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



U.S. Citizenship
and Immigration
Services



B4

DATE: SEP 04 2012

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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: SELF-REPRESENTED

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 a Florida corporation that seeks to employ the beneficiary as its manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

In support of the Form I-140 the petitioner submitted a statement dated February 10, 2011, which contained information pertaining to the petitioner's business and the beneficiary's U.S. employment. The petitioner also provided supporting evidence in the form of tax, bank, and corporate documents.

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 dated May 11, 2011 informing the petitioner of numerous evidentiary deficiencies that directly affect the petitioner's eligibility. The director determined that the record lacked evidence showing that 1) the beneficiary was employed abroad in a qualifying capacity; 2) the petitioner has a qualifying relationship with a qualifying foreign employer; and 3) the petitioner has the ability to pay the beneficiary's proffered wage.

The petitioner's response included a statement dated June 1, 2011 which was accompanied by several sales invoices issued to the petitioner's clientele.

After reviewing the record, the director concluded that the petitioner failed to meet key eligibility requirements, including providing evidence of a qualifying relationship between the petitioner and the beneficiary's foreign entity and evidence of the petitioner's ability to pay the beneficiary's proffered wage. The director therefore issued a decision dated September 28, 2011 denying the petition based on these two adverse findings.

The petitioner appeals the director's denial, contending that the decision was an abuse of discretion. In a supplemental appellate brief, the petitioner addresses each of the director's adverse conclusions.

After thoroughly reviewing the record of proceeding, the AAO finds that the petitioner's assertions fail to effectively address and overcome the denial.

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 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.

The petitioner states that it is a subsidiary of [REDACTED] which is another U.S. entity. Although the petitioner stated that the beneficiary was employed abroad by [REDACTED] the petitioner neither claimed nor has provided any evidence to establish that it and the beneficiary's employer abroad share similar ownership and control. Despite the fact that the petitioner repeatedly restated the regulatory definitions of the terms *subsidiary* and *affiliate*, the petitioner seemingly overlooks the fact that the affiliate or parent-subsidiary relationship must exist between the petitioning entity and a foreign entity where the beneficiary was employed prior to coming to the United States to be employed by the petitioner itself. See section 203(b)(1)(C) of the Act. In other words, the fact that the petitioner has a parent-subsidiary relationship with [REDACTED] is entirely irrelevant in the present matter, as this is not a foreign entity where the beneficiary was previously employed. While the petitioner seemingly focuses on its business associations with foreign entities and provides sales invoices as evidence of the claimed business ties, the statute and regulations are clear in requiring a qualifying relationship, which is based on common ownership and control between the U.S. petitioner and the beneficiary's foreign employer. The petitioner neither claimed nor does the evidence establish that either an affiliate or a parent-subsidiary relationship exists between the petitioner and a foreign entity for which the beneficiary was previously employed abroad.

In reviewing the petitioner's main arguments, it appears that the petitioner has overlooked the multinational component that is a prerequisite in order for a qualifying relationship to exist. The petitioner has failed to establish that it shares ownership and control with a foreign entity that previously employed the beneficiary. The petition must therefore be denied on this initial basis of ineligibility.

Another issue addressed in the director's decision is whether the petitioner has provided sufficient relevant supporting evidence to establish that it has the ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states the following, in pertinent part:

Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petition was filed on March 15, 2011. Therefore, the petitioner's tax returns for 2008 and 2009, which the petitioner provided in support of the Form I-140, are not relevant, as they fail to determine the petitioner's financial status at the time the petition was filed. Although the petitioner urges the AAO to consider the totality of the circumstances, focusing on the fact that the company has been doing business for longer than one year, no documentary evidence has been submitted to establish how the petitioner planned to compensate the beneficiary's proffered wage of \$780 per week. 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)).

Lastly, the AAO agrees with the director's finding that the petitioner erroneously relied on the American Competitiveness in the Twenty-First Century Act (AC21) guidelines.¹ As the director properly pointed out, AC21 assures applicants, who filed for adjustment of status pursuant to section 245 and whose applications remained unadjudicated for 180 days or more, that their applications will remain valid. However, the AAO observes that for the portability provisions to apply, the underlying petition must be "valid" to begin with if it is to "*remain* valid with respect to a new job." Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added). In this matter, the above discussion expressly determines that the petitioner has failed to establish eligibility for this visa classification. Moreover, merely establishing that the beneficiary changed jobs within a similar job classification does not establish that the beneficiary should be accorded the benefits of the provisions stated within AC21.

In summary, the record strongly indicates that the petitioner is not eligible for the immigration benefit sought herein because it has not formed a qualifying relationship with the beneficiary's employer abroad and because it has not adequately documented its ability to pay the beneficiary's proffered wage at the time of filing.

The petition will therefore 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.

¹ In 2000, Congress passed American Competitiveness in the Twenty-First Century Act (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000). Section 106(c) of AC21 amended section 204 of the Act. The "portability provision" at section 204(j) of the Act provides that "an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed." CIS has not issued regulations governing this provision.