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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



By

DATE: JUN 22 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 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 request 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 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 an Alabama corporation that seeks to employ the beneficiary as its vice president/general 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 supplemental statement, dated July 10, 2009, which contained relevant information pertaining to the petitioner's eligibility, including an overview of the petitioner's business and descriptions of the beneficiary's foreign and proposed employment. The petitioner also provided supporting evidence in the form of financial and corporate documents as well as documents pertaining to the beneficiary's employer abroad.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for additional evidence (RFE) dated May 6, 2010 informing the petitioner of various evidentiary deficiencies. The director determined that the record lacked evidence showing that 1) the beneficiary was employed abroad in a qualifying managerial or executive capacity; 2) the petitioner has a qualifying relationship with the beneficiary's foreign employer; or 3) the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

The petitioner provided a response, which included affidavits, bank and tax documents, stock certificates and a stock transfer ledger, and job descriptions pertaining to the beneficiary's foreign and proposed employment.

After reviewing the record, the director concluded that the petitioner failed to submit sufficient credible evidence to overcome the deficiencies cited in the RFE. The director therefore issued a decision denying the petition.

On appeal, counsel submits a brief addressing the petitioner's qualifying relationship and the beneficiary's proposed employment with the U.S. entity. Additionally, the petitioner provided supplemental evidence, including affidavits, original amended tax returns, supplemental organizational charts and the beneficiary's job descriptions, the petitioner's bank documents, and business documents pertaining to the foreign entity.

The AAO finds that neither counsel's arguments nor the supplemental documents are persuasive in overcoming the director's denial. The discussion below will provide an analysis of the relevant documentation and explain the basis for the AAO's conclusion.

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 whether the petitioner submitted sufficient credible 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;

\* \* \*

*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.

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 (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 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. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The record in the present matter shows that the petitioner submitted inconsistent documentation regarding its ownership. Namely, while the petitioner provided a photocopied stock certificate, No. 00, which indicates that [REDACTED] (India), the beneficiary's foreign employer, was issued 1,000, or 100% of the petitioner's authorized stock, on July 31, 2006, Schedule E of the petitioner's 2007 and 2008 tax returns indicate that [REDACTED] owns 90% of the petitioner's common stock.

The petitioner attempted to overcome the above inconsistency by submitting additional evidence in response to the RFE. Namely, the petitioner provided amended 2007 and 2008 tax returns, both striking the beneficiary as owner on Schedule E. Both tax returns show a filing date of May 19, 2010.<sup>1</sup>

The petitioner also provided two affidavits—one signed by [REDACTED] and the other signed by the beneficiary—both indicating that when the petitioner was initially incorporated [REDACTED] was issued 510 shares and the beneficiary was issued the remaining 490 shares and that upon subsequent request from the beneficiary, both individuals transferred their shares to the foreign entity, thus giving the foreign entity 100% ownership of the petitioner's issued shares. Although the beneficiary claimed in his affidavit that [REDACTED] transfer of shares to the foreign entity represented his repayment of \$100,000 that he owed the beneficiary, [REDACTED] did not corroborate this claim in his own affidavit. Rather, he merely claimed that he personally “deposited such amounts” from his personal bank account to the personal bank account of the beneficiary as repayment of funds he borrowed from the beneficiary in India. The affidavit contains no clarification as to what [REDACTED] meant by “such amounts.” While he claimed to have transferred \$75,000 from the petitioner's Illinois bank account to the petitioner's Alabama bank account at the beneficiary's request on September 17, 2007, he did not explain the significance, if any, of the fund transfer, nor did he indicate that he transferred his ownership of the petitioning entity as a means of repaying a loan he incurred. The fact that the petitioner provided bank documents showing the petitioner's fund transfers from one of its

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<sup>1</sup> Although the director questioned the authenticity of the amended tax returns in light of the alteration of the date stamp, the petitioner submitted the original amended tax returns, thus establishing that the documents were authentic.

accounts to another is not relevant to the overall issue of the petitioner's ownership, as these documents do not show that the funds originated from the foreign entity, which was purportedly the ultimate recipient of the petitioner's stock.

Additionally, while the petitioner provided a copy of its stock transfer ledger showing the original issue of shares on March 28, 2006 via stock certificate Nos. 1 and 2, the surrender of such shares on July 31, 2006, and the ultimate transfer of those same shares to the foreign entity on July 31, 2006, the record contains stock certificate Nos. 1 and 2, both dated August 1, 2007, which purported to transfer 510 shares and 490 shares to the beneficiary and to Deven Patel, respectively, one year after those very shares were purportedly transferred to the foreign entity. It is noted that neither the stock transfer ledger nor any of the supporting statements made any mention of the 2007 stock issuance.

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). Furthermore, 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.

Counsel relies heavily on the previously approved nonimmigrant petition (which the same petitioner filed on behalf of the beneficiary) as evidence that the petitioner had a valid qualifying relationship with the beneficiary's foreign employer. Each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. USCIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. A prior nonimmigrant approval would not preclude USCIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Similarly, the approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. USCIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

Furthermore, if the previous nonimmigrant petition was approved based on the same contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of a prior approval that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Counsel also asserts that errors were made by the petitioner's incorporator, [REDACTED], and by the petitioner's CPA, who filled out the original 2007 and 2008 tax returns. Specifically, counsel claims that [REDACTED] erroneously named himself and the beneficiary as shareholders at the time he incorporated the petitioning entity and similarly blames the petitioner's CPA for naming the beneficiary as 90% shareholder when completing the 2007 and 2008 tax returns. Counsel therefore relies on the amended tax returns to rectify the latter error. However, neither of counsel's assertions is adequately corroborated by the evidence of

record, which primarily consists of self-serving affidavits and amended tax returns, which the petitioner internally generated in response to the adverse findings listed by the director in the RFE. The AAO finds that none of these documents can be deemed as "independent objective evidence" which is needed in order to resolve the considerable inconsistencies catalogued above.

With regard to the errors committed by [REDACTED] the more recent affidavit, dated October 4, 2010, which [REDACTED] provides in support of the appeal, is inconsistent with the claims he made in his earlier affidavit, dated June 4, 2010, where he did not claim that he erroneously listed himself and the beneficiary as the petitioner's shareholders; rather, [REDACTED] indicated that he intentionally claimed himself and the beneficiary as the petitioner's shareholders and that the beneficiary was well aware of and was "pleased with the idea," despite the fact that he ultimately wanted ownership of the petitioner to be transferred to the foreign entity. Regardless of the beneficiary's ultimate intent, the claims made in [REDACTED] October 2010 affidavit as to his intent regarding the petitioner's ownership are inconsistent with the statements the same individual previously made under oath with regard to the same issue. These contradictions and the petitioner's failure to resolve them cast further doubt on the veracity and reliability of the petitioner's claims.

In light of the serious nature of the errors and anomalies concerning the issuance of the petitioner's shares, the AAO is unable to determine who in fact owns the petitioning entity. Without a proper determination of the petitioner's ownership, it cannot be concluded that the petitioner and the beneficiary's foreign employer have a qualifying relationship. On the basis of this conclusion, this petition cannot be approved.

The two remaining issues to 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 the beneficiary was employed abroad and whether he 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.

Turning first to the issue of the beneficiary's employment abroad, the AAO questions why the *employment* letter containing the beneficiary's job description was signed by an individual, whom the organizational chart identified as the beneficiary's subordinate. Given that the director specifically instructed the petitioner to provide a detailed list of the beneficiary's job duties, it is unclear how someone who is subordinate to the beneficiary would know the specific details of the beneficiary's daily activities.

In reviewing the job description itself, the AAO finds the percentage breakdown to be significantly lacking in content. The job description is primarily comprised of general information that failed to convey a meaningful understanding of the beneficiary's daily tasks. For example, 25% of the beneficiary's time was said to be spent "directing and coordinating activities within the organization" for the purpose of increasing profit margin; planning, developing, and implementing goals and policies; ensuring that a strategy and business plan is in effect for each construction project; familiarizing himself with vendors; and maintaining technical expertise. These vague statements failed to explain how, precisely, the beneficiary would accomplish these broad business objectives. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. The actual duties themselves will 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).

Moreover, listing tasks that the beneficiary performs irregularly in isolated instances does little to clarify what specific tasks the beneficiary performed regularly on a daily basis. Claiming that the beneficiary hired and trained employees would not fall within the category of daily activity, as there is no evidence that changes in staffing occurred daily or even weekly such that hiring or firing comprised a significant portion of the beneficiary's time.

The job description failed to isolate and assign a specific time allocation to the beneficiary's non-qualifying administrative and marketing tasks, including generating accounts payable, compiling financial data, researching business opportunities, arranging for payroll services, preparing an annual budget, conducting due diligence, preparing a summary report, and conducting market research. As the petitioner failed to allocate specific time constraints to these non-qualifying tasks, it cannot be determined that the beneficiary did not spend the primary portion of his time performing them. While 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 performed are only incidental to the position in question. 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. at 604. Although the beneficiary supported the appeal with an affidavit in which he provided an account of the job duties he claims to have performed during his employment abroad, this job description was virtually identical to the one submitted earlier in response to the RFE and is equally unpersuasive.

The AAO cannot conclude that the petitioner provided sufficient evidence to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. On the basis of this second adverse conclusion, the instant petition cannot be approved.

Turning to the issue of the beneficiary's proposed employment with the U.S. entity, the AAO finds that the record lacks sufficient evidence showing that the beneficiary would be employed in a qualifying managerial or executive capacity.

The description of the beneficiary's proposed job duties is a primary concern when determining whether a given position fits the statutory definition of executive or managerial capacity. *See* 8 C.F.R. § 204.5(j)(5). The AAO considers other relevant factors in making this determination, including the petitioner's organizational hierarchy, the beneficiary's position with respect to others within the organization, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks.

The petitioner's response to the RFE included a percentage breakdown where the petitioner indicated that 45% of the beneficiary's time would be allocated to day-to-day operational management, including directing and coordinating activities for the purpose of increasing the company's profits; planning, developing, and implementing goals and policies; ensuring that a strategy and business plan is in effect for each construction project; familiarizing himself with projects, clients, and regulations; ensuring that realistic goals are set; becoming familiar with vendors; and maintaining a level of expertise. These statements are virtually identical to those used to describe the beneficiary's role in daily operational management with the foreign entity and as previously noted, the information provided fails to clarify how the beneficiary would accomplish these broad business objectives. Without a more detailed description of the beneficiary's actual daily job duties, the AAO is unable to determine the true nature of the proposed employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The statements used to describe the beneficiary's role in finance and accounting, marketing, and employment and training were virtually identical to those used in describing the beneficiary's employment abroad and are deemed to be deficient for the same reason, i.e., both job descriptions list a number of non-qualifying tasks without any clarification as to how much of the beneficiary's time would be specifically allocated to the performance of such tasks.

Reviewing the petitioner's organizational chart and comparing the information in the chart with the information provided in the petitioner's quarterly wage report for July of 2009 when the Form I-140 was filed, it appears that the two documents are at odds with one another. While the petitioner's quarterly wage report (as well as the Form I-140 itself) indicates that the petitioner had a total of seven employees, the petitioner listed a total of nine employees in its organizational chart. The AAO further notes that the salaries

shown in the quarterly wage report indicate that some of the petitioner's employees—the retail services managers, three cashiers, and the design and drawings employee—were either employed on a part-time basis or were not employed for the entire quarter. This leaves the AAO to question whom specifically the petitioner employed at the time of filing the petition and whether that staffing composition was sufficient to relieve the beneficiary from having to allocate the primary portion of his time to the performance of non-qualifying tasks. Thus, when reviewing the beneficiary's job description in light of what appears to have been a limited staffing arrangement, the AAO questions how the petitioning entity was capable of supporting the beneficiary in a position where the primary portion of his time would be allocated to tasks within a qualifying managerial or executive capacity.

While the beneficiary provides an additional job description in support of the appeal, the AAO is unable to make an affirmative determination as to the beneficiary's employment capacity without full knowledge of the petitioner's staffing at the time of filing the petition. Moreover, a number of the job duties the beneficiary has listed in the most recent job description would be deemed non-qualifying operational tasks. As it is unclear what portion of the beneficiary's time would be allocated to the qualifying tasks versus those that are deemed to be non-qualifying, the AAO cannot affirmatively conclude that the beneficiary's proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity. On the basis of this third adverse finding, the instant petition cannot be approved.

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.