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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

DATE: **SEP 29 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:

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 director of sales. 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 the determination that the ownership breakdown of the beneficiary's foreign and U.S. employers does not amount to a qualifying relationship as defined by regulation.

On appeal, the petitioner disputes the director's decision and claims that the two entities do have a qualifying relationship despite the fact that the U.S. entity has one more owner than the foreign entity.

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 the statement dated May 18, 2007, which was appended to the Form I-140, the petitioner stated that the U.S. and foreign entities are affiliates by virtue of having two common owners. Specifically, the petitioner indicated that it is owned by three individuals each owning approximately one third of the petitioner's stock, while the foreign entity is owned by two individuals in equal shares where both owners of the foreign entity also own a portion of the U.S. entity. Additionally, article five of the petitioner's articles of incorporation shows that the petitioner issued 170 shares of its stock to [REDACTED] and 165 shares each to the beneficiary and to [REDACTED]. Although the petitioner also provided documents pertaining to the foreign entity, none were accompanied by certified English language translations as required by 8 C.F.R. § 103.2(b)(3).

On March 13, 2009, the director issued a notice of his intent to deny (NOID) the petition, instructing the petitioner to provide additional documentation to establish that the beneficiary's U.S. and foreign employers have either an affiliate or a parent-subsidiary relationship.

In response, the petitioner provided a statement dated April 9, 2009. The petitioner claimed to be the subsidiary entity in a parent-subsidiary relationship with the beneficiary's foreign employer. The petitioner resubmitted the foreign documents that were previously submitted in support of the Form I-140 and requested an additional twelve weeks in which to provide foreign language translations.

The record shows that the petition was not denied until November 3, 2009, which is approximately eight months after the NOID was issued. There is no indication that the petitioner supplemented the record with additional documentation addressing the foreign entity's ownership. Notwithstanding the lack of certified translations of documents pertaining to the foreign entity's ownership, the director took note of the foreign documentation, determining that the foreign entity is 50/50 owned by the beneficiary and Sergio Albuquerque. In light of this determination, the director concluded that the U.S. and foreign entities do not

have a qualifying relationship, despite the fact that the two entities "share some common ownership." The director specified that the two entities are not owned by the same group of individuals.

On appeal, the petitioner restates the definitions for affiliate and subsidiary and asserts that a qualifying relationship is apparent in light of the similar name shared by the foreign and U.S. entities and the information provided in each entity's articles of incorporation. The petitioner also asserts that the director acknowledged that the U.S. and foreign entities are owned by the same group of individuals with the exception of the additional owner in the U.S. entity's ownership scheme.

Based on a review of the record, the AAO finds that the petitioner's statements are not persuasive and fail to overcome the basis for denial.

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, while the director took notice of the petitioner's untranslated documents with regard to the foreign entity, the AAO cannot overlook the petitioner's failure to resolve a documentary deficiency by not providing translations to foreign documents that pertain to the foreign entity's ownership. More simply put, the petitioner's failure to submit certified translations of the documents precludes the AAO from being able to determine whether the untranslated documents support the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the AAO finds that such evidence is not probative and will not be accorded any weight in this proceeding.

Notwithstanding the above adverse finding, even if the AAO chose to adopt the director's interpretation of the foreign documents that address ownership of the foreign entity, the ownership breakdowns of the U.S. and foreign employers shows that the two entities do not have an affiliate relationship as claimed. After applying subsection (B) of the definition for affiliate, the AAO cannot conclude that the petitioner is one of two legal entities that is owned and controlled by the same group of individuals with each individual owning and controlling approximately the same share or proportion of each entity. While the petitioner is owned by three individuals with each individual owning approximately one third, or less than 50% of the entity, according to the director's interpretation of the foreign documents, the foreign entity's ownership is evenly split between two individuals each of whom owns 50% of that entity. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals control both entities. Thus, despite the fact that the two individuals who purportedly own the foreign entity also own a portion of the U.S. entity, the two ownership schemes are distinctly different and do not meet the definition of affiliate. Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations and on the basis of this conclusion, the instant petition cannot be approved.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision. Specifically, the AAO finds that the petitioner failed to establish that the beneficiary was employed abroad and that he would be employed in the United States in a qualifying managerial or executive capacity. Although the petitioner provided a percentage breakdown of the beneficiary's broad job responsibilities with each entity, neither description is adequately detailed with specific job duties that convey a meaningful understanding of the managerial- or executive-level tasks that comprised and would comprise the primary portion of the beneficiary's time. The AAO further notes that any time spent directly communicating with customers and vendors is deemed as time spent carrying out operational tasks, not tasks within a qualifying capacity.

Additionally, with regard to the proposed employer, the record lacks evidence to establish the petitioner's staffing composition. The AAO is therefore unable to determine whether the petitioner's staff of four individuals was sufficient to relieve the beneficiary from having to primarily perform non-qualifying tasks at the time the petition was filed. 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 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).

With regard to the beneficiary's foreign employment, while the petitioner indicated that 40% of the beneficiary's time was allocated to supervising subordinates, no evidence was provided to establish that such subordinates were managerial, supervisory, or professional employees.

As previously noted, the burden is on the petitioner to establish that the beneficiary's employment abroad and his proposed employment with the U.S. entity consists of tasks that are primarily within a qualifying capacity. In the present matter, the petitioner has not provided sufficient documentation to meet this evidentiary burden.

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 grounds 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.