



**U.S. Citizenship
and Immigration
Services**

(b)(6)

DATE **MAY 29 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 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,


4 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 Texas limited liability company that seeks to employ the beneficiary in the United States as its “vice president/director of operations.” 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.

In support of the Form I-140 the petitioner submitted a statement dated May 20, 2011, which contained claims made in an effort to establish the petitioner’s eligibility. The petitioner also provided supporting evidence in the form of various tax and business documents.

The director reviewed the petitioner’s submissions and determined that the petition did not warrant approval based on numerous deficiencies in the record. The director therefore issued a request for evidence (RFE) dated October 5, 2011 instructing the petitioner to supplement the record with evidence establishing that it meets the following regulatory and statutory criteria: (1) the petitioner has the ability to pay the beneficiary’s proffered wage as of the date the Form I-140 was filed; (2) the petitioner had been doing business for one year prior to the date the petition was filed; and (3) the petitioner has a qualifying relationship with a foreign organization and that the foreign organization continues to do business.

The petitioner’s response included a statement from counsel dated December 23, 2011. Counsel explained that the petitioner acquired majority ownership of [REDACTED], which operated as a retailer of gas, fast food, and automotive and household products under the business name “[REDACTED]”. Counsel referred to the petitioner as a holding-operating company by virtue of its ownership of a majority of [REDACTED] and its operation of the subsidiary. Based on counsel’s claim that the petitioner operates [REDACTED], the petitioner offered evidence showing that [REDACTED] has been doing business during the time period in question. The petitioner also provided its quarterly tax returns and wage reports as well as the beneficiary’s pay stubs showing wages allegedly paid by the petitioner from June through November 2011. Finally, the petitioner provided tax, business, and corporate documents pertaining to [REDACTED].

After considering documents that the beneficiary submitted in support of his Form I-485, Application to Register Permanent Residence or Adjust Status, as well as the documents the petitioner submitted in response to the RFE, the director determined that the petitioner was ineligible for the immigration benefit sought and therefore issued a decision dated September 27, 2012 denying the petition. Specifically, the director determined that the petitioner failed to establish that: (1) the petitioner has the requisite qualifying relationship with the beneficiary’s employer abroad; (2) the beneficiary has the requisite time period of employment in a qualifying managerial or executive position with a qualifying entity abroad; (3) the petitioner had been doing business for at least one year prior to the filing of the Form I-140; and (4) the petitioner has the ability to pay the beneficiary’s proffered wage.

Additionally, the director issue a finding of fraud concluding that the petitioner submitted falsified documents in support of its claims in an attempt to procure an immigration benefit under provisions of the Act. Specifically, the director determined that the beneficiary provided information pertaining to his foreign residence that rendered his foreign employment claim dubious. The director further pointed out that the

beneficiary made inconsistent claims pertaining to his place of employment by indicating in his visitor visa application that he worked at [REDACTED] which is located in Pune, State of Maharashtra where the beneficiary lived, while claiming in his Form G-325, Biographic Information, that he worked for [REDACTED] which was located in Gondal, State of Gujarat, and lived in Pune, State of Maharashtra, despite the over-300-mile distance between the States of Gujarat and Maharashtra.

On appeal, counsel provides an appellate brief disputing the claim that the beneficiary intentionally misrepresented information or misled U.S. Citizenship and Immigration Services (USCIS). Counsel attempts to provide plausible explanations to address the director's misgivings regarding the credibility of the petitioner's claims and further contends that the petitioner is not statutorily ineligible on the grounds cited in the denial. Counsel asserts that the petitioner is a holding-operating company and claims that the petitioner uses its majority ownership to control other companies "as a means to concentrate control with a single management team" in order to maximize cost efficiency. Counsel urges the AAO to consider the petitioner's entire organization in determining whether the petitioner is doing business.

After reviewing the record in its entirety, the AAO finds that counsel's assertions are not persuasive in overcoming the grounds for denial or the director's additional finding of fraud. The AAO's analysis of relevant documents and submissions will be addressed in the discussion below.

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 two issues to be addressed in this proceeding—the beneficiary’s employment abroad and the petitioner’s qualifying relationship with the petitioner’s foreign employer—share a common element in that both look to the beneficiary’s nexus with the foreign entity that is claimed to share common ownership with the U.S. petitioner. Specifically, in order 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 that the two entities are 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"). It follows, therefore, that in order to establish that the beneficiary meets the statutory and regulatory foreign employment requirements, the petitioner must establish that the beneficiary has the requisite qualifying employment abroad, which means that not only must the employment have been in a qualifying managerial or executive capacity for at least one year during the statutorily required three-year time period, but that foreign employment must have been with a foreign entity that has a qualifying relationship with the petitioner. In other words, a qualifying relationship with a foreign entity can be established only if the record shows that the beneficiary was employed by that foreign entity.

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.

In the present matter, the petitioner claims to be a subsidiary of [REDACTED] the beneficiary’s claimed employer located in India. In support of this claim the petitioner provided a copy of its minutes of organizational meeting, which took place on October 28, 2009, and a copy of a membership certificate showing that it issued 1,000 units to [REDACTED]

Notwithstanding evidence ostensibly showing [REDACTED] ownership and control of the petitioning entity, the record does not establish that [REDACTED] was the beneficiary’s employer abroad. As indicated in the director’s decision, information that the beneficiary previously provided in his Form G-325 with regard to his place of residence and the address of [REDACTED] where the beneficiary claims to have been employed

prior to coming to the United States to work for the U.S. petitioner, strongly indicates that the distance—over 300 miles—between the beneficiary’s place of residence and [REDACTED] would have made employment at [REDACTED] highly unlikely.

On appeal, counsel attempts to address the anomaly, stating that while the beneficiary owns a residence in Pune, India he assumed a position with [REDACTED] as a result of a dispute he had with his business partner. Counsel claims that the beneficiary’s intent was ultimately to return to his residence in Pune, India when the dispute subsided, thus indicating that it was not unreasonable for the beneficiary to have listed the Pune, India property as his foreign address, despite the alleged claim that the beneficiary was physically residing in Gondal, India in close proximity to [REDACTED] where the beneficiary claims to have worked prior to coming to the United States.

The AAO finds that there is no evidence to support counsel’s explanation. As the record includes no information pertaining to the beneficiary’s relations with a business partner, it is unclear why the beneficiary would opt to leave his position of employment, where he was apparently a partner, and take a job at a location that is hundreds of miles away from both the employment and his place of residence. The AAO notes that while there is no affirmative proof that counsel’s assertions are not valid, there is no evidence to attest to their validity. 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).

Merely offering unsupported new information as a means of explaining away an inconsistency that was pointed out earlier in the proceeding is not sufficient to establish that counsel’s statements are truthful and reflective of the beneficiary’s actual circumstances during the time period in question. 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).

Additionally, the director pointed to statements the beneficiary made on December 3, 2008 when being issued a visitor visa at which time he stated that he was employed at [REDACTED] which is located in Pune, State of Maharashtra, India, where the beneficiary resided prior to coming to the United States. The beneficiary further indicated at the time of the interview that his position was that of “landlord.” This information is not consistent with the claims the beneficiary has recently made in his Form G-325 or with the claims the petitioner made in its supporting documents.

In summary, while the evidence may support a finding that [REDACTED] owns the petitioning entity, this fact is only relevant to the issue of a qualifying relationship if the petitioner is able to establish that [REDACTED] was the beneficiary’s employer abroad. The mere fact that [REDACTED] and the petitioner have a parent-subsidiary relationship is irrelevant if the petitioner fails to provide evidence to establish the beneficiary’s employment with the foreign parent entity. Similarly, even if the beneficiary had been employed abroad in a managerial or executive capacity and the evidence of record were sufficient to make this determination, this fact would be irrelevant if the foreign entity where the beneficiary was employed did not share common ownership and control with the U.S. petitioner.

In the present matter, it appears more likely than not that the beneficiary was employed by [REDACTED] not by [REDACTED] as has been claimed in all documents submitted in support of the instant petition. As the statute and the regulations clearly indicate, in order to establish eligibility the petitioner must establish that the beneficiary's qualifying employment abroad was with a foreign entity that is either a branch of the U.S. petitioner or has an affiliate or parent-subsidiary relationship with the petitioner and that the employment abroad was ongoing for at least one year during the required three-year time period. In this matter, despite the explanation counsel offers on appeal, the petitioner has failed to submit sufficient credible evidence to make the necessary connection between the beneficiary's employment abroad and [REDACTED] the foreign entity that owns the petitioner. In other words, despite [REDACTED] ownership of the U.S. petitioner, the record lacks sufficient credible evidence to establish that the beneficiary was in fact employed at [REDACTED] as claimed. Therefore, the AAO cannot conclude that (1) the petitioner has the requisite qualifying relationship with the beneficiary's foreign employer and, in light of conflicting information regarding the identity of the beneficiary's foreign employer, that (2) the entity where the beneficiary's employment abroad took place is either a branch, an affiliate, a parent, or a subsidiary of the petitioning U.S. entity. In light of these adverse findings with regard to two separate grounds of eligibility, the instant petition cannot be approved.

Next, the AAO will examine the record as it pertains to the regulatory requirement discussed at 8 C.F.R. § 204.5(j)(3)(i)(D), which 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) defines doing business as 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.

In the present matter, the director made several observations in support of the adverse finding, including the small size of the business space the petitioner was authorized to occupy and the fact that the petitioner had only one employee during the time period that immediately preceded the filing of the instant Form I-140. The director also observed that despite the petitioner's organizational chart, which includes the staffing structure of the entity that the petitioner purchased, and regardless of evidence showing that the entity that the petitioner purchased is doing business, the record lacks evidence to establish that the petitioner itself is doing business.

On appeal, counsel disputes the director's finding, asserting that the petitioner "is responsible for the entire operations and management of its holdings," which includes [REDACTED] which in turn operates under an assumed name as a retailer of gas, fast food, and automotive and household products. Counsel claims that the petitioner has put together a management team that is responsible for the petitioner's investment entities and further asserts that the petitioner is not merely a holding company, whose sole purpose is to own a majority of the stock of another entity. Rather, as previously indicated, counsel claims that the petitioner is a holding-operating company, which, in addition to owning a controlling share of another entity, also engages in a business of its own.

The AAO fails to see how the petitioner fits the definition of a holding-operating company when no evidence has been provided to establish that the petitioner actually engages in any business that is independent from simply owning and controlling an investment entity. Merely establishing that the petitioner controls its investment entity by virtue of its majority ownership does not establish that such control is equivalent to engaging in a business activity of its own. In fact, the AAO points to the petitioner's Form I-140 Part 5, Item 2 where the petitioner identified itself as a "retail trade/investments" enterprise. It is noted that the only evidence of any retail trade is

documentation that pertains to [REDACTED] an entity that is entirely separate from the petitioner itself and was conducting business well prior to the petitioner's purchase of its shares. There is no evidence that the petitioner itself conducts any retail or trade. While the petitioner clearly invested funds in order to purchase [REDACTED] this single act of investing into an existing enterprise is not reflective of business that the petitioner carries on in a regular, systematic, and continuous manner.

Additionally, while the petitioner provided a photocopied document titled "Special Warranty Deed with Vendor's Lien" in which the petitioner was named as the grantee of a property whose legal description was provided, it is unclear how this document relates to [REDACTED], which the petitioner also claims to own and operate. It is noted that the warranty deed does not contain the specific address of the property in question. Moreover, the petitioner's submission of Texas permits for sales and use tax and tobacco products tax fail to establish the petitioner's connection to the gas station/convenience store business images depicted on pages that the petitioner titled "[REDACTED] Kingsland, Texas." While the tobacco and sales and use tax permits indicate that the petitioner is authorized to engage in some type of retail operation, none of the documents establish that the petitioner was in fact operating and conducting business on a regular, systematic, and continuous for one year prior to the filing of the instant petition. The evidence of record does not support counsel's assertion that the petitioner is both an operating and a holding company, nor is there other evidence that the petitioner has been and continues to do business. Therefore, the petitioner has failed to establish that it meets the doing business filing requirement defined at 8 C.F.R. § 204.5(j)(3)(i)(D) and on the basis of this third adverse finding the instant petition cannot be approved.

The AAO will now turn to the final ground for ineligibility that addressed in the director's decision—the conclusion that the petitioner failed to establish that it 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:

Ability of prospective employer to pay wage. 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.

The petitioner's Form I-140 indicates that the beneficiary's proffered wage is \$30,000 per year. The director summarized the record of the beneficiary's pay to include the petitioner's 2011 quarterly wage report for the third quarter showing that the beneficiary was compensated at total of \$2,500 for the entire three-month period from July through September and photocopied pay stubs from June 1, 2011 through November 30, 2011, where the June pay stub, which was dated December 1, 2011, showed gross monthly earnings totaling \$1,750, while the remaining monthly pay stubs from July through November showed gross monthly earnings of \$2,500 for each of the respective months making the six-month salary total to \$14,250.

After reviewing the above documents, the director determined that the quarterly wage report for the 2011 third quarter, which showed that the beneficiary earned \$2,500 for a combined three-month period, was not consistent with the pay stubs, which indicated that, with the exception of June 2011, the beneficiary earned

\$2,500 per month for each of the remaining months, thus indicating that his total earnings for a three-month period should have been \$7,500, not \$2,500 as indicated in the wage report. The AAO notes that 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).

On appeal, counsel asserts that the petitioner paid the beneficiary a total of \$16,730, which, when considered in light of the 29 weeks that were left in 2011 when the beneficiary's nonimmigrant visa was approved, would exceed the proffered wage of \$30,000 annually. In support of the appeal, the petitioner resubmitted the beneficiary's pay stubs from June through November 2011, and noncertified photocopies of the beneficiary's 2011 IRS Form W-2 statement and annual tax return dated October 19, 2012—ten days prior to USCIS's receipt of the petitioner's appeal.

Although the director determined that the petitioner established paying the beneficiary wages totaling \$7,500 2011, the AAO finds this conclusion to be unacceptable as it was entirely based on documents that were inconsistent and thus unreliable. While the director appears to have accepted the information contained in the beneficiary's October and November 2011 pay stubs, which indicate that the beneficiary was compensated \$2,500 for each of the two months, the AAO cannot accept this finding as fact, as doing so would require the AAO to assume that the pay stubs for October and November 2011 were valid. The AAO finds that neither the documents submitted in response to the RFE, nor those submitted on appeal are sufficient to resolve the considerable inconsistencies that continue to exist between the information found in the petitioner's 2011 third quarterly wage report and the pay stubs the petitioner submitted for the same three-month time period, where the beneficiary is shown to have received wages that are three times greater than those shown in the wage report. In light of these anomalies, the AAO cannot accept the petitioner's submission of uncertified tax documents as adequate evidence that the above discussed inconsistency has been resolved, particularly given the date on the beneficiary's 2011 tax return, which indicates that the document was completed on October 19, 2012—less than one month after the petition was denied—and was possibly created with the desired information for the purpose of overcoming the adverse findings cited in the director's decision, which predated the tax return itself. While the AAO does not deny that the information contained within the beneficiary's recently submitted IRS Form W-2 for 2011 matches the information claimed in the beneficiary's tax return, the petitioner provided no evidence establishing that any of the information that appears in the beneficiary's Form W-2 and personal tax return is the same information that was reported to the IRS.

Given the considerable and grave inconsistencies that have been observed in the current evidence of record, the AAO is reluctant to assume the validity of earnings documents, such as pay stubs and IRS Form W-2s, which can be internally generated with relative ease without having to report the same information to the IRS.

In summary, the AAO finds that the petitioner has failed to provide evidence that is credible and reliable in support of its claim that it had the ability to pay the beneficiary the proffered wage at the time the petition was filed. Therefore, the instant petition cannot be approved on the basis of this additional finding of ineligibility.

Lastly, the AAO will address the director's finding of fraud and material misrepresentation.

First, the AAO notes that under BIA precedent, a material misrepresentation is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961).

The federal courts state that the general rule is that a concealment or misrepresentation is material if it "has a natural tendency to influence or was capable of influencing, the decision of the decision-making body to which it was addressed." *Kungys v. United States*, 485 U.S. 759, 770 (1988); *Monter v. Gonzales*, 430 F.3d 546 (2d Cir. 2005).

In light of the discussion above, the AAO finds that the petitioner knowingly submitted documents containing false statements in an effort to mislead USCIS and the AAO on an element material to the beneficiary's eligibility for a benefit sought under the immigration laws of the United States. See 18 U.S.C. §§ 1001, 1546. The AAO hereby enters a finding of fraud.

Additionally, the evidence is not credible and will not be given any weight in this proceeding. 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). Moreover, the petitioner's submission of a fraudulent document brings into question the reliability and sufficiency of the remaining evidence offered in support of the visa petition. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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.

FURTHER ORDER: The AAO finds that the petitioner knowingly submitted documents containing false statements in an effort to mislead USCIS and the AAO on an element material to the beneficiary's eligibility for a benefit sought under the immigration laws of the United States.