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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**

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AUG 14 2012

OFFICE: TEXAS SERVICE CENTER

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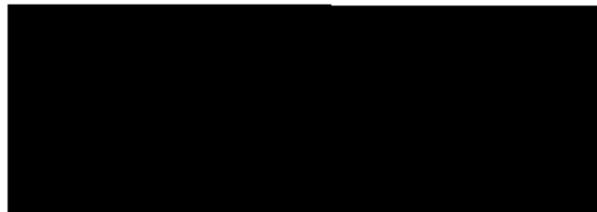
Petitioner:

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:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 initially approved by the Director, Texas Service Center. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice of his intention to revoke the approval of the preference visa petition, and his reasons therefore.¹ The director ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation which claimed five employees at the time of filing the petition and currently seeks to employ the beneficiary as its executive vice president. 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 petitioner was established in 1995 and filed the present petition on January 15, 1998. The director approved the petition on November 25, 1998. In 2010, upon further review of the record, the director determined that the petitioner failed to provide sufficient probative and reliable evidence to establish that it has a qualifying relationship with the beneficiary's claimed foreign employer. The director therefore revoked the petition on June 25, 2010.

On appeal, counsel disputes the director's findings, contending that U.S. Citizenship and Immigration Services (USCIS) issued adverse findings against the petitioner based on evidence pertaining to the petitioner's prior counsel. Counsel provides additional evidence in an attempt to overcome the revocation.

I. The Law

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

¹ Among other issues, the director observed in the notice that the petitioner's previous counsel, [REDACTED] had been convicted of immigration fraud in 2009. Specifically, on August 24, 2009, a judgment in a criminal case was entered in the U.S. District Court for the Southern District of Texas, Houston Division, after Mr. [REDACTED] pleaded guilty to conspiracy to engage in visa fraud, encouraging and inducing aliens for the purpose of commercial advantage and private financial gain to come to the United States, making false statements, and money laundering.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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.

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.

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

II. Qualifying Relationship

The primary issue in this matter is whether the petitioner has submitted sufficient credible evidence to establish that it had at the time of filing, and continues to have, a qualifying relationship with Tianjin New World Stationary & Sporting Goods, Co. Ltd., the beneficiary's claimed foreign employer.

In support of the Form I-140, the petitioner provided ownership evidence in the form of two photocopied stock certificates, dated November 30, 1995, which indicated that the petitioner issued a total of 100,000 shares of its stock—60,000 shares to the foreign entity named above and another 40,000 shares to [REDACTED]—giving the beneficiary's claimed foreign employer majority ownership and control of the petitioning entity.

The petitioner also provided numerous tax documents, including a copy of its 1996 tax return complete with relevant schedules. Schedule K, No. 5 shows that the petitioner claimed to be 100% owned by a single individual, partnership, corporation, estate or trust and Schedule K, No. 10(a) specified that the owning party was foreign. A supplement to Schedule K and Form 5472 both named the beneficiary's claimed foreign employer as the entity that owns the petitioner. Part IV of Form 5472 further indicates that the petitioner borrowed a total of \$2,750 from its foreign owner, but received no other consideration or goods such as inventory. Lastly, Schedule L, No. 22(b) of the same tax return shows that the petitioner received \$5,000 in exchange for issuance of its stock.

Although the director approved the petitioner's Form I-140, upon further review and upon learning certain information about the petitioner's prior counsel, who filed the Form I-140 and submitted evidence on the petitioner's behalf, the director determined that the petition may have been approved in error and therefore issued a notice, dated May 7, 2010, informing the petitioner of the intent to revoke (NOIR) the prior approval and the reasons therefore. One of the director's observations was made with regard to the tax return (described above) which the petitioner provided in support of the Form I-140.² The director pointed out that the information concerning the petitioner's ownership, found on Form 5472 of the return, was handwritten, in contrast to the remainder of the return, where the information was typed. The director also made note of the fact that the petitioner submitted only copies of stock certificates to establish its alleged qualifying relationship with the foreign entity and questioned why the petitioner's state Franchise Tax Public Information Report, filed on January 13, 2005, did not make any mention of any companies that owned 10% or more of the petitioning entity. The director deemed the validity of the petitioner's Form I-140 as suspect in light of the fraudulent actions of the petitioner's former attorney, who was convicted of conspiracy to engage

² Although the director referred to the petitioner's submission of a 1997 tax return, the record shows that the tax return that the petitioner submitted in support of the Form I-140 was for the 1996 tax year, which covered a seven-month time period that commenced on November 28, 1996 and ended on June 30, 1997.

in visa fraud. The director also relied on a Google search and Dun and Bradstreet report, which he claimed made no mention of the petitioner's alleged foreign ownership.

In response, current counsel for the petitioner provided a statement dated June 3, 2010 in which he asserted that the stock certificate that was issued by the petitioner on November 30, 1995 established the foreign entity as the petitioner's majority owner. Counsel dismissed the director's findings based on the Google search and the Dun and Bradstreet report, claiming that both mediums are sources for general information. Counsel urged the director to review the petitioner's IRS Form 5472 from year 2000 to 2001 and the Amended Texas Franchise Tax forms from 2004 to 2010.

After reviewing the petitioner's record, the director determined that neither counsel's statements nor the supplemental documents provided by the petitioner were sufficient to overcome the adverse information and issues of credibility that stemmed from the petitioner's prior counsel's conviction regarding visa fraud. The director therefore issued a notice of revocation dated June 25, 2010.

On appeal, counsel restates his objection to the director's reliance on a Google search and Dun and Bradstreet report and urges the AAO to refrain from unduly relying on the conviction of the petitioner's prior counsel when making a determination as to the petitioner's eligibility. Counsel points to the stock certificates that the petitioner originally issued and asks the AAO to consider a previously filed assumed name certificate and company letterhead in determining whether the requisite qualifying relationship has been established. Counsel further contends that there is no requirement that the information in the petitioner's tax returns must be typewritten and contends that having portions of the document handwritten should not lead to questions concerning the validity of said document.

After reviewing the record in its entirety, the AAO finds that the petitioner has failed to provide sufficient evidence to establish that it has a qualifying relationship with the beneficiary's alleged foreign employer. The petitioner has failed to overcome the inconsistencies and deficiencies in the record of proceeding.

Generally, with regard to revocations, section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In Matter of Esteime, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

In the present matter, the record shows that the director properly issued the NOIR. In light of the fraudulent acts committed by the petitioner's prior counsel, the director had good and sufficient cause to issue a notice of intent to revoke on the claimed qualifying relationship between the petitioner and a foreign entity, particularly given that the petitioner provided little more than two photocopied stock certificates to corroborate its claimed ownership. While the criminal conviction of the petitioner's prior counsel, by itself, is not sufficient to invalidate the petitioner's assertions of fact, it was reasonable for the director to look beyond the mere assertions of counsel and the petitioner's internally generated stock certificates for evidence of the claimed qualifying relationship.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

Here, the petitioner relied on its stock certificates as primary evidence of its qualifying relationship. However, when comparing the information provided in the stock certificates with the information provided by the petitioner in Schedule K of its 1996 tax return, the AAO finds that the two documents are at odds with one another. While the stock certificates indicate that the petitioner has two owners, one being the foreign entity where the beneficiary was allegedly employed, the information found in the 1996 tax return shows the foreign entity as the petitioner's sole owner. This information is restated again in Form 5472 of the same tax return, despite the stock certificates that were previously issued. While both documents name the same foreign entity as its majority owner, thus seemingly meeting the requirements of a parent-subsidary relationship, the AAO cannot discount the overall significance of this inconsistency in terms of the petitioner's credibility.

It is further noted that the petitioner did not explain why the 1996 IRS Form 1120 was typewritten, while the IRS Form 5472, Information Return of a 25% Foreign Owned U.S. Corporation, was handwritten. On appeal, counsel simply accuses the director of "manufactur[ing] a requirement that hand written information in the 1997 [sic] federal tax return somehow weakens the validity of the supporting document." Neither the petitioner nor counsel explains why the document is visibly and demonstrably different from the other accountant-prepared tax forms. Such inconsistencies might have been resolved by evidence such as an IRS-certified copy of the 2006 tax return, demonstrating that the tax forms were actually filed as represented. By leaving the discrepancies unexplained, the petitioner allows the director and the AAO to conclude that the IRS Form 5472 was not concurrently prepared along with the IRS Form 1120, or that it may have been materially altered since the filing of the original tax return.

To determine whether a stockholder maintains ownership and control of a corporate entity, USCIS will typically look to the stock certificates, corporate stock certificate ledger, stock certificate registry, articles of incorporation, corporate bylaws, and the minutes of relevant annual shareholder meetings. These records will document the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 362.

In the present matter, the petitioner submitted the articles of incorporation which, at Article IV, limit the corporation to the issuance of 1,000 shares of common stock at a par value of one dollar (\$1). This is in direct conflict with the stock certificates which purport to represent 100,000 shares of stock. Additionally, at a par value of one dollar per share, the AAO would expect to see an entry for \$100,000 on Schedule L, line no. 22(b), of the IRS Form 1120, rather than the \$5,000 of common stock that is represented on the form. Finally, as noted by the director, the petitioner submitted a document titled "Ratification and Consent in Lieu of Organizational Meeting," but the document was signed more than a year after the event that the document purports to memorialize.

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). Moreover, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Furthermore, with regard to counsel's claim that the foreign entity "supplied [the petitioner with] goods, salaries, human resources, supply chain services, and supporting manufacturing capabilities," the AAO notes that without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. 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). This claim is also in conflict with the 1996 IRS Form 5472, which indicates that the petitioner borrowed a total of \$2,750 from its foreign owner, but received no other consideration or goods such as inventory.

In proceedings to revoke the approval of a visa petition, the burden of proof to establish eligibility for the benefit sought is on the petitioner. *Id.* at 589; *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968); *see also Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The Board's decision in *Matter of Ho* further clarified that, by itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho, supra* at 590.

In the present matter, the record lacked sufficient reliable evidence of a qualifying relationship between the petitioner and the named 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 (Assoc. Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19

I&N Dec. 362; *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 failed to provide adequate documentation establishing its ownership, the AAO concludes that the record lacks one of the key elements necessary to establish the existence of a qualifying relationship. Therefore, on the basis of this conclusion, the instant petition cannot be approved.

III. Beyond the Decision of the Director

Additionally, while this decision will be based entirely on the findings discussed above, the record indicates that there is further evidence of ineligibility that was not previously addressed in the director's decision.

Specifically, the record indicates that the petitioner failed to establish that the beneficiary meets the foreign employment requirements set out in 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. The record further indicates that the petitioner failed to provide sufficient evidence showing that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

Turning first to the issue of the beneficiary's employment abroad, the AAO notes that the petitioner did not provide any supporting evidence from the foreign entity to verify the beneficiary's claimed period of employment from June 1993 to 1996. Next, in reviewing the job description that the petitioner provided in its January 14, 1998 support statement, the AAO finds that the percentage breakdown of the beneficiary's duties does not establish that the beneficiary's time was primarily allocated to the performance of tasks within a qualifying managerial or executive capacity. Namely, the beneficiary's alleged employment with the foreign entity involved such tasks as preparing balance sheets, preparing profit and loss statements, conducting various types of audits, and representing the company before government agencies. Cumulatively, these administrative and operational tasks consumed approximately 50% of the beneficiary's time.

Although the petitioner stated that another 50% of the beneficiary's time was allocated to directing and coordinating the work of employees in general accounting and accounts and records, the petitioner only generally indicated that the beneficiary supervised the work of supervisory personnel; the petitioner did not, however, provide any information about the subordinates' job titles, job duties, or respective placements within the foreign entity's organizational chart such that would support the claims 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)). Moreover, the petitioner did not specify the actual supervisory tasks the beneficiary performed in the course of daily business.

In light of the above, the record indicates that the petitioner failed to establish that the requirements set out in 8 C.F.R. § 204.5(j)(3)(i)(A) had been met.

Finally, turning to the issue of the beneficiary's proposed employment with the U.S. entity, the AAO first notes the discrepancy between the organizational chart that was submitted in support of the Form I-140, where the petitioner illustrated a hierarchy consisting of six employees, and the information provided in the Form I-140 itself, where the petitioner claimed to have had a total of five employees at the time of filing. As previously noted, the petitioner is expected to resolve any inconsistencies in the record by submitting 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. at 591-92.

Furthermore, after examining the percentage breakdown offered in the support statement, the AAO finds that the petitioner provided overly generalized information without disclosing what actual tasks the beneficiary would perform on a daily basis. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Accordingly, published case law supports the pivotal role of a clearly defined job description, as the actual duties themselves reveal the true nature of the employment. *Id.*

When a petitioner relies on vague generalities to describe a given position, the only element that is conveyed clearly is the beneficiary's discretionary authority. However, merely establishing that the beneficiary is in charge of personnel and/or business matters does not exclude the possibility that the beneficiary is heavily engaged in the performance of non-qualifying operational tasks, particularly when the size of the support staff is limited. While a determination of the beneficiary's employment capacity will not be based on staffing size alone, this factor is highly relevant and should be considered, as it allows the AAO to determine the extent to which the petitioner is capable of relieving the beneficiary from having to primarily perform tasks of a non-qualifying nature.

It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15.

In the present matter, the deficient information concerning the beneficiary's proposed employment does not lead to the conclusion that the beneficiary would more likely than not be engaged primarily in the performance of tasks within a qualifying managerial or executive capacity. As the petitioner failed to meet this crucial statutory requirement, the AAO finds that the petition was approved in error on this basis as well.

Thus, even if the petitioner had been able to overcome the single ground cited in the original NOIR, this matter would nevertheless have been remanded to the director for possible revocation on the two remaining grounds that were discussed above. Regardless, the petitioner failed to overcome the adverse conclusion that

was originally addressed in director's NOIR and the approval of the instant petition will be revoked on that basis.

IV. Conclusion

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.