



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: JUN 14 2013

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:

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 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 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,

Ron Rosenberg  
Acting 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 District of Columbia corporation. The petitioner states that it is engaged in manufacturing and sales, and it seeks to employ the beneficiary as Chief Executive Officer. The petitioner seeks 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 July 24, 2012, the director denied the petition based on the following grounds of ineligibility: (1) the petitioner failed to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer; (2) the petitioner failed to establish that it is doing business; (3) 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; and (4) the petitioner failed to establish the ability to pay the beneficiary's proffered wage.

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 in this proceeding is whether the petitioner submitted sufficient 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 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 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 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., supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The petitioner submitted Stock Certificates Number 1 and 2 for the petitioner. Stock certificate number 2 states that [REDACTED] owns 50 shares of the petitioner, and stock certificate number 1 states that the beneficiary owns 50 shares of the petitioner. The stock certificates are not dated. The petitioner also submitted the minutes of a shareholder meeting of the foreign company that confirms that [REDACTED] will own 50 shares and the beneficiary will also own 50 shares of the petitioner. In addition, the petitioner submitted a document that did not list a company name or a date, that stated [REDACTED] owns 90 percent, [REDACTED] owns 5 percent and the beneficiary owns 5 percent. It appears to be a stock registry for an unidentified company.

The petitioner did not submit sufficient evidence to establish a qualifying relationship. Stock certificates and a copy of the minutes of the foreign company are not sufficient evidence of the relationship between the petitioner and the foreign company. As noted above, the petitioner must submit corroborating evidence such as a stock ledger, a stock certificate registry, corporate bylaws, tax returns, or proof of payment for the stocks. 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)).

Furthermore, the petitioner has not established that a qualifying relationship exists because the petitioner is 50% owned by [REDACTED] and 50% owned by [REDACTED] and thus, there is no one majority owner who owns and controls the petitioner. The petitioner claimed that since [REDACTED] owns 90 percent of the foreign company and 50 percent of the petitioner, the foreign company and the petitioner are affiliates. This is incorrect. The current ownership of the petitioner does not meet the regulatory definition of an affiliate at 8 C.F.R. § 204.5(j)(2). In the current case, no one individual owns and controls the petitioner since [REDACTED] and [REDACTED] both own 50 percent of the petitioner. The petitioner did not submit sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer. For this reason, this petition cannot be approved.

The second issue in this proceeding is whether the United States entity is doing business. The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

On appeal, counsel for the petitioner states the following:

The Service erroneously denied the petition, finding that there is no evidence that the Petitioner is engaged in regular, systematic, and continuous provision of goods or

services where the evidence showed that (1) to engage in mining business, Petitioner commissioned and obtained geological reports; hired mining workers and geologists; obtained license to mine in Zambia; etc. (2) to engage in computer business, purchased an existing business and is conducting repairs etc. as well as has a website to sell computer parts, etc.; and (3) to engage in flower business, has purchased expensive equipment, is running ads, and is taking orders. The Service failed to recognize that not all businesses are about daily sale of goods and services. One cannot apply a cookie cutter approach to Petitioner's business. Initially, the Petitioner wanted to engage in the steel business. It did spend a considerable amount of time and money to learn that it would be an economic disaster. Nonetheless, [the foreign company] remained committed to investing in the U.S. and in [the petitioner]. It decided to engage in export and import and purchased 2 business units – computer business and flower business. These businesses are operational. Unfortunately, the economy has been tough and revenues are not pouring in. Nonetheless, the Petitioner remains committed to the U.S. market. It has signed a lease that is valid for 3 additional years. Surely, it wants to engage in prolific business and as a result has made a financial commitment to keep its business in the U.S.

The petitioner submitted Form 1120, U.S. Corporation Income Tax Return, for 2010 indicating a gross receipt of sales of \$0.00. The petitioner also indicated that it owns a flower shop and a computer repair shop. According to Form 1040, Schedule C, the flower shop has \$0.00 in gross receipts or sales. The petitioner also submitted Form 1040, Schedule C, for a computer repair company that shows gross receipts or sales of \$3129.00.

In response to the request for evidence, the petitioner also stated that for a few months it exported electronic products. The director requested copies of the Customs and Border Protection Forms used in conjunction with the petitioner's export/import business but the petitioner stated that it utilized customs brokers and the petitioner is not required to have its own Form 301. In the course of examining whether a petitioning company has been doing business as an import and export firm, it is reasonable to request that the company produce copies of documents that are required in the daily operation of the enterprise due to routine regulatory oversight. Upon the importation of goods into the United States, the Customs Form 7501, Entry Summary, serves to classify the goods under the Harmonized Tariff Schedules of the United States and to ascertain customs duties and taxes. The Customs Form 301, Customs Bond, serves to secure the payment of import duties and taxes upon entry of the goods into the United States. According to 19 C.F.R. § 144.12, the Customs Form 7501 shall show the value, classification, and rate of duty for the imported goods as approved by the port director at the time the entry summary is filed. The regulation at 19 C.F.R. § 144.13 states that the Customs Form 301 will be filed in the amount required by the port director to support the entry documentation. Although customs brokers or agents are frequently utilized in the import process, the ultimate consignee should have access to these forms since they are liable for all import duties and taxes. Any company that is doing business through the regular, systematic, and continuous provision of goods through importation may reasonably be expected to submit copies of these forms to show that they are doing business as an import firm.

As indicated by the petitioner, it spent many years trying to set up a new business that did not succeed. Finally, the petitioner purchased two companies but according to both the petitioner's statements and the tax returns, one company had zero gross receipts or sales and the second company had a total of \$3129.00 of gross receipts or sales. It appears that the petitioner, since the time of filing the I-140, has been trying to start up a business but is not yet doing business.

On review, the evidence submitted is insufficient to establish that the U.S. entity has been or is engaged in the regular, systematic, and continuous provision of goods and/or services as a qualifying organization.

The third issue that will 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 petitioner submitted sufficient evidence to establish that the beneficiary 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.

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.

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. With regard to the proposed position, the petitioner provided a list of job duties to be performed by the beneficiary which included broadly stated job responsibilities. Due to the overly general information, the AAO is unable to gain a meaningful understanding of how much time the beneficiary spent performing qualifying tasks versus those that would be deemed non-qualifying.

In response to the request for evidence, the petitioner stated that the beneficiary has "managed the start-up of [the petitioner], hired workers including independent contractors, negotiated leases for the new business, obtained the necessary filings, and is continuing to guide the direction in which this company will grow and in which business this company will engage."

The petitioner stated that since the beneficiary's entry into the United States in L-1A nonimmigrant status, the beneficiary has "conducted meetings with lawyers, accountants and others for the preliminary operations of the company." In addition, "under the management of [the beneficiary], [the petitioner] purchased a computer repair and sales business including all of its assets for \$35,000"; and "negotiated and procured a new lease" and "formed [redacted]" The petitioner goes on to state that the beneficiary "continues to oversee the exploration of the mining operation in Zambia while creating client lists for sale of its products once the mining is authorized."

The petitioner also stated that the beneficiary "provides overall direction and manages the high-level functions and processes for the company's business operations and staff in the U.S. and mining exportation and staff in Zambia," and is also "responsible for leading the company's formation including setting the initial goal for manufacturing in the U.S. but abandoning that goal when market

research showed the economic disaster that might bring to the company.” Merely using the term “manage” to describe the beneficiary’s function does not establish that the tasks the beneficiary performed are of a qualifying nature, particularly when it appears that the beneficiary performed several non-qualifying duties such as being responsible for partnerships and contracting and negotiations. Without further information, it appears that the beneficiary was directly providing services rather than directing such activities through subordinate employees. An employee who “primarily” performs the tasks necessary to produce a product or provide a service 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. 593, 604 (Comm. 1988).

As noted above, the petitioner failed to submit the percentage of time the beneficiary spent on each duty, as requested by the director. 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). On appeal, counsel for the petitioner asserts that the beneficiary primarily performs executive and managerial duties, however, the petitioner did not submit any documentation to confirm this assertion. 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).

After reviewing the beneficiary’s job description, the AAO cannot conclude that the primary portion of the beneficiary’s time was spent performing tasks within a qualifying managerial or executive capacity.

In response to the director’s request for evidence, the petitioner explained that it employed a secretary, a computer technician, a sales research and marketing coordinator, and a consultant. The petitioner also explained that it did not prepare quarterly wage reports. Instead, the petitioner provided the salary paid to each employee in 2010 as follows: [REDACTED]: \$547.50; [REDACTED]: \$1666.98; [REDACTED]: \$1,500.00 and [REDACTED]: \$672.00.

An analysis of the nature of the petitioner's business undermines the petitioner’s assertion that the beneficiary is employed in a managerial or executive capacity. The Form I-129 stated that the petitioner employs 4 individuals. According to the salaries paid in 2010, the four individuals worked part-time. It is not clear who is running the two businesses purchased by the petitioner, the computer repair store and the flower shop, and who is assisting the beneficiary in performing the day-to-day duties of running a business such as financial operations, negotiations, sales, market research, marketing, purchasing and import and export. 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).

It appears from the record that the beneficiary may be performing several, if not all, of the finance operations and business development activities, and all of the various operational tasks inherent in operating a business on a daily basis, such as purchasing inventory, paying bills, handling customer

transactions, and negotiating contracts. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. 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 Intn'l.*, 19 I&N Dec. at 604.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. As discussed above, the petitioner has not identified employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business since the subordinates' duties are to execute the project and not look for new engagements and lead the projects.

In summary, the petitioner has failed to provide sufficient evidence to establish that the beneficiary has been or would be employed in the United States in a qualifying managerial or executive capacity. Based on these findings, the instant petition cannot be approved.

The final issue in this proceeding is whether the petitioner has the ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states, 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

(Emphasis added.)

The petitioner indicates on the Form I-140, at Part 6, that it will pay the beneficiary \$72,000.00 per year. In response to the director's request for evidence, the petitioner stated that the foreign company "paid for [the beneficiary's] salary as well as salaries for the personnel engaged in the mining operations." USCIS must, however, examine whether the prospective United States employer maintains the ability to pay the proffered wage.

As no evidence of the ability to pay by the petitioner was submitted, such as audited financial statements or tax returns showing enough income to pay the beneficiary's wage, the petitioner failed to establish that it had the ability to pay the beneficiary's proffered wage at the time of filing the petition.

On appeal, the petitioner does not discuss this issue and does not provide any evidence to overcome the director's concerns. The AAO, therefore, considers this issue to be abandoned. Sepulveda v. U.S. Att'y Gen., 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); Hristov v. Roark, No. 09-CV-27312011, 2011 WL 4711885 at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). Accordingly, in light of the lack of evidence submitted to establish that the petitioner meets the provisions of 8 C.F.R. § 204.5(g)(2), the petition cannot be approved.

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.