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



U.S. Citizenship
and Immigration
Services

DATE: MAR 22 2013

OFFICE: NEBRASKA SERVICE CENTER

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 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a Missouri company that is a grocery store, and it seeks to employ the beneficiary as its Vice-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 denied the petition on December 14, 2011, concluding that: (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 the beneficiary's proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity, and (3) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

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

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States

in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The first issue that will be addressed 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").

On appeal, counsel for the petitioner indicated that the petitioner is owned 50 percent by the beneficiary's foreign employer, [REDACTED], and thus the petitioner is a subsidiary of the foreign company. On appeal, counsel contends that [REDACTED] has owned 50 percent of the petitioner since 2004 and this ownership has never changed. Counsel further states that the other 50 percent ownership has changed throughout the years.

In reviewing the director's decision, he laid out several instances where the documentation is inconsistent with counsel's claims. The AAO will not repeat each instance since the denial decision is part of the record. To name one example, during a USCIS site visit to the petitioner, the beneficiary stated that in 2009 the ownership changed and the beneficiary owned 50 percent of the petitioner and [REDACTED] owned 25 percent and [REDACTED] owned the remaining 25 percent. However, according to the appeal, counsel for the petitioner asserts that [REDACTED] still owns 50 percent of the petitioner. In addition, the petitioner's 2010 tax returns list [REDACTED] and [REDACTED] each owning 50 percent of the petitioner even though the petitioner asserted on several occasions that [REDACTED] closed down and their ownership of the petitioner was sold. The numerous inconsistencies in the record make it impossible to determine that there is a qualifying relationship between the petitioner and the beneficiary's foreign employer.

As general evidence of a petitioner's claimed qualifying relationship, the articles of incorporation alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The stock certificates, 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. In the instant petition, the petitioner submits the stock ledger and 4 out of the 5 stock certificates but failed to submit any additional documentation such as corporate bylaws, the minutes of relevant annual shareholder meetings and the stock certificate registry.

Counsel claims that [REDACTED] still owns 50 percent of the petitioner but does not provide sufficient evidence to corroborate this claim. 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). Because the petitioner has not established that a qualifying relationship exists between the petitioner and the beneficiary's previous foreign employer, this petition cannot be approved.

The second issue that will be addressed in this proceeding calls 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). 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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

An analysis of the record does not lead to an affirmative conclusion that the beneficiary was employed abroad or would be employed in the United States in a qualifying managerial or executive capacity.

As noted in the director's denial decision, the petitioner submitted an organizational chart for the petitioner on April 11, 2011 that differs from the information USCIS received from the petitioner during an on-site visit. For example, the individual listed on the organizational chart as a controller is actually a warehouse worker; the produce manager is actually a driver; and the manager of quality assurance is actually a cashier. In addition, the director noted that [REDACTED] was signing several legal documents and representing herself as the petitioner's current acting president even though it does not appear that she is currently employed by the petitioner. The fact that the petitioner may not have a controller, produce manager, manager of quality assurance or president may significantly change the organizational structure of the company and the duties performed by the beneficiary. 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).

On appeal, counsel for the petitioner submits the duties that will be performed by the beneficiary and states that the beneficiary will work in a managerial capacity. Counsel for the petitioner does not provide any evidence to overcome the director's concerns that the job descriptions for the positions stated in the organizational chart are quite different from the job duties that are actually performed by these individuals as discovered in the site visit. 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).

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

Furthermore, an analysis of the record does not lead to an affirmative conclusion that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

According to the record, the beneficiary held the position of vice-president of [REDACTED] and president of [REDACTED]. The petitioner did not clarify how the beneficiary divided his work time between two companies and the director requested further information regarding this issue. As noted in the director's denial decision, some documentation states that the beneficiary's wife ran the business of [REDACTED] since the beneficiary was working full-time in [REDACTED]. Several documents submitted by the petitioner state that the beneficiary's wife was only an accountant for [REDACTED] and the documents do not state that she was essentially running the business.

The director also noted that it appears that the beneficiary was supervising one manager only and may have had to perform non-qualifying duties in running a store such as working as the cashier, stocking shelves, inventory, customer service, and inventory, when the one manager was off duty. On appeal, counsel for the petitioner simply states that the previous documentation establishes that the beneficiary was working in a managerial capacity. However, counsel does not provide any evidence to overcome the director's concerns. 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)).

A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint is that the director denied the petition. The petitioner insists that it provided sufficient documentation to establish eligibility. The director's decision clearly outlined the missing information and documentation that the petitioner failed to submit, and the record has insufficient evidence to establish eligibility. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulations. Accordingly, the petitioner's claim is without merit.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of the evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

The submitted evidence does not meet the preponderance of the evidence standard. As noted in the director's decision, the petitioner did not provide sufficient evidence to establish that the petitioner meets the regulatory requirements to establish eligibility for the benefit sought.

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.