude that the beneficiary was either employed abroad or that he would be employed by the U.S. entity in a qualifying managerial or executive capacity.

The third issue to be addressed in the proceeding is whether the petitioner has established its 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 the May 12, 2010 decision, the director determined that the petitioner failed to provide any of the three forms of documentation specified in the above regulation and therefore did not establish its ability to pay the wage offered. The director specifically noted that the unaudited profit and loss statement provided for a non-petitioning entity—[REDACTED]—does not establish that the petitioner is able to pay the beneficiary's proffered wage.

On appeal, counsel asserts that a 2004 USCIS memorandum requires the issuance of an RFE when evidence of ability to pay is missing. Counsel's assertion, however, lacks merit for two reasons. First, USCIS memoranda merely articulate internal guidelines for service personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)). Second, 8 C.F.R. § 103.2(b)(8), which governs the issuance of an RFE or NOID, was revised effective June 18, 2007 thereby granting the director authority to deny a petition without issuing either notice prior to denial. The AAO further notes that, despite having the opportunity to provide supplemental evidence on appeal, the petitioner has not supplemented the record with the required documentation. Counsel's argument does not rectify the documentary deficiency. Therefore, on the basis of this third adverse finding, the instant petition cannot be approved.

The fourth 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 the present matter, the beneficiary claims that the petitioner and the beneficiary's employer abroad are affiliates by virtue of the beneficiary owing a majority of the ownership interests in both entities. Supporting evidence includes the foreign entity's articles of association with an annexed subscription notice dated July 27, 2004 showing that the beneficiary agreed to be the subscriber of one share of the foreign entity's stock. With regard to the U.S. entity, the record includes the petitioner's articles of organization, filed on April 20, 2004, showing that the U.S. entity is a manager-operated organization. The record also includes membership certificate no. 1, dated April 20, 2004, naming [REDACTED] as a member of the petitioning entity, and membership certificate no. 2 naming the beneficiary as a member of the petitioning entity. The ledger showing these two transactions indicates that each member was issued 100 units of the petitioning entity.

The AAO notes that the above documentation with regard to the ownership of the petitioning entity is inconsistent with the May 6, 2005 support statement in which the beneficiary stated that the petitioner was formed on April 20, 2004 as a subsidiary of [REDACTED]. In the same support letter, the beneficiary stated that on April 29, 2004 he entered into an agreement with [REDACTED] wherein he agreed to purchase 90% of the petitioning entity for \$120,000. However, neither of the beneficiary's statements is corroborated by the evidence of record. Rather, these statements are contradicted by the membership certificates and ledger memorializing the issuance of those certificates, all of which indicate that the petitioner was owned and managed by two individuals, not by another entity. In fact, there is no evidence at all showing that [REDACTED] was ever in possession of any of the petitioner's membership units. Although the record contains agreements purporting to sell the beneficiary ownership interest in [REDACTED] these documents, even if valid and credible, would be irrelevant to the separate issue of the petitioner's ownership. As noted above, the petitioner must resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. It is further noted that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

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; 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 the petitioner did not resolve the considerable inconsistencies with regard to its ownership, the AAO concludes that the petitioner has failed to meet the filing criterion at 8 C.F.R. § 204.5(j)(3)(i)(C).

The final issue to be addressed in this proceeding is whether the petitioner met the filing criterion discussed at 8 C.F.R. § 204.5(j)(3)(i)(D), which requires that the petitioner provide evidence to establish that it has been

doing business for at least one year prior to filing the Form I-140. 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."

In the present matter, while the petitioner submitted documentation showing the business activity of [REDACTED] as previously noted, [REDACTED] is not the petitioning entity in the present matter. As such, its business activity, or lack thereof, is entirely irrelevant for the purpose of determining whether the petitioner qualifies for the immigration benefit sought in this proceeding. Accordingly, the petition must be denied on the basis of this fifth and final ground of ineligibility.

With regard to issues concerning the petitioner's credibility, the AAO notes that 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). However, 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. In this case, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of the beneficiary's eligibility is not credible. Accordingly, the petitioner has not established the beneficiary's eligibility for the requested immigrant visa classification.

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.