



U.S. Citizenship
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DATE: **MAR 09 2012** OFFICE: TEXAS SERVICE CENTER

FILE: 

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 petitioner subsequently filed a motion to reopen and reconsider, which the director dismissed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation that seeks to employ the beneficiary as its president and CEO. 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 two independent grounds of ineligibility.

The director denied the petition based on the determination that the petitioner failed to submit sufficient evidence to establish that it has a qualifying relationship with the beneficiary's employer abroad. The director focused primarily on the responses that were provided in items 4, 5, and 7 in Schedule K of the petitioner's 2006 corporate tax return. The director ultimately concluded that the petitioner's responses were inconsistent and therefore failed to corroborate the claimed parent-subsidiary relationship between the foreign employer and the petitioner, respectively.

The petitioner subsequently filed a motion to reopen and reconsider and submitted additional documentation. The director determined that the additional documentation failed to overcome the ground cited for denial and dismissed the petitioner's motion.

On appeal, counsel challenges the director's decision and refers to the letter of explanation from a tax expert, which had been submitted earlier in support of the motion.

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 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.

II. Qualifying Relationship

The primary issue in this proceeding is whether the petitioner submitted sufficient evidence to establish that it has a qualifying relationship with the entity that employed the beneficiary abroad.

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.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the present matter, the petitioner provided a statement dated January 28, 2009 claiming to be wholly owned by the beneficiary's foreign employer, [REDACTED]. The petitioner provided corporate documents, including its Articles of Incorporation, showing that it is authorized to issue 100 shares of stock with a par value of \$1.00 per share, and a single stock certificate, showing that 100 shares of the petitioner's stock were issued to one shareholder, [REDACTED] on November 14, 2005.

The petitioner also submitted copies of a 2006 IRS Form 1120 U.S. Corporation Income Tax Return, which indicated at Schedule K that:

- it is not a subsidiary in an affiliated group or a parent-subsiary controlled group (responding "No" at line 4);
- no foreign person owned, directly or indirectly, at least 25% of the total voting power of all classes of stock (responding "No" at line 7); and
- it had 2 shareholders at the end of the tax year (responding "2" at line 10).

On April 16, 2009, the director issued a request for additional evidence (RFE) in which the petitioner was instructed to provide, in part, evidence showing the method by which the foreign entity paid for the stock shares that were issued. The director also noted that the petitioner's IRS Form 1120 U.S. Corporation Income Tax Return, indicated at line 10 of Schedule K that the petitioner had two shareholders. The director put the petitioner on notice that this statement conflicted with other evidence in the record.

The petitioner failed to respond and the director denied the petition for abandonment on November 17, 2008.

Subsequently, on motion, the petitioner provided a partial copy of the stock certificate that was originally submitted in support of the petition as well as a document titled "Stock Purchases" in which the petitioner indicated that "good will" was the consideration received in exchange for issuing 100 shares of its stock to the foreign entity.

The petitioner also submitted an IRS Form 1120X, Amended U.S. Corporation Income Tax Return, for the 2006 tax year. In this amended tax return, the petitioner indicated on Schedule K that:

- a foreign person owned, directly or indirectly, at least 25% of the total voting power of all classes of stock (responding "Yes" at line 7), indicating that it was 100% owned and the owner's country was Venezuela; and
- it had 1 shareholder at the end of the tax year (responding "1" at line 10).

In the director's decision dated June 19, 2009, the petition was denied based on the conclusion that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel challenges the director's interpretation of Schedule K of the petitioner's tax return and contends that the petitioner submitted sufficient documentation to establish that a parent-subsidiary relationship exists between the beneficiary's foreign employer and the petitioning entity.

Upon review, the AAO finds that neither counsel's assertions nor the additional documents are persuasive in establishing the existence of a valid qualifying relationship.

First, the petitioner must submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

Second, the petitioner has not submitted sufficient evidence to clarify the exact ownership of the petitioning corporation. Specifically, it is noted that Schedule K, Line 10, of the original Form 1120 tax returns reported two owners. This directly contradicts the claim that it is the wholly owned subsidiary of the foreign company, [REDACTED]. The petitioner failed to submit evidence to resolve this inconsistency.

The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply asserting that the reported ownership in the original tax returns was the result of a clerical error does not qualify as independent and objective evidence. 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'r 1998). Furthermore, evidence that the petitioner creates after USCIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

Like a delayed birth certificate, the submission of amended tax return years after the applicable tax year will raise serious questions regarding the truth of the facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991)(discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings).

Finally, as ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. See 8 C.F.R. § 103.2(b)(8). As requested by the director in the RFE, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Consideration is defined as something of value (such as an act, a forbearance, or a return promise) received by a promisor from a promisee and is necessary in order for an agreement to be enforceable. *Black's Law Dictionary* 300-01 (7th Ed., West 1999).

In the present matter, Article IV of the petitioner's Articles of Incorporation, which was executed on October 19, 2005, shows that the petitioner is authorized to issue 100 shares of stock with a par value of \$1.00. However, the stock purchase document that was submitted in response to the RFE (Exhibit 5), shows that the foreign company paid for the stock issuance in "good will" as consideration for the issuance of stock. Based on this document, it appears that the petitioner did not comply with the terms expressly stated in Article IV of its Articles of Incorporation. As the record lacks any evidence to show that the issuance of stock was accompanied by the receipt of consideration offered by the stock recipient, i.e., the foreign entity, the AAO finds that the record lacks sufficient evidence to establish that its stock was conveyed to the foreign entity through a valid and legally binding transaction.

In light of the above, the AAO finds that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer. As such, the petitioner has failed to establish that it is eligible for the immigration benefit sought and the director's conclusion will not be withdrawn.

III. Managerial or Executive Duties

Additionally, while not previously addressed in the director's decision, the AAO finds that the petitioner failed to provide an adequate description of the beneficiary's proposed employment such that would establish that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity.

In reviewing the job description that was submitted in response to the RFE, the AAO finds that the petitioner failed to convey sufficient information with regard to the beneficiary's actual daily job duties. Specifically, the petitioner failed to explain what specific tasks are involved in developing and maintaining the company's image. In other words, what is the beneficiary's role in marketing the

petitioner's business and are the job duties he performs in that role daily operational tasks? Similarly, what specific tasks does the beneficiary perform in meeting his responsibilities in coordinating and implementing new sales strategies, maintaining a marketing program, or seeking out new customers? None of these job responsibilities, without further explanation, indicate that the underlying job duties the beneficiary would perform can be deemed managerial or executive.

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. *See* 8 C.F.R. § 204.5(j)(5). 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). Here, the petitioner has failed to provide critical information specifying the beneficiary's actual daily job duties. As such, the AAO cannot determine whether the proposed employment would be within a qualifying managerial or executive capacity.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground of ineligibility discussed above, this petition cannot be approved.

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.