



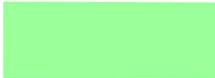
U.S. Citizenship
and Immigration
Services

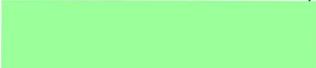
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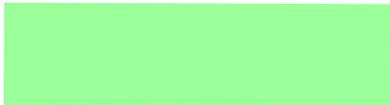
OFFICE: TEXAS SERVICE CENTER

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry 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. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. 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 denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded for further consideration.

The petitioner is a Florida corporation that seeks to employ the beneficiary in the position of 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.

Relying on the common law definition of the term "employee," the director determined that the petitioner and the beneficiary do not have an employer-employee relationship. The director therefore denied the petition, finding that the petitioner is ineligible for the visa classification sought herein. The director's decision was based on the affirmative finding that the beneficiary is the owner of the petitioning entity and is therefore the employer rather than an employee of the petitioning entity.

Pursuant to a comprehensive review of the record, the AAO finds that the record contains inconsistent and insufficient supporting documents, which fail to establish who in fact owns the petitioning entity. Therefore, to the extent that the director's finding was the direct result of an affirmative determination as to the petitioner's ownership, such finding must be and hereby is withdrawn.

As a preliminary matter, the AAO points to counsel's initial supporting statement dated July 6, 2009, in which counsel stated that the beneficiary is the 100% owner of the foreign entity where he had been previously employed. Despite this claim, counsel continued to refer to the foreign employer as the parent entity of the petitioner. As supporting evidence, the petitioner provided its stock certificate No. 1, which indicated that 100 shares of the petitioner's stock were issued to the beneficiary on July 2, 2008.

However, in the petitioner's Request for Evidence (RFE) response Exhibit No. 2, the petitioner provided stock certificate No. 2, dated August 1, 2009, indicating that another 60 shares were issued to [REDACTED] the beneficiary's foreign employer. Notwithstanding the two stock certificates, which show a combined issued total of 160 shares, the petitioner's stock transfer ledger, which was submitted as RFE response Exhibit No. 3, indicates that the beneficiary has 40 shares of stock remaining. The petitioner has provided no evidence to show that the beneficiary relinquished any portion of his original issue of 100 shares, nor is there any indication that the petitioner was authorized to issue more than 100 shares of stock as indicated in Article IV of the petitioner's Articles of Incorporation.

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). The petitioner has not provided any objective evidence that would help to resolve the damaging anomalies that are contained within the record with regard to ownership of the petitioning entity. Accordingly, as it is unclear whether the beneficiary or the beneficiary's foreign employer owns the majority

of the petitioner's stock, the AAO finds that it cannot support an adverse conclusion that is based on an affirmative finding with regard to the petitioner's ownership.

The withdrawal of the director's conclusion notwithstanding, the record indicates that the petitioner has failed to meet certain statutory and regulatory requirements and is therefore ineligible to classify the beneficiary as a first preference employment-based immigrant.

First, as indicated above, the record contains grave inconsistencies regarding the petitioner's ownership. Such inconsistencies preclude the AAO from being able to determine whether the petitioner has a qualifying relationship with the beneficiary's employer abroad. *See* 8 C.F.R. § 204.5(j)(3)(i)(C).

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 (BIA 1988); *see also*

Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (Assoc. Comm. 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

Given the petitioner's submission of inconsistent evidence to establish its ownership, the AAO is unable to conclude that the petitioner and the beneficiary's foreign employer are similarly owned and controlled.

Second, the record lacks evidence to establish that the petitioner meets the provision discussed at 8 C.F.R. § 204.5(j)(3)(i)(D), which requires the petitioner to establish that it has been doing business for at least one year prior to filing the Form I-140. "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. 8 C.F.R. § 204.5(j)(2).

In an effort to establish that it meets the above regulatory criterion, the petitioner provided evidence to show its purchase of [REDACTED], a separate corporate entity, and [REDACTED] business activity during the time period in question. However, establishing that the petitioner purchased an entity that has been doing business is not sufficient to establish that the petitioner itself has been doing business during the requisite one-year period. In fact, the record contains no evidence of the petitioner's own business activity during that same time period, nor has the petitioner even stated with any degree of clarity what type of business it purports to operate. Again, the single transaction of purchasing a previously existing entity, which continues to exist simultaneously with the petitioner, is not evidence that the petitioner has been doing business on a regular, systematic, and continuous basis."

Third, the record lacks sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. Based on the deficient job description provided for the beneficiary's position and the petitioner's limited organizational hierarchy, the evidence of record does not establish that the beneficiary would allocate the primary portion of his time to carrying out tasks at a managerial or executive level.

Finally, the AAO finds that the petitioner provided a fraudulent document in an effort to establish a basis for sustaining the appeal. Specifically, the AAO observes that the document titled "Minutes," purports to establish that a meeting of the foreign entity's board of directors took place on Monday, August 3, 2009 and thus preceded the filing of the Form I-140. The document states that the meeting was held for the purpose of confirming that the beneficiary "is an employee of [the petitioner]" and further asserts that "[a]n employer-employee relationship exists" between the petitioner and the beneficiary, given the board's majority ownership and control over the U.S. entity, which thereby gives the board control over the beneficiary's work performance. The document further stated that the beneficiary is subject to being hired and fired, reports to the board of directors, and is controlled by directives that are handed down by the board of directors.

The AAO points out that prior to the director's denial, which was issued on May 4, 2010, the record contains no references to an "employer-employee relationship" or the characteristics of such a relationship. The fact that the petitioner submits a document that predates the denial by approximately nine months in which the exact language of the denial was incorporated is questionable, as the document seemingly suits no other

purpose than to address the adverse findings issued by the director in his May 4, 2010 decision, issued nine months after the date shown in the minutes of meeting.

Given the circumstances described above, the AAO does not believe that the foreign entity's board of director's meeting memorialized in the "Minutes" took place nine months prior to the issuance of the director's denial, as indicated. There is simply no logical explanation as to why the foreign entity would have cause to hold a meeting to determine the employer-employee relationship between the petitioner and the beneficiary. Merely generating and dating the document does not establish that the document was created on the date indicated. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Here, the AAO has ample reason to believe that the minutes document was not created pursuant to an August 3, 2009 meeting as the petitioner claims. Rather, the AAO believes that the director's adverse findings prompted the petitioner to create such document, thereby indicating that the date on the document is false.

In light of the significant deficiencies discussed above, this matter will be remanded for a new decision, which shall take proper notice of the AAO's findings. The director may issue a notice requesting any additional evidence he deems necessary in order to determine the petitioner's eligibility for the benefit sought.

ORDER: The decision of the director dated May 4, 2010 is hereby withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision, which, if adverse, shall be certified to the AAO for review.