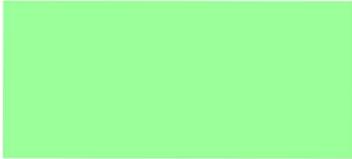




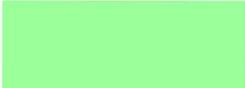
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **DEC 31 2013**

OFFICE: TEXAS SERVICE CENTER

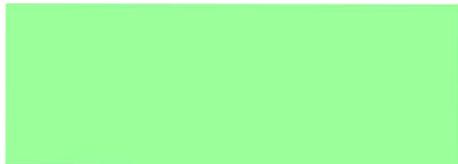
FILE: 

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:

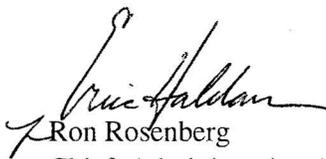


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail investment business that operates two convenience stores. It seeks to employ the beneficiary as its Chief Executive 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 May 6, 2013, the director denied the petition concluding that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.¹

On appeal, counsel disputes the director's findings and provides an appellate brief laying out the grounds for challenging the denial.

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

¹ The director initially denied the petition on April 19, 2012. The director granted the petitioner's subsequent motion to reopen and issued a new decision on May 6, 2013, after determining that the initial decision primarily contained references to another Form I-140 immigrant petition filed on the beneficiary's behalf by a different petitioner.

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 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.

II. Qualifying Relationship

The primary issue in this matter is whether the petitioner established that it has a qualifying relationship with the beneficiary's former 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").

A. Facts

In the letter of support, dated May 22, 2011, the petitioner stated that the beneficiary is the sole shareholder of the foreign company, [REDACTED] located in India. In addition, the petitioner stated that the beneficiary owns 50% of the petitioner and controls the company, as the two remaining owners hold membership interests of 30% and 20%, respectively. Therefore, the petitioner contends

that the foreign employer and the petitioner have a qualifying affiliate relationship as the beneficiary owns 100% of the foreign company and 50% of the petitioner.

At the time of filing, the petitioner submitted the following evidence of its ownership: (1) a stock purchase agreement dated May 13, 2011 between the beneficiary and [REDACTED] in which the beneficiary agreed to purchase a 50% ownership interest in the petitioner from Mr. [REDACTED] who, according to the agreement, owns 70% of the petitioner's shares, for a purchase price of \$49,000 with \$25,000 payable immediately; (2) a copy of the petitioner's membership certificate No. 5, dated May 13, 2011, which indicates that the beneficiary has 50% ownership of the limited liability company and is one of three members; and (3) a copy of a cashier's check purchased by the beneficiary in the amount of \$25,000 which was made payable to [REDACTED]

On December 1, 2011, the director issued a notice of intent to deny the petition, advising the petitioner that it submitted insufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer. The director acknowledged the evidence submitted, but found that the petitioner had not provided evidence that it amended its Articles of Organization to reflect the beneficiary's claimed ownership interest in the company. The director also questioned the validity of the submitted stock certificate no. 5, as the document appeared to be a "modified Microsoft Office template."

The petitioner has since submitted, among other evidence, the following:

- A "Percentage of Ownership" certificate number 5, dated May 13, 2011, indicating that the beneficiary owns a 50% interest in the petitioning company. The certificate is signed by two members and indicates the membership interest was transferred by [REDACTED]
- Its 2011 and 2012 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, which indicate at Schedules K-1 that the beneficiary owns a 50% interest in the company, with the two remaining members holding 30% and 20% interests, respectively.
- Its Amended Articles of Organization filed with the South Carolina Secretary of State on December 14, 2011, which indicate that "[the beneficiary] is now a 50% member [*sic*], [REDACTED] is a now [*sic*] 30% member and [REDACTED] is a 20% member."
- The beneficiary's 2012 IRS Form 1040, U.S. Individual Income Tax Return, in which he reported income from the petitioner's Schedule K-1.

The petitioner also provided a print-out of its profile on the South Carolina Secretary of State online company database. The listed "Corporation History Records" reflect that the petitioner filed the above-referenced amendment to its Articles of Organization on December 14, 2011. Counsel explained that the beneficiary and the petitioner's other members did not use the services of a corporate attorney and were not aware that the company was required to file an amendment to its articles of organization, which is why the amendment was filed in December 2011, rather than at the time the change in ownership took place in May 2011.

The petitioner's Corporation History Records reflect that it also filed an amendment to its Articles of Organization, annotated as "Amendment/Membership Interest," with the South Carolina Secretary of State on January 2, 2013. The petitioner did not submit a copy of this latest amendment.

Counsel asserts that the petitioner has established by a preponderance of the evidence that the beneficiary owns a controlling 50% membership interest in the company and thereby established a qualifying affiliate relationship with the beneficiary's foreign employer. Counsel contends that the director denied the petition, in part, based on evidence of ownership that pre-dated the beneficiary's acquisition of a majority membership interest in the company.

A. Analysis

Upon review, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer.

As general evidence of a petitioner's claimed qualifying relationship, a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or control of an LLC. LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

Here, the petitioner has submitted two different versions of a single membership certificate in order to establish that the beneficiary acquired a 50% ownership interest in the petitioning company in May 2011. The membership certificate provided at the time of filing was in a completely different format from that submitted in response to the notice of intent to deny and again on appeal, although both certificates number 5 indicate that the beneficiary acquired a 50% interest in the company as of May 13, 2011. The petitioner provided no explanation for this discrepancy. Further, the petitioner has not submitted copies of other membership certificates issued by the company which would aid in clarifying which form of certificate the company actually uses, as well as how many certificates have been issued to date and to whom. 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). 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)).

Therefore, the petitioner's multiple versions of a single membership certificate are insufficient evidence to establish the ownership and control of this limited liability company.

The petitioner also submitted a "Stock Purchase Agreement" which was intended to document the beneficiary's acquisition of a 50% ownership interest in the company. However, as the petitioner is a limited liability company and not a corporation that issues stock, this document is of limited probative value in establishing that the beneficiary acquired a controlling membership interest in the company.

As noted by the director, the petitioner did not establish that it filed an amendment to its articles of organization with the South Carolina Secretary of State at the time the beneficiary is claimed to have acquired membership and majority ownership in the company. Counsel indicates that the petitioner's failure to timely file the amendment was as a result of the company members' ignorance of the law and reporting requirements. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, while the petitioner provides evidence that it eventually filed the amended articles of organization with the Secretary of State, the date of the amendment stated on the document filed is December 13, 2011, rather than May 13, 2011. The petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). For this reason, the petitioner's 2011 and 2012 tax returns identifying the beneficiary as its 50% owner do not establish that the beneficiary actually became an owner prior to the filing of the petition on May 31, 2011. In addition, the petitioner did not provide evidence that the tax returns were actually filed with the Internal Revenue Service.

Finally, as noted above, the evidence submitted on appeal indicates that the petitioner filed another amendment to its articles of organization on January 2, 2013, which is annotated as an "Amendment/Membership Interest." The company's resulting ownership as a result of this amendment and apparent change in membership interest has not been documented. The petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984). Therefore, any changes in ownership that took place while the petition was pending or subsequent to the denial must be disclosed. Again, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Overall, in light of the deficiencies, inconsistencies and omissions addressed herein, the petitioner has not established by a preponderance of the evidence that it has a qualifying relationship with the beneficiary's foreign employer. Accordingly, the appeal will be dismissed.

III. Employment in a Managerial or Executive Capacity

Beyond the decision of the director, the petitioner did not submit sufficient evidence to establish that it would employ the beneficiary 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.

The petitioner provided a description of the beneficiary's proposed position in a letter dated May 22, 2011. The petitioner stated that the beneficiary will divide his time among several areas of responsibility as follows: 30% to "Organizational Development"; 30% to "Financial, Management and Administration"; 10% to "Program Development and Management"; 10% to "Board Relations and Communications"; and 10% to "Personnel." While the petitioner listed two to six duties associated with each area of responsibility, the information provided was overly vague and failed to convey any understanding of the tasks the beneficiary would perform on a day-to-day basis as the CEO of a retail investment business that operates two gas stations and convenience stores. Many of the duties simply paraphrased the statutory definitions of managerial and executive capacity at section 101(a)(44)(A) and (B) of the Act. For instance, the petitioner stated that the beneficiary works with the Board of Directors to set policies, develops company strategy, implements board-approved strategic plans, provides leadership in developing organizational plans, develops programs to achieve objectives of the company's strategic plan, promotes the vision and mission of the company in achieving the goals and directives of the strategic plan, and recommends and develops policies. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner stated on the Form I-140 that it has 16 employees, not including the beneficiary. The petitioner submitted an organizational chart indicating that both of its [REDACTED] stores are staffed by one full-time operations manager, one full-time retail manager, two full-time assistant managers, two full-time cashiers and two full-time cooks, for a total of eight full-time employees per store. Out of these employees, only the operations managers were identified by name. The petitioner also provided a year-to-date payroll journal for [REDACTED] which indicates that only five employees were working at this location as of March 31, 2011. A payroll journal for [REDACTED] reflected seven employees as of March 31, 2011. The petitioner did not corroborate its claim that it had 16 full-time employees as of the date of filing.

Further, the record does not contain job titles or duties for the individuals employed at the time of filing, and as such, the petitioner did not establish which positions are actually filled or how the administrative, operational and other routine duties associated with each store are divided among the employees. The evidence of record does not establish that the subordinate personnel in place at the time of filing would relieve the beneficiary from involvement in the day-to-day administrative and operational tasks associated with operating two gas stations/convenience stores, such that he could spend the majority of his time on the vaguely described strategy and policy-making duties included in his job description. Based on this deficiency, and the lack of information in the record regarding the beneficiary's actual day-to-day job duties, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity. For this additional reason, the petition cannot be approved.

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).

IV. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.