

(b)(6)

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

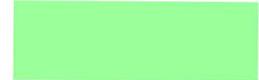


DATE:

OCT 02 2013

OFFICE: TEXAS SERVICE CENTER

FILE:



IN RE:

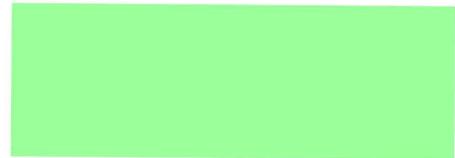
Petitioner:

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".
for Ron Rosenberg
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, a Georgia corporation, operates a restaurant and claims to be a subsidiary of M [REDACTED] located in India. It seeks to employ the beneficiary in the United States as its president and CEO. 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 February 9, 2012, which contained relevant documents and information pertaining to its eligibility.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a notice of intent to deny (NOID) dated November 26, 2012 informing the petitioner of various evidentiary deficiencies. The NOID informed the petitioner that the record lacked sufficient evidence to establish that: 1) the petitioner has a qualifying relationship with the beneficiary's foreign employer; 2) the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 3) the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The petitioner was given an opportunity to provide evidence to respond to the director's preliminary adverse findings.

The petitioner's response came in the form of numerous additional documents and a statement from counsel dated December 19, 2012 in which counsel specifically discussed the documents that were being submitted to address the director's adverse findings. Counsel claimed that the petitioner and the beneficiary's foreign employer have a qualifying relationship and further stated that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity.

After considering the petitioner's response, the director determined that the petitioner failed to overcome any of the three adverse findings that were previously cited in the NOID. With regard to the issue of a qualifying relationship, the director found that the petitioner failed to provide evidence to show a monetary exchange between the foreign entity and the petitioner wherein the foreign entity paid for receipt of the petitioner's stock. With regard to the beneficiary's proposed employment, the director determined that the petitioner provided an inadequate job description and failed to provide evidence that the beneficiary oversees a managerial, supervisory, or professional staff of employees who relieve her from having to primarily perform non-qualifying tasks. It is noted that this latter finding was based, in part, on the respective salaries of the beneficiary's subordinate employees. Finally, with regard to the beneficiary's employment abroad, the director determined that the petitioner failed to provide an adequate job description properly delineating the beneficiary's job duties and further noted that the job description provided originally included certain tasks that were of a non-qualifying nature. In light of these adverse findings, the director issued a decision dated March 1, 2013 denying the petition.

On appeal, counsel provides a brief supported by new and previously submitted evidence.

After reviewing the record in its entirety, the AAO finds that the petitioner has submitted sufficient evidence to establish that the beneficiary was more likely than not employed abroad in a qualifying managerial or executive capacity. Therefore, the director's adverse finding with respect to the beneficiary's foreign employment capacity is hereby withdrawn.

However, for the reasons discussed below, the record does not contain sufficient evidence to overcome the remaining two adverse findings with regard to the claimed qualifying relationship between the petitioner and the beneficiary's foreign employer or with regard to the beneficiary's proposed employment in the United States.

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.

First, the AAO will determine whether the petitioner has provided 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 general, when examining the executive or managerial capacity of the beneficiary, the AAO reviews the totality of the record, starting first with the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed 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). The AAO will then consider this information in light of other relevant factors, including (but not limited to) job descriptions of the beneficiary's subordinate employees, the nature of the business conducted by the entities in question, the size of the subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role in the petitioner's organization.

The petitioner indicated in its initial support statement that the beneficiary's proposed position would include financial management duties, which would consume 25 hours of the work week, and operations management and public relations functions, each of which would consume another 10 hours of the work week. The AAO finds that a number of the duties under these three categories would be deemed as non-qualifying. Such duties include: arranging for financing and wire transfers, negotiating terms of purchases and investments, keeping and maintaining employment records, recruiting and organizing human resources, and promoting the petitioner's business in public media. As no specific time allotments were assigned to individual job duties, it was impossible to determine how much time the beneficiary would actually allocate to these non-qualifying tasks. Additionally, the petitioner did not specify what types of purchases and investments the beneficiary would be required to make within the context of a restaurant business, nor has the petitioner explained why the beneficiary would be tasked with arranging for wire transfers if the petitioner employs a director of finances as claimed. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

The AAO further notes that a number of the items listed in each of the three categories - namely prudent management of the organizations resources, performing due diligence, developing and implement "systems for efficient and measurable operations flow to ensure fluid an flexible service," integrating customer service and personnel satisfaction, and ensuring that the petitioner "is an integral part of the community" - were overly vague and failed to disclose what underlying tasks the beneficiary would ultimately perform. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner also provided a copy of its organizational chart depicting the beneficiary's four subordinates - one director, one director of finances, one information technology manager, and one executive chef - as well as their job descriptions. Although the petitioner provided another, more comprehensive chart, which included the restaurant's kitchen and wait staff, these individuals were not specifically named. Thus, despite the job descriptions that the petitioner provided with regard to these positions along with wage and salary information, it is unclear which positions were filled at the time the petition was filed.

Although the director allowed the petitioner an opportunity to respond to the NOID by providing additional information pertaining to the beneficiary's job description, the petitioner did not provide a more detailed statement delineating the specific tasks to be performed. Additionally, while the record contains a number of the petitioner's quarterly tax returns, it failed to provide the relevant return for the first quarter of 2012 which would reflect the petitioner's staffing levels as of the date of filing. Rather the latest quarterly report was provided for the fourth quarter of 2011, which showed that the petitioner employed a total of 12 people, five of whom would include the beneficiary and her four subordinates. It is unclear which of the kitchen and wait staff positions were filled at the time of filing.

On appeal, counsel contends that the beneficiary would be employed in an executive capacity and claims that a detailed breakdown of the beneficiary's proposed position was previously provided. However, as determined by the director and further discussed in this decision, the job description that the petitioner

provided was not sufficient as it was lacking in key information. As previously noted, the job description included a number of non-qualifying tasks to which no specific time allotments were assigned. Merely assigning time constraints to broad categories rather than specific job duties is not sufficient to convey a meaningful understanding of how the beneficiary's time would be distributed and how much of that time would be consumed with qualifying tasks versus those that are non-qualifying. While 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 would perform are only incidental to the position in question. Again, 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).

Furthermore, in reviewing the list of positions for which job descriptions were provided, the AAO observes that while a job description was provided for a full-time human resources manager, this position was not included in the organizational chart that accompanied the employee job descriptions. 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). Given the inconsistency discussed herein, the AAO has reason to further question which of the positions that were listed in the petitioner's organizational chart were actually filled at the time the petition was filed. In other words, the petitioner has not provided sufficient evidence to establish that the hierarchy it depicted in its initially submitted organizational chart was actually in place at the time of filing.

Accordingly, while the petitioner's organizational hierarchy seemingly indicates that the beneficiary's subordinates would include supervisory and professional personnel, despite the director's determination to the contrary,¹ the record has not been supplemented with adequate evidence and information to allow the AAO to affirmatively conclude that (1) the petitioner had the organizational complexity to allow the beneficiary to allocate her time primarily to overseeing her subordinates or (2) that the petitioner had s to otherwise relieve the beneficiary from having to spend her time primarily carrying out non-qualifying tasks. As discussed at length in this decision, the petitioner has failed to provide an adequate job description establishing that the beneficiary would spend her time primarily performing tasks within a qualifying managerial or executive capacity. Therefore, based on this initial adverse determination the instant petition cannot be approved.

Next, the AAO will determine whether the petitioner submitted sufficient evidence to establish whether the petitioner and the beneficiary's employer abroad have a qualifying relationship. 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").

¹ The director improperly relied on salaries to question whether certain employees were employed in a professional capacity.

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 claims to be a wholly-owned subsidiary of the beneficiary's foreign employer. The director found that the petitioner provided insufficient evidence to establish that it had actually paid for its claimed ownership interest in the petitioner. Specifically, the director questioned how such a relationship between the

two entities when the only evidence of the petitioner's receipt of funds shows that the beneficiary's brother-in-law made deposits into the petitioner's bank account and that such deposits were in fact a loan to the petitioner.

Counsel sought to respond to the director's questions concerning the petitioner's ownership. Counsel indicated that [REDACTED] who deposited funds into the petitioner's account, had no relationship with the foreign entity and no ownership interest in the petitioning entity. Counsel claimed that Mr. [REDACTED] merely acted "as an agent on behalf of the corporation." Counsel relied on a photocopied checking deposit slip, which bore Mr. [REDACTED]'s signature and showed that a sum of \$21,000 was deposited into account no. [REDACTED] on October 9, 2004. The record shows, however, that the same page that contains the photocopied deposit slip also contains a photocopy of a check written in the same amount of \$21,000 paid to the order of the petitioning entity. The check was dated July 9, 2004 and appears to have been signed by Nilesh Samant. It also appears that the issuing bank was [REDACTED] New York.

Other than the \$21,000 amount that is common to both transactions, it is unclear how or whether these two transactions are related and, more critically, how they can be seen as representative of the foreign entity's purchase of the petitioner's stock when there is no evidence of a nexus between the claimed foreign parent entity and either of these transactions. Although the petitioner submitted an undated statement signed by [REDACTED] a financial services specialist of [REDACTED] " who claimed that [REDACTED] India deposited \$21,000 into checking account number [REDACTED] on October 9, 2004, the evidence of record is not sufficient to corroborate Mr. [REDACTED]'s claim, which is not supported by actual documentation given that the bank where the deposit was allegedly made purged its records from that date due to the passage of seven years. In other words, it is unclear what basis Mr. [REDACTED] had for corroborating the petitioner's claim if the documentation of the transaction in question no longer exists.

Additionally, the petitioner submitted a document titled, "General Memo of Understanding," executed by Mr. [REDACTED] and the petitioner on December 12, 2012. Although the document memorializes an agreement between Mr. [REDACTED] and the petitioner wherein the petitioner agreed that funds of varying amounts were accepted as loans from Mr. [REDACTED] to be paid back at a 5% accrued interest, this document did not exist at the time of filing and thus cannot be considered as evidence to support the petitioner's eligibility as of the priority date. Furthermore, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired.

The petitioner has provided a number of confusing documents that are not sufficient to corroborate the claim that the petitioner is a wholly-owned subsidiary of the foreign entity that previously employed the beneficiary. Therefore, the petitioner has failed to establish the requisite qualifying relationship and on the basis of this second adverse finding this petition cannot be approved.

(b)(6)

NON-PRECEDENT DECISION

Page 9

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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.