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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



B4

DATE: JAN 10 2012

OFFICE: TEXAS 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, 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 organized in the State of North Carolina. It seeks to employ the beneficiary as its executive 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 five independent adverse findings. Of the five adverse findings, four are based on requirements that are mandated by statute, regulation, or both. Namely, the director determined that the petitioner failed to establish that 1) the beneficiary was employed abroad in a qualifying managerial or executive capacity; 2) the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; 3) the petitioner has a qualifying relationship with the beneficiary's foreign employer; and 4) the petitioner had not been doing business for one full year prior to the date the Form I-140 was filed. The director also cited a fifth ground as a basis for denial, concluding that the petitioner failed to establish that it has an employer-employee relationship with the beneficiary.

On appeal, counsel disputes the director's decision and contends that the director's findings are erroneous. After careful consideration of the petitioner's submissions the AAO finds that the record contains sufficient evidence to establish that the petitioner had been doing business for the requisite one-year period prior to filing the instant petition. Therefore, the AAO hereby withdraws the fourth ground as a basis for denial. Counsel's arguments with regard to the remaining grounds, as well as other relevant evidence on record, will be duly 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 two issues that the AAO will address in this proceeding call for an analysis of the beneficiary's employment abroad as well as his proposed employment with the U.S. entity. The AAO will discuss the evidence submitted in order to determine whether the primary portion of the beneficiary's time in both positions was and would be allocated to tasks within 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 petitioner submitted a letter dated July 14, 2009, which included brief descriptions of the beneficiary's foreign and proposed employment. As the director restated the description of the beneficiary's employment abroad, this information will not be repeated. With regard to the beneficiary's proposed employment with the U.S. entity, the petitioner stated that the beneficiary will engage in negotiations with vendors and hotel owners to expand the petitioner's business. The petitioner indicated that the beneficiary's responsibilities include conferring with attorneys and accountants; directing and coordinating financial and budget activities to fund operations and maximize investments; communicating directly with business owners in order to coordinate funds and resolve problems; evaluating the performance of the client companies and their respective staff in order to determine what necessary changes need to be made in terms of policy and cost reduction; directing, planning, and implementing policies and objectives of client companies to maximize their return on investments and increase productivity; directing and coordinating pricing, sales, and marketing; negotiating or approving contracts with suppliers, distributors, and other related parties; reviewing reports submitted by managers; appointing department managers and delegating responsibilities; and, when the business attains a certain level of success, the beneficiary will establish a marketing department and direct marketing activities.

On September 14, 2009, the director issued a notice of his intent to deny the petition (NOID) informing the petitioner that the initially submitted supporting evidence failed to establish the beneficiary's qualifying employment with the foreign and U.S. employers. With respect to the beneficiary's foreign employment, the director restated the beneficiary's job description and determined that the information provided was overly broad and conveyed only the beneficiary's degree of discretionary authority rather than the actual tasks the beneficiary performed on a daily basis. With respect to the beneficiary's proposed position with the U.S. entity, the director noted that the petitioner has a total of two employees and determined that the petitioner's staffing arrangement would require the beneficiary to primarily partake in executing the petitioner's daily operational tasks rather than allowing the beneficiary to limit his role to performing primarily qualifying managerial- or executive-level tasks. The petitioner allowed the opportunity to provide additional evidence to overcome the director's adverse findings.

In response, the petitioner provided a statement from counsel dated October 16, 2009, stating that the beneficiary was employed abroad in a managerial capacity and that he would be employed in the United States "as an executive in a managerial capacity." With respect to the employment abroad, counsel further stated that the beneficiary hired, occasionally trained, and managed employees. The beneficiary also managed and supervised the foreign entity's marketing strategy by directing commercials and promoting the foreign business to farmers, wholesalers, and distributors. Counsel claimed that while the beneficiary performed some managerial duties in his role as part owner of the foreign entity, he also performed some executive duties in his effort to market the company and act as its representative. As additional evidence, the petitioner provided a statement, signed by each of the foreign entity's owners, further explaining the beneficiary's role within the foreign entity. As the director's decision incorporates information that was provided in the foreign entity's statement, such information need not be repeated here.

With regard to the beneficiary's proposed employment, counsel challenged the director's finding that the petitioner's staff is limited to two employees, claiming that the petitioner employs two managers who oversee twelve other employees. Counsel claimed that the beneficiary is relieved from having to perform non-qualifying tasks and stated that the beneficiary's role is limited to promoting the business, overseeing the operations and expansion, and seeking out additional management opportunities. Counsel pointed out that under the beneficiary's management, the Days Inn, which the petitioner is contracted to manage, has

undergone significant restructuring and renovation and has experienced steady financial growth as a result. As additional supporting evidence, the petitioner provided an organizational chart, which depicts the beneficiary at the top of a hierarchy that consists of two hotel managers, both under the beneficiary's direct supervision, followed by a full hotel staff.

On November 3, 2009, the director issued a decision denying the petitioner's Form I-140. The director referred to the support letter that was submitted by the partners of the foreign entity and determined that the information provided therein further indicates that the beneficiary did not primarily allocate his time to tasks of a qualifying nature. The director determined that the beneficiary's direct role in setting up and implementing various automated technology, assisting with and negotiating for the wholesale of poultry, and his direct involvement in addressing feeding issues indicate that the beneficiary allocated considerable portions of his time to the performance of non-qualifying operational tasks.

In addressing the beneficiary's proposed employment, the director discussed the organizational chart that was submitted in the response to the NOID. The director noted that the individuals depicted in the chart do not appear to be the petitioner's employees, but rather the employees of the establishment, i.e., [REDACTED] which the petitioning entity was contracted to manage. The director analyzed the organizational chart in light of a quarterly tax return that the petitioner submitted earlier in this proceeding and determined that the record lacks evidence to establish that the individuals listed in the chart are the petitioner's employees. The director further noted that the petitioner erroneously focused on the services the beneficiary directly provides to the [REDACTED] despite the fact that [REDACTED] is not the entity that has filed the instant Form I-140.

On appeal, counsel challenges the director's findings claiming that the beneficiary's role with the foreign entity was that of a function manager and that the beneficiary therefore did not need to show that he was overseeing employees. Counsel asserts that the director must properly weigh the beneficiary's role in bringing the foreign organization to a higher level of sophistication and claims that the beneficiary managed the initiatives that allowed the foreign entity to progress. Counsel also states that the director was overly critical of the verbs that were used to describe the beneficiary's initiatives and claims that the beneficiary focused on overseeing departments, while the employees within those departments were supervised by department managers.

The AAO finds that counsel's statements are unpersuasive and fail to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

First, the AAO notes that while the beneficiary's initiatives and contributions to the foreign entity are certainly relevant in evaluating his employment capacity, the beneficiary's significance to the organization as a whole does not outweigh the statutory requirement that qualifying employment within a managerial or executive capacity must primarily consist of job duties that are at a managerial or executive level. 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 beneficiary's non-qualifying tasks are only incidental to his 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).

Additionally, in assessing the petitioner's claim that the beneficiary was a function manager in his position with the foreign entity, it must be noted that the term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written statement that clearly describes the beneficiary's duties, i.e., the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *managed* the function rather than *performed* the duties related to the function. As noted above, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

In this matter, the petitioner has not: 1) identified the beneficiary's essential function with specificity; 2) provided information specifying the beneficiary's qualifying tasks; or 3) established that the primary portion of the beneficiary's time in his position with the foreign entity was spent performing qualifying tasks, rather than tasks that are necessary to produce a product or provide services. In light of these findings, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

With regard to the beneficiary's proposed position with the U.S. entity, the AAO finds that the director's analysis is also on point. The AAO finds the organizational chart that was offered in response to the NOID unpersuasive, as the chart seemingly commingles the employees of the Days Inn and the employees of the petitioning entity in an effort to create an organizational hierarchy capable of relieving the beneficiary from having to primarily perform non-qualifying tasks.

As properly pointed out by the director, USCIS's analysis must focus on the petitioner's own organizational hierarchy rather than the hierarchy of the client entity that hired the petitioner to perform a management service. Although the payroll documents that have been submitted in support of this petition contain the petitioner's name as the paying entity, this appears to be consistent with the terms of the management agreement that the petitioner and [REDACTED] entered into on August 8, 2008. See *Management Agreement*, page 2, 2(c). Thus, the payroll documents merely establish that the petitioner was in compliance with its agreement with [REDACTED] not that the individuals named in the payroll documents are the direct employees of the petitioning entity. Further review of a check reconciliation document issued by [REDACTED] for the pay period of December 16 through December 31, 2008 indicates that the petitioning entity and the employees whom the petitioner named in its organizational chart were all listed as recipients of checks, which appears to have been issued by [REDACTED].

Moreover, while the petitioner repeatedly lists numerous managerial tasks that the beneficiary performs for the Days Inn, including overseeing the [REDACTED] managerial employees, these tasks cannot be deemed as qualifying, even if the performance of these specific tasks would normally be deemed managerial or executive if performed in relation to the internal staff of the petitioning entity. To clarify, the record in the present matter shows that [REDACTED] hired the petitioning entity to perform management services. Here, it appears that the beneficiary himself is actually providing those services. As such, it can be concluded that the beneficiary's primary concern would be to perform the tasks that are necessary to provide services, i.e., the

management services for which the [REDACTED] has been compensating the petitioner pursuant to the express terms of their agreement. In light of these findings, the AAO finds that the beneficiary would not primarily perform managerial or executive tasks in his proposed position and thus can not be deemed as an employee in a managerial or executive capacity.

The next issue to be addressed 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 petitioner has provided a deed of partnership showing that ownership of the foreign entity is divided among six individuals in varying parts, with the beneficiary owning 15% of that entity. Although the petitioner claimed to be a wholly owned subsidiary of the foreign entity, the petitioner's Articles of Organization show that it is a member-managed organization and identify the beneficiary as its only member. In response to the NOID, counsel focused on the regulatory definition of the term *subsidiary*, claiming that the definition allows for situations where a parent entity owns less than 50% of a subsidiary but in fact controls that subsidiary. Counsel claims that the foreign entity is an indirect owner of the U.S. petitioner, regardless of the fact that the beneficiary is identified as the petitioner's owner on paper.

In the November 3, 2009 denial, the director rejected counsel's reasoning, stating that the term *subsidiary* is not applicable to the petitioner in the instant matter. The director explained that the de facto control to which counsel referred in his response to the NOID is not relevant in the present matter because the petitioner does not meet the prerequisite of being a subsidiary in a parent-subsidiary relationship. The director properly noted that the beneficiary's direct ownership of the petitioning entity clearly precludes the petitioner from

qualifying as a subsidiary, which must be owned, in whole or in part, by another entity, not by an individual as is the case in the present matter.

Although counsel challenges the director's findings on appeal, his statements are not persuasive, as they are based on the same reasoning that counsel employed in his response to the NOID. Namely, counsel's claim that owners of the foreign entity "essentially support and control the US company" has no legal significance. It is noted that 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)).

Here, there is absolutely no evidence establishing that the foreign entity owns the petitioning entity in any part. To the contrary, the petitioner concedes that the beneficiary is the petitioner's documented owner. The mere claim that the beneficiary is only the owner on paper is entirely contrary to the law and public policy. Counsel's suggestion that corporate ownership documentation can be contradicted or disputed by mere statements would enable any party to stake a claim to any entity simply by disputing documentation that would otherwise be deemed as valid. Counsel's arguments are simply erroneous and will not cause the AAO to disregard the petitioner's ownership documents which show that the beneficiary, not the foreign entity, is the petitioner's legal owner.

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 light of the above findings, the AAO concludes that the petitioner and the beneficiary's foreign employer are not similarly owned and controlled and thus do not have the requisite qualifying relationship.

The AAO acknowledges that the director relied on one more ground as a basis for denial, i.e., the finding that the petitioner and the beneficiary do not have an employer-employee relationship. However, in light of the petitioner's failure to meet express eligibility criteria, as described above, the AAO does not need to address the remaining issue and will dismiss the appeal based on the three grounds that were thoroughly addressed in the above discussion.

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.