



U.S. Citizenship
and Immigration
Services

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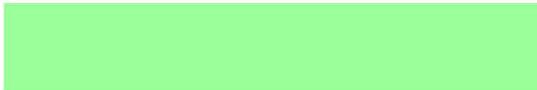


DATE: **JUN 29 2013**

Office: CALIFORNIA SERVICE CENTER

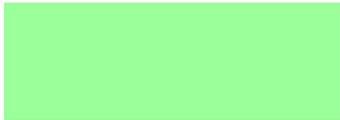
FILE: 

IN RE: Petitioner:
 Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
 Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

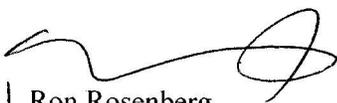


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen 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,



Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, Nebraska Service Center, on October 5, 1998. The case was subsequently transferred to the California Service Center. Upon further review, the Director, California Service Center, issued a notice of intent to revoke the approval, and ultimately revoked approval of the petition. The petitioner appealed the revocation to the Administrative Appeals Office (AAO). The AAO withdrew the decision of the director and remanded the matter to the California Service Center for further consideration. The director issued a second notice of intent to revoke, and after reviewing the petitioner's response, revoked the approval of the petition and certified the decision to the AAO pursuant to 8 C.F.R. § 103.4. The AAO will affirm the director's decision to revoke the approval of the petitioner's Form I-140.

The petitioner is a California corporation engaged in general trade and services. It claims to be a subsidiary of a [REDACTED] the beneficiary's claimed overseas employer. The petitioner seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director concluded that the approval of the petition should be revoked based the petitioner's failure to establish: (1) that it has a qualifying relationship with the beneficiary's foreign employer; (2) that it will employ the beneficiary in a qualifying managerial or executive capacity.

The director certified the decision to the AAO and advised the petitioner that it may submit a brief or other written statement for consideration within 30 days, pursuant to 8 C.F.R. § 103.4(a)(ii). The record reflects that the petitioner did not submit a brief within the given timeframe, and the record will be considered complete.

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 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 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.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

II. Procedural History

The petition was initially approved by the Nebraska Service Center. Prior to the beneficiary's application for adjustment of status, the petitioner moved to California and the case was transferred to the California Service Center. Upon further review of the record and pursuant to an overseas investigation conducted on November 19, 2002, the director of the California Service Center issued a notice of intent to revoke the approved petition. The director ultimately revoked the approval of the petition citing facts from the investigation report. The director found that the petitioner did not have a qualifying relationship with the beneficiary's claimed foreign employer, [REDACTED] and that the beneficiary was never an employee of the foreign entity.

Through counsel, the petitioner appealed the revocation. The AAO withdrew the director's decision and remanded the matter back to the service center for further consideration. The AAO found that the director failed to fully comply with 8 C.F.R. § 103.2(b)(16)(i), which states, in part:

If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered

The AAO also noted that the record, as constituted, did not establish: (1) that the beneficiary would be primarily employed in a managerial or executive capacity as defined in sections 101(a)(44)(A) and (B) of the Act, respectively; or (2) that the petitioner had been doing business for one year prior to filing the Form I-140, as required by 8 C.F.R. § 204.5(j)(3)(i)(D). Finally, the AAO noted that the record contained inconsistencies in relation to the petitioner's incorporation documents. The AAO instructed the director to issue a new notice of intent to revoke to fully comply with 8 C.F.R. § 103.2(b)(16)(i), and to include the additional issues identified in the AAO's decision.

The director issued a second notice of intent to revoke including the additional issues mentioned in the AAO remand. The petitioner responded to the notice and provided additional evidence.

After reviewing the petitioner's response to the NOIR, the director revoked the approval of the petition, finding that a letter written by "the alleged president" of the foreign entity denying that he made the statements attributed to him in the investigation report is insufficient to establish that the petitioner had a qualifying relationship with the foreign entity. The director found that although the petitioner submitted evidence to show business activities dating back to the time of its incorporation, it failed to establish a qualifying relationship with the foreign entity existed at the time of filing. The director stated that the president and other officials at the foreign entity stated that they knew the beneficiary and that the foreign entity gave her permission to open an office in the U.S., but that they did not have contact with the beneficiary after her arrival in the U.S. and that they were unaware of the existence of the petitioner's offices in California and Indiana.

III. Analysis

A. Qualifying Relationship

Upon review, the AAO agrees with the director's determination that the petitioner has failed to establish a qualifying relationship with the beneficiary's overseas 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.

As a preliminary matter, the petitioner's assertions that the NOIR failed to comply with regulation and binding precedent are unpersuasive. The regulation at 8 C.F.R. § 103.2(b)(16)(i) requires that the petitioner be "advised" of derogatory information considered by the Service of which it is unaware and offered an opportunity for rebuttal. The decision in *Matter of Estime* requires that the notice include "a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." 19 I&N Dec. at 452.

Although the petitioner asserts that USCIS is required to provide the petitioner with a copy of the investigative report, 8 C.F.R. § 103.2(b)(16)(i) requires only that a petitioner be "advised of" the derogatory information that USCIS would rely on in an adverse decision. The regulation does "not place upon USCIS a requirement that the actual documents be provided to a petitioner in order to comply with due process." *Mangwiro v. Napolitano*, --- F.Supp.2d ----, 2013 WL 1499373 (N.D.Tex., 2013) (adopting the reasoning of nonprecedent BIA decisions).

Here, the NOIR informed the petitioner that the evidence on record was insufficient to establish a qualifying relationship with the foreign entity and provided a specific statement describing the derogatory information contained in the overseas investigation report, including statements by the president of the foreign entity that there was no formal employment contract with the beneficiary. The NOIR also explained an employee of the foreign entity, identified as the personnel manager, stated that there was only an intention to establish a U.S. company and that there was a "loose association" between the petitioner and the foreign entity.

The NOIR gave the petitioner a chance to rebut the bases of denial, and the petitioner did, in fact, submit further evidence in response to the NOIR. The petitioner submitted a rebuttal letter from the General Director of the foreign entity denying that he made statements attributed to him in the investigation report and statements from the petitioner rebutting derogatory conclusions based on comments from an unidentified personnel manager. The evidence on record including the two NOIRs, AAO remand, and responses from the petitioner and the General Director of the foreign entity demonstrates that the petitioner was aware of the derogatory evidence and was provided sufficient detail to rebut the bases for the revocation.

The petitioner asserts that without the actual investigation report, or at least the names and the time and date of the interview, it is unable to verify that the overseas investigator was at the correct location when conducting the interviews, and therefore, cannot verify that the personnel manager was privy to information regarding the beneficiary's employment or the existence of the U.S. subsidiary. This explanation is unpersuasive. It was the petitioner who provided the contact information of the foreign entity in the petition. Further, the petitioner claims that it relies heavily on the foreign entity to provide the cheap labor and to relieve the beneficiary from her non-managerial non-executive tasks and the U.S. organization chart indicates that three of the employees subordinate to the beneficiary are compensated by the foreign entity. It seems unlikely that the personnel manager of the foreign employer would be unaware of the existence of a subsidiary using its personnel resources. Further the General Director submitted a rebuttal letter admitting that he was contacted by the overseas investigator, indicating the validity of the contact information used in the overseas investigation.

Although the General Director submitted a letter rebutting that he made the statements in the investigation report, simply denying having made inconsistent statements that are documented in the record is insufficient to overcome the director's adverse finding. Rather, precedent case law requires the petitioner to resolve any inconsistencies in the record by submitting 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. at 591-92. Thus, while it is possible for an individual to make statements that may be interpreted in ways that are contrary to the petitioner's interests, the fact remains that the petitioner had the opportunity, both in response to the NOIR and on appeal, to rebut the adverse findings by submitted documentary evidence to support the intended claim. Here, such evidence was not submitted. Instead, the evidence on record supports the conclusion that there is no qualifying relationship between petitioner and the foreign 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.*, 19 I&N Dec. at 362.

In support of the Form I-140, Immigrant Petition for Alien Worker, the petitioner appended a letter dated September 3, 1998, in which it claimed to be a wholly owned subsidiary of [REDACTED] located in China, ("foreign entity"). The only stock certificate for the petitioner indicates that "[REDACTED] owns 100,000 shares of "[REDACTED]". The articles of incorporation for the petitioner were filed on October 23, 1995, and authorize the issuance of 100,000 shares of common stock.¹

The petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, and the California Tax statements from October of 1996 through the time the petition was filed in 1998, indicate that the beneficiary, [REDACTED], owns 100% of the petitioner's stock. The California Statement states names the beneficiary as the petitioner's sole officer. This contradicts the petitioner's December 1996 business license from the city of San Diego naming [REDACTED] as the company's owners and the application to conduct business in Indiana as a foreign corporation file September 4, 1998, naming the corporate officers as: [REDACTED]

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). Without conclusive evidence showing the corporation's ownership and control, the petitioner cannot establish that a qualifying relationship exists with the foreign entity.

The foreign entity's Instrument of Ratification submitted with the Form I-140 states that the foreign entity is a Sino-foreign joint venture owned by [REDACTED]

¹ It is noted that the articles of incorporation submitted with the Form I-140 were for a California corporation named [REDACTED] filed August 31, 1995. It does not appear this corporation is related to the instant matter. The petitioner submitted its articles of incorporation in response to the NOIR.

[REDACTED] (20%); [REDACTED] (20%); and [REDACTED] (60%). The petitioner has failed to establish that the foreign entity possess an ownership interest and/or control over the U.S. company, such that the U.S. company qualifies as a subsidiary of the foreign entity. The petitioner has also not provided evidence that it is owned and controlled by the same group of individuals, such that it qualifies as an affiliate of the foreign entity.

For the above mentioned reasons the petitioner has failed to establish a qualifying relationship with the foreign entity.

B. Managerial or Executive Capacity

The petition must also be revoked because the petitioner has failed to establish that the beneficiary would be employed in a 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, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

In response to the NOIR the petitioner submitted a detailed job description for the beneficiary's position in the U.S. indicating that her primary responsibilities include checking faxes and emails for important communications, directing the sales department to perform research and contact suppliers based on directions from the parent company, instructing the sales department to negotiate prices, meeting supplier executives in person to establish relationships, making ultimate decisions to meet parent company and customer needs, signing contracts and purchase orders, inspecting photos of products, reviewing the operation department's carrier bookings, dealing with Chinese inspection requirements, making sure a system is in place to track the customs and shipping documents, and directing the accounting department to make sure there are funds to pay business costs.

A job description alone, no matter how detailed, is of little probative value unless the petitioner is able to support its claims by providing evidence to show that it had the human resources to support the beneficiary in a position where she is called upon to allocate the primary portion of her time to performing managerial- or executive-level tasks. It is reasonable to assume that any entity with limited staffing would require assistance from the individual(s) at the top of its organizational hierarchy to assist in carrying out the daily operational tasks. Thus, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors,

such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner claims that it receives extensive support from the Chinese parent company and that the employees from the overseas company conduct the non-managerial functions to save on labor costs and the organization chart indicates that a Vice President in Charge of Sales, Senior Sales Agent, and Accounting Manager are compensated by the foreign entity. However, the petitioner has not provided any documents from the foreign entity to support these claims. The petitioner has not provided an organization chart for the foreign entity, pay records, communications, or any other documents to indicate the existence of sales, operation, or accounting departments to relieve the beneficiary of non-qualifying activities in her position with the petitioner. 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)).

The petitioner submitted federal and state employer quarterly tax returns for the first and second quarters of 1998, but did not submit the tax returns for the third quarter of 1998, the time period in which the petition was filed. The quarterly tax returns for the second quarter of 1998 indicate that the petitioner had three employees: the beneficiary; [REDACTED]. An organization chart provided in response to the NOIR, indicates that the [REDACTED] is employed as a sales agent and [REDACTED] is employed as an accountant. The tax return indicates that [REDACTED] earned \$2,400 and [REDACTED] earned \$2,200 in the second quarter of 1998. The fourth quarter tax return from 1997 indicated that the petitioner had one employee.

While the AAO acknowledges that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary performed or would perform were/are only incidental to the position in question. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). It is therefore particularly important for the petitioner to provide enough information about the beneficiary's employment to establish how much of the beneficiary's time would be allocated to qualifying tasks versus those that are deemed non-qualifying. It is unclear how the beneficiary could allocate her time primarily to the performance of managerial or executive duties with a staff of one full-time employee, i.e., the beneficiary, and two potentially part-time employees.

The petitioner has not provided evidence of sufficient staffing levels to relieve the beneficiary from performing the non-qualifying duties, and has failed to establish that the beneficiary would be

employed in a primarily managerial or executive capacity. For this additional reason, the approval must be revoked.

IV. CONCLUSION

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The decision of the director is affirmed. The approval of the petition is revoked.