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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: FEB 21 2012

OFFICE: NEBRASKA SERVICE CENTER

IN RE: 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 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, Nebraska 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 a multinational 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.

In support of the Form I-140 the petitioner submitted a statement from counsel dated February 3, 2009 in which counsel stated that the beneficiary was ready to become president of the petitioning organization and to “assume all responsibility of being the chief executive of the entire world of [REDACTED]” Counsel did not explain what was meant by “entire world of [REDACTED],” but went on to discuss a Venezuelan entity, [REDACTED], where the beneficiary was previously employed and in which the beneficiary was claimed to be the majority stockholder. Counsel stated that the beneficiary is also the majority stockholder of the petitioning entity and that the beneficiary’s foreign and U.S. employers are therefore part of a parent-subsidiary relationship. The petitioner also provided supporting documents, including corporate and financial documents pertaining to both entities, an untitled organizational chart, tax returns pertaining to the petitioner and other U.S. entities, and untranslated foreign print advertisements.

After reviewing the record, the director determined that the petition did not warrant approval based on the following grounds: 1) the petitioner failed to establish that it has a qualifying relationship with the beneficiary’s foreign employer; 2) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; 3) the petitioner failed to establish that the petitioner would employ the beneficiary in the United States in a qualifying managerial or executive capacity; and 4) the petitioner failed to establish that it had the ability to pay the beneficiary’s proffered wage as of the date the petition was filed. The director therefore issued a decision dated February 10, 2010 denying the petition.

The director properly observed that the beneficiary’s recent promotion to president of the foreign entity is irrelevant to the issue of whether the beneficiary was employed abroad in a qualifying capacity prior to his arrival to work for the U.S. petitioner. 8 C.F.R. § 204.5(j)(3)(i)(B). The director was also correct in questioning the relevance of describing the beneficiary’s current position as president of the U.S. petitioner in light of the claim made at Part 6, Item 1 of the Form I-140, where the petitioner indicated that the beneficiary’s proposed position is that of marketing and electronic media director, not president, of the petitioning entity. Lastly, in addressing the issue of the petitioner’s ability to pay, the director observed that the petitioner submitted tax returns pertaining to a number of different U.S. entities. The director declined to consider documents pertaining to any entity other than the petitioner, noting that only those documents that pertain specifically to the petitioning entity are relevant in determining the petitioner’s ability to pay.

On appeal, the petitioner provides a statement from counsel disputing the denial and contending that the petitioner meets the relevant regulatory requirements. Counsel also provides a supplemental description of the beneficiary’s position as president of the petitioning U.S. entity, claiming that the beneficiary is employed in a qualifying managerial capacity. Counsel also challenges the director’s conclusion with regard to the petitioner’s ability to pay claiming that the beneficiary has received the proffered wage.

Although counsel states that the beneficiary currently serves as the foreign entity’s president in addition to his position as president of the petitioning entity, counsel fails to address the critical issue concerning the

beneficiary's position abroad prior to his entry to the United States to work for the U.S. petitioner. 8 C.F.R. § 204.5(j)(3)(i)(B). In light of counsel's failure to address the issue of the beneficiary's employment abroad prior to his arrival to the United States, the AAO finds that counsel has effectively conceded the director's adverse conclusion with regard to the beneficiary's employment abroad and the appeal will be dismissed on the basis of this initial finding. The discussion below will therefore focus on the three remaining grounds that were cited in the director's decision.

It is noted that all of the petitioner's submissions have been reviewed and all relevant documentation that pertains to the beneficiary's proposed employment will be 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 to be addressed in this proceeding is the beneficiary's employment capacity in his proposed position with the petitioning U.S. entity. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that the beneficiary's proffered position fits the statutory definition of 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.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). This information is highly probative, as 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).

In the present matter, the record lacks relevant information that specifically pertains to the position being offered, i.e., the position of marketing and electronic media director. Rather, counsel focuses almost entirely on the beneficiary's current position as president of the petitioning entity and in fact supplements the record on appeal with a percentage breakdown that provides additional information about that position, rather than his proposed position of marketing and electronic media director. However, such information is devoid of any probative value, as the petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the

petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by counsel on appeal does not clarify or provide more specificity about the job duties of the position being offered, but rather adds new generic duties to a job description that pertains to an entirely different position, one that is not cited in the petitioner's Form I-140. In light of these deficiencies, the AAO is unable to conduct an analysis of the proffered opposition and thus cannot determine whether this position meets the statutory criteria specified above. Based on this second adverse finding, the AAO cannot approve the petition in the present matter.

The next issue to be addressed in this proceeding is whether the petitioner has submitted sufficient evidence to establish that it 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;

* * *

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.

The director pointed out that the supporting evidence submitted with the Form I-140 indicated that the beneficiary owns 10% of the foreign employer. The director also pointed out that no evidence was submitted to establish ownership of the petitioning entity and that as a result no conclusion could be made as to whether a qualifying relationship exists between the petitioner and the beneficiary's foreign employer.

To the extent that the director's conclusion is based on the lack of evidence documenting the petitioner's ownership, the AAO finds that the director's analysis was incorrect. While the director accurately pointed out that the petitioner did not provide evidence of its ownership in support of the instant petition, the petitioner's consolidated record of proceedings contains evidence that the petitioner provided in support of a previously filed immigrant petition (with receipt number [REDACTED]). Namely, in support of the earlier petition, the petitioner submitted a photocopy of a single stock certificate, dated September 18, 2002, which names the beneficiary as the owner of 1,000 shares of the petitioner's stock. In support of the same petition, the

petitioner also provided a copy of its articles of incorporation showing that the petitioner is authorized to issue a maximum of 1,000 shares of stock, thus indicating that the beneficiary is the petitioner's sole shareholder.

On appeal, counsel asserts that the petitioner is a subsidiary of the beneficiary's foreign employer and further asserts that evidence in support of this claim was previously submitted in connection with a nonimmigrant L-1A petition filed by the same petitioner. The AAO finds that counsel's statements are inconsistent with the evidence that the petitioner submitted earlier in support of the previously filed Form I-140. 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). A review of the record shows that the petitioner has not provided any documentation sufficient to address and resolve the inconsistency described herein. Moreover, regardless of the inconsistency, the evidence that is contained in the instant record shows that while the beneficiary is the sole shareholder of the petitioning entity, he owns only 10% of the foreign entity where he was previously employed.

In light of the above, the AAO finds that the petitioner does not meet the criteria listed under the regulatory definitions for affiliate or subsidiary and on the basis of this third adverse finding the instant petition cannot be approved.

Finally, the remaining issue concerns the petitioner's ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states, 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary.

In the present matter, while counsel claims on appeal that the petitioner has paid the beneficiary the proffered wage, no evidence has been submitted in support of this claim. 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)). 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).

Although the AAO may examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses, as an alternate means of determining the

petitioner's ability to pay, the petitioner has provided only the petitioner's 2006 and 2007 tax returns. As the instant Form I-140 was filed on March 27, 2009, tax returns that address the petitioner's financial status in 2006 and 2007 have no probative value, as they cannot be used to ascertain the petitioner's ability to pay the proffered wage as of the date the petition was filed. In light of the petitioner's failure to provide relevant supporting evidence, the AAO cannot conclude that the petitioner had the ability to pay the beneficiary's proffered wage at the time of filing and on the basis of this final conclusion this petition will not be approved.

Accordingly, 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.