

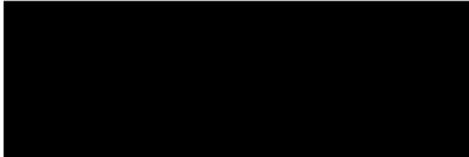
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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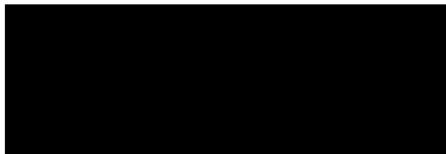
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DATE: **MAY 29 2012** Office: TEXAS SERVICE CENTER FILE

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was 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 Florida corporation that seeks to employ the beneficiary as its Secretary, Treasurer, and Chief Financial Officer. 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.

On April 5, 2010, the director denied the petition concluding the following: (1) the petitioner failed to establish that the beneficiary's proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity; (2) the petitioner failed to establish that the beneficiary's employment abroad was within a qualifying managerial or executive capacity; and, (3) the petitioner failed to establish that a qualifying relationship exists between the beneficiary's foreign employer and the U.S. petitioner.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel disputes the director's findings and provides an appellate brief laying out the grounds for challenging the denial. Counsel submits a brief and additional evidence in support of the appeal.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that 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. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner submitted sufficient evidence to establish that it would employ the beneficiary 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.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, 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); *see also* 8 C.F.R. § 204.5(j)(5). That being said, however, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

In the present matter, an analysis of the record does not lead to an affirmative conclusion that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

In the April 17, 2009 support letter, the petitioner indicated that the beneficiary's job responsibilities as secretary, treasurer, and chief financial officer of the U.S. company include "maintaining corporate records, including records of sales, rental, usage activity, market status, special permits, maintenance and operations costs, and property availability"; "retaining custody of all corporate funds and financial records"; "maintaining full and accurate accounts of receipts and disbursements, render accounts at the annual shareholders meeting and at any other time required by the Board of Directors or the President"; "recording the minutes of all meetings of the partners and Board of Directors"; "sending all notices of meetings, and perform such additional duties as directed by the President or Board of Directors"; "directing the collection of monthly assessments, rental income, deposits and payment of insurance premiums, mortgage, taxes, construction costs, and operating expenses"; and "preparing detailed budget and financial reports for properties."

The petitioner also submitted names, job titles and duties of the companies that will provide accounting, property management, and real estate leasing services to the petitioner. The petitioner also listed vendors that are utilized by the petitioner on an as-needed basis.

On review, the petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. 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. The petitioner has

failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature. The job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

The beneficiary's job duties, as described by the petitioner, are not indicative of an employee who is primarily focused on the broad goals and policies of the organization. The fact that the beneficiary is a shareholder of the organization is insufficient to establish the beneficiary's employment in an executive capacity. 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). The petitioner has not established that the beneficiary is primarily engaged in directing and controlling a subordinate staff comprised of professional, managerial or supervisory employees, nor has it indicated that she is charged with managing an essential function of the petitioning organization. *See* section 101(a)(44)(A) of the Act. Therefore, the AAO is not persuaded that the beneficiary would be employed in a primarily managerial capacity. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the beneficiary's employment abroad was within a qualifying managerial or executive capacity. An analysis of the record does not lead to an affirmative conclusion that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

The petitioner claimed in its April 17, 2009 letter that the beneficiary has served continuously for at least one year as a director of the foreign company. While the record contains documentary evidence of the beneficiary's minority ownership interest in the foreign entity, the record contains minimal information regarding her job duties as director. The petitioner stated that the beneficiary "manages [the foreign company] with the President and other Directors"; "participates in the appointment of the company's managers and assigns responsibilities to them"; "confers with fellow board members to discuss issues and resolve business problems"; and "works with the president to

direct, plan and implement policies and activities of [the foreign company] to ensure the company's productivity." This description provides little insight into what the beneficiary primarily did on a day-to-day basis as a director of the foreign entity. 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. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. Again, the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Accordingly, the evidence of record is insufficient to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

In addition, the petitioner stated that the foreign company "currently employs a workforce of at least 70 employees, no less than eight of which are managers." The petitioner did not, however, submit an organizational chart of the foreign company, a list of duties performed by the employees, or evidence of employees such as tax documents or paystubs. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The AAO acknowledges that USCIS has previously approved an L-1A petition filed by the petitioner on behalf of the instant beneficiary. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103. Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Despite the previously approved petition, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act. Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous nonimmigrant petition approval by denying the instant petition.

The third issue in this proceeding is whether the petitioner has established 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 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 a letter dated April 17, 2009, submitted with the Form I-140, the vice president and CEO of the petitioner stated that, prior to her transfer to the United States, the beneficiary was a director of [REDACTED]. The petitioner further claimed that the U.S. company and the beneficiary's foreign employer are affiliates because both are majority owned and controlled by the same individuals.

The petitioner stated that the foreign entity is 69% owned by [REDACTED], and 28% owned by the beneficiary. The petitioner submitted a copy of the original and English translation of: (1) the foreign company's articles of incorporation dated August 26, 1999; (2) the minutes of a shareholders meeting held in January 2002 regarding the company's name change; and (3) the minutes of the company's shareholders meeting held on September 20, 2005 authorizing the sale of shares of the company by two of its previous shareholders to [REDACTED] and the beneficiary, resulting in the following distribution of shares among the company's shareholders as of that date:

- [REDACTED]
- [REDACTED]
- [REDACTED]

With respect to ownership of the U.S. company, the petitioner submitted the following documentation: (1) the company's operating agreement, dated January 2, 2002, schedule A of which lists [REDACTED], the beneficiary, and [REDACTED] as initial members of the company, each having one-third ownership in the company, (2) the company's IRS Form 1065, U.S. Return of Partnership Income, for the years 2005 and 2006, reporting the three members' shares of profit, loss and capital in the company as 33.33% each for those years; and, (3) a member's agreement dated February 2, 2009, stating that [REDACTED] have voted in concert since 2001 and they continue to vote in concert on matters relating to the management and operations of the petitioner, and that [REDACTED] has the overriding and controlling vote in the event of a disagreement.

In denying the petition, the director determined that, based on the record, the United States company and the foreign employer do not qualify as affiliates as that term is defined in the regulations. The director noted the record shows that two individuals holding shares in both companies do not own approximately the same share or proportion of each entity as the regulations require.

On appeal, counsel asserts that the director erred in considering only the percentage owned by [REDACTED] and the beneficiary in the two companies and not the control of the companies. Counsel claims that [REDACTED] and the beneficiary together own the majority of each company and, as owners and directors of the foreign entity and managing partners of the U.S. company, make all decisions pertaining to the companies unanimously and have always done so. In support of this claim, counsel submits a document entitled, "Articles of Amendment to Articles of Organization of [the petitioner]."

Upon review, the AAO concurs with the director's conclusion that the petitioner has failed to establish that a qualifying relationship between the petitioner and the beneficiary's foreign employer existed at the time the petition was filed.

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.

As general evidence of a petitioner's claimed qualifying relationship, in addition to stock certificates, 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.*, *supra*.

To establish eligibility in this case, it must be shown that the foreign employer and the petitioner share common ownership and control. Control may be *de jure* by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be *de facto* by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. Here, the foreign entity has a majority shareholder, [REDACTED] who has *de jure* control of the company based on her majority ownership of a 69 percent interest in the company. The U.S. company, by contrast, is owned by three individuals in equal proportions, with no one person exercising *de jure* control over the company.

On appeal, the petitioner submits an amendment to the articles of organization of the petitioner, indicating that [REDACTED] and the beneficiary will vote in concert. Upon review of the amendment to the articles of organization, dated February 2, 2009, this document is not sufficient evidence to establish that [REDACTED] and the beneficiary will vote in concert. The document is only signed by [REDACTED] and the beneficiary and is not signed by the third member of the limited liability company. The petitioner did not provide evidence that an amendment can be made to the articles of organization without the signature of all three members. In addition, there is no evidence that the amendment was filed with the state. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Thus, the amendment submitted on appeal is not sufficient evidence to establish a qualifying relationship.

Therefore, the petitioning enterprise does not maintain a qualifying "affiliate" relationship with the overseas company. Three individuals own the foreign company, with one shareholder maintaining a majority interest in the company. Three individuals own the petitioning entity in the United States in equal proportions. The two companies have only two common shareholders and no common majority shareholder. Accordingly, the two entities are not "owned and controlled by the *same group of individuals*, each individual owning controlling approximately the same share or proportion of each entity. . . ." 8 C.F.R. § 204.5(j)(2)(emphasis added). In addition, there is no parent entity with ownership and control of both companies that would qualify the two as affiliates. Based on the evidence submitted, the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations. For this additional reason, the appeal will be dismissed.

Counsel for the petitioner contends that the director did not provide the petitioner with an opportunity to address the director's concerns through a Request for Evidence or a Notice of Intent to Deny. The regulation at 8 C.F.R. § 103.2(b)(8) clearly states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." The regulation does not state that the evidence of ineligibility must be irrefutable. Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the director to deny the petition

without a request for evidence. If the petitioner has rebuttal evidence, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as a forum for that new evidence. In the present case, the petitioner did not establish eligibility for the immigrant petition. Accordingly, the denial was appropriate.

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.