



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **SEP 25 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)

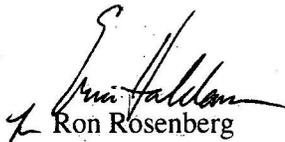
ON BEHALF OF PETITIONER:
[REDACTED]

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,


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 is a Texas corporation that seeks to employ the beneficiary in the United States as its chief executive officer. 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 11, 2012, which contained relevant information pertaining to the petitioner's eligibility. The petitioner indicated that it owns several subsidiary corporations in the United States and further stated that the beneficiary "applies her trading expertise in special, one-of-a-kind pianos," which is part of [REDACTED] one of the petitioner's wholly owned U.S. subsidiaries. The petitioner claimed to have formed other subsidiaries, one of which involves tilapia fish farming. The petitioner provided various business documents showing evidence of its business transactions prior to its acquisition by the beneficiary's foreign employer. The petitioner also provided organizational charts pertaining to itself and the beneficiary's employer abroad. The organizational chart depicting the petitioner's organizational hierarchy as of May 2012 identified six employees including the beneficiary.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for evidence (RFE) dated October 15, 2012¹ informing the petitioner of various evidentiary deficiencies. The director instructed the petitioner to provide evidence establishing that the beneficiary would be employed in a qualifying managerial or executive capacity. Such evidence was to include a job description delineating the beneficiary's proposed duties and the percentage of time the beneficiary would allocate to each specific job duty, accompanied by evidence of salaries or wages paid to all in-house and contracted employees. The director pointed out that the petitioner's staff of five employees may not be sufficient to support the beneficiary in a position where she would primarily perform job duties within a qualifying managerial or executive capacity. Next, the director pointed out that the petitioner's subsidiaries are separate business entities and thus instructed the petitioner to provide evidence demonstrating that it, i.e., the petitioner, has been doing business for at least one year prior to filing the petition. Finally, the director asked the petitioner to provide evidence of its ability to pay the beneficiary's proffered wage commencing with the priority date and going forward through the date the RFE was issued.

The petitioner's response included a statement from counsel dated December 31, 2012 in which she resubmitted the petitioner's original job description, which was included with the petition and other supporting evidence. Counsel claimed that the petitioner used only contract labor in 2011 and indicated that the company currently has six employees, all of whom were hired in 2012. Counsel asked the director to consider business documents that reflected business transactions that took place prior to the petitioner's recent change in ownership and further claimed that the beneficiary incorporated [REDACTED] on February 27, 2012 and later merged this company with the petitioning entity "after she acquired the majority

¹ The record indicates that the director initially issued an identical RFE on July 11, 2012 and further shows that a response to that RFE was provided. It is unclear why the duplicate RFEs were issued. However, all evidence submitted in each response has been considered in making a determination with regard to the instant appeal.

shares of the company." Counsel claimed that the beneficiary "purchased controlling shares of [the petitioner] in May 2012" and merged it with [REDACTED], which, according to counsel, was also established as a subsidiary. With regard to the petitioner's ownership in a fish farming enterprise, counsel stated that actual production had not yet begun when the response was filed. Finally, with regard to the petitioner's ability to pay, counsel offered bank records for the petitioner's three U.S. subsidiaries, asserting that the subsidiaries' combined "cash on hand" as shown in their respective bank statements far exceeds the beneficiary's proffered wage.

After considering the petitioner's response, the director determined that the petitioner failed to meet several statutory and regulatory criteria. First, with regard to the beneficiary's proposed employment, the director found that the beneficiary's job description lacked details about the beneficiary's specific tasks and further stated that the petitioner's staffing was not sufficient to support the beneficiary in a primarily managerial or executive capacity. Moving on to documents pertaining to the foreign entity's business activity, the director determined that the petitioner failed to provide certified English translations, which are required when submitting foreign language documents, and thus failed to establish that the foreign entity continues to provide goods and/or services on a regular, systematic, and continuous basis. Next, with regard to the beneficiary's business activity in the United States, the director took note of the petitioner's claim at Part 5, No. 2 of the Form I-140, where the petitioner indicated that it is a farming and trading enterprise and pointed out that the supporting documents the petitioner submitted indicated that its fish farming subsidiary was issued an assumed name certificate on May 7, 2012 and that its piano retail business was established on February 27, 2012. Given the facts addressed herein, the director determined that neither the fish farming nor the piano retail operation had been doing business for one year at the time the petition was filed in May 2012. Finally, the director determined that the petitioner failed to provide requested evidence establishing its ability to pay the beneficiary's proffered wage. In light of these adverse findings, the director issued a decision dated March 1, 2013 denying the petition.

On appeal, counsel explains that the petitioner was originally a real estate development company until it was acquired by the foreign entity where the beneficiary had been previously employed. Counsel further explained that 2012 tax documents for the petitioner's employees were not available when the RFE was first issued and therefore offers IRS Form W-2 statements from 2012 in support of the appeal. Counsel asserts that it is unnecessary to provide full translations of the foreign entity's invoices given that the invoices are bilingual and already carry English language translations. With regard to the issue of the petitioner doing business, counsel focuses on the U.S. entity's change of business direction from real estate development, which the company engaged in prior to its change in ownership, to May 2011 when the foreign entity acquired the petitioner and changed its business direction to include varying enterprises, such as international trading of high-end pianos, tilapia farming, fast food franchising, and real estate acquisition. Finally, with regard to the petitioner's ability to pay, counsel points out that the beneficiary only had authorization to work for two months in 2012 and for three months in 2013 until her work authorization was revoked upon denial of the Form I-140. Nevertheless, counsel asserts that the petitioner had sufficient cash to pay the beneficiary's proffered wage and indicates that the petitioner plans to submit further evidence showing that wages were paid to the beneficiary.

The record shows that the petitioner has supplemented the record with a second statement from counsel as well as additional documents in support of the appeal.

After reviewing the petitioner's submissions, the AAO finds that the petitioner has provided sufficient evidence to establish that the foreign entity continues to do business abroad. As counsel properly pointed out, the foreign entity's invoices, which are a testament to the ongoing provision of goods and/or services, are formatted with both a Chinese and an English language text and thus do not require separate English language translations. The invoices account for time periods that extend well beyond the date the petition was filed and thus indicate that the foreign entity continues to do business. Therefore, the AAO hereby withdraws one of the four adverse findings that were cited as grounds for denial.

The remainder of this decision will focus on the three remaining grounds to include the question of whether the beneficiary's proposed employment with the U.S. petitioner would be within a qualifying managerial or executive capacity, whether the petitioner was doing business for one year prior to filing the instant petition, and whether the petitioner had the ability to pay the beneficiary's proffered wage as of the date the petition was filed.

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 to be addressed in this discussion is the beneficiary's proposed employment with the U.S. entity. The AAO will review the evidence to determine whether the petitioner established that it would employ the beneficiary 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 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, such as job duties and responsibilities of the beneficiary's subordinates, the nature of the petitioner's business and the size of its staff, and any other factors that may contribute to a comprehensive understanding of the beneficiary's role within the petitioner's organizational hierarchy.

In the present matter, the nature of the petitioner's business is such that its key focus is on the operations of its subsidiaries, whose respective levels of function and operation at the time of filing were entirely unclear. As the petitioner did not indicate what specific activities it would undertake, other than overseeing the functioning of its subsidiary businesses, the beneficiary's role within the petitioner's organization becomes equally unclear. For instance, the petitioner indicated that the beneficiary would allocate ten hours per week to managing and supervising the work of executives and managers of the petitioner's U.S. subsidiaries, setting goals and objectives, and reviewing executive and financial reports regarding the petitioner's various projects. However, to the extent that this portion of the beneficiary's time would be essentially spent managing the petitioner's business investments, such activities would be more akin to tasks required to provide services and thus would not be deemed as tasks within a qualifying managerial or executive capacity. 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).

The petitioner went on to state that five hours of the beneficiary's time would be spent working with department managers to evaluate "commercial offers including evaluating the competitiveness of the bids" being proposed. However, the petitioner did not explain the nature of the "commercial offers" or bids or how the offers and bids fit in with the type of business the petitioner's Form I-140 indicates it conducts. Similarly, although the petitioner indicated that the beneficiary would spend four hours per week executing agreements and consulting with accountants and lawyers regarding key projects, the petitioner did not specify the nature of the agreements or the beneficiary's specific role in their execution.

Additionally, the petitioner claimed that the beneficiary would engage in contract negotiation and travel to meet with "high end customers, suppliers, [and] sellers" for a total of fourteen hours per week. However, without further information, these job duties cannot be deemed as being within a qualifying managerial or executive capacity.

In reviewing the business documents that have been presented, it appears that the petitioner's key business focus is to invest funds to set up subsidiaries, which would then engage in various business activities. These subsidiaries, however, when individually incorporated, are entities entirely separate from the petitioning entity itself, which, despite its role as an investor and possibly a manager of these separate enterprises, cannot be deemed as engaging in the business activities of the subsidiaries. Given the structure of this business arrangement, any time the beneficiary herself would spend managing the petitioner's investments, including overseeing the execution of contractual agreements or even overseeing the work of the executives or managers whom the subsidiary entities employ, would not be deemed as time spent performing tasks within a qualifying managerial or executive capacity. 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 would perform would be only incidental to the position in question.

In the present matter, given the petitioner's failure to establish that it, in its own right, would be engaged in the sale of products and/or services, the managerial or executive capacity of the beneficiary's proposed employment is nearly impossible to gauge, as the petitioner's key focus in the supporting evidence has been the business activities of the petitioner's subsidiaries rather than those of the petitioner itself. Although the record indicates that the petitioner had six employees shortly after the petition was filed, it is unclear how these individuals' purported job assignments fit within the petitioner's business scheme and, more critically, how these individuals would relieve the beneficiary from having to allocate her time primarily to directly managing the petitioner's subsidiary businesses.

Lastly, the AAO finds that counsel's statements on appeal, in which he claimed that the beneficiary merged [redacted] with the petitioning entity "after she acquired the majority shares of the company" and further stated that the beneficiary "purchased controlling shares of [the petitioner] in May 2012" and merged it with [redacted] are not supported by the evidence of record and are not consistent with any of the petitioner's own claims. The record in the present matter bears no evidence to establish that the beneficiary had any ownership interests in the petitioner or its subsidiaries, nor is there any indication that the petitioner's subsidiaries were ever merged with the petitioner itself such as to create a single entity. 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). Counsel's claims are confusing and fail to further the petitioner's objective in establishing eligibility for the benefit sought herein.

In conclusion, the AAO finds that the record does not support a finding that the beneficiary's proposed employment would be within a qualifying managerial or executive capacity and on the basis of this initial conclusion, this petition cannot be approved.

Next, the AAO will determine whether the record contains sufficient evidence to establish that the petitioner meets the filing criteria cited at 8 C.F.R. § 204.5(j)(3)(i)(D), which requires the petitioner to establish that it had 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.

As properly pointed out in the director's decision, the Form I-140 at Part 5, No. 2, indicates that the petitioner is engaged in the business of farming and trading. Looking to the additional statements that provide a more comprehensive explanation of the petitioner's business, it does not appear, nor has any evidence been submitted, to establish that the petitioner itself engages in either of these business activities. Rather, as has been discussed in counsel's various statements, the petitioner has assumed the role of an investor in its purchase and incorporation of various types of enterprises, which themselves do or would engage in fish farming and trade of collectible pianos, respectively. While the petitioner's purchase of these various types of business may be deemed as business transactions, there is no evidence in the record to suggest that the petitioner engaged in the purchase, setup, and management of subsidiary entities on a regular, systematic, and

continuous basis for one year prior to filing the instant petition. In fact, the record shows that the petitioner did not actually establish the subsidiary that engages in the trade of high-end pianos until February of 2012, only three months prior to filing the instant petition.

Counsel attempts to explain the petitioner's lack of business activity by focusing on the petitioner's stage of development. Counsel points out that prior to its change in ownership, the petitioner was a real estate development business and has since changed business direction. In essence, counsel describes a successor-in-interest relationship where the petitioner purchased a previously existing business and thus became its successor. However, the record lacks any evidence of, and in fact contradicts, a finding that the petitioner could be a successor-in-interest to the previously existing entity.

The generally accepted definition of a successor-in-interest is: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." Black's Law Dictionary 1473 (8th Ed. 2004). A mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *Id.*; see also *Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property – to another business organization. While the merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law, the purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business in the same manner with regard to the assets sold. See generally 19 Am. Jur. 2d Corporations § 2170 (2010).

Considering the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes. However, in order to do so, the petitioner must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also assumed the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor and the essential business functions must remain substantially the same as before the ownership transfer.

Applying the analysis set forth above to the instant petition, the documentation submitted by the petitioner does not meet the evidentiary requirements. By definition, the actions required to establish a successor-in-interest must be more than the mere acquisition of one company's stock by another company, even where both companies continue to exist and do business. In the present matter, the record clearly indicates that the petitioner is not, in fact, engaged in the same business as that of its predecessor. Furthermore, aside from providing stock certificates to show that the petitioner has purchased the stock of a previously existing U.S. entity, the petitioner has not provided the requisite documentary proof. 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)). Rather, while the documents on record indicate that the petitioner may have acquired ownership interest from the previous owners of [REDACTED], there is little evidence to suggest that the petitioner became [REDACTED] successor-in-interest.

In light of the above, the AAO finds that the petitioner has failed to establish that it had been doing business for one year prior to filing the instant Form I-140 and the petition must therefore be denied.

Finally, the AAO will address the issue of the petitioner's ability to pay the beneficiary's proffered wage of \$75,000 per year. 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.

In determining the petitioner's ability to pay the proffered wage, the AAO will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence would be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner indicates that the beneficiary did not have work authorization and therefore could not be employed at the petitioning entity at the time the petitioner was filed.

Although the petitioner had the opportunity to establish its ability to pay through alternate means - namely by providing evidence of its net income figure as reflected on its federal income tax return - the petitioner has not provided such information. Rather, the petitioner has provided the beneficiary's pay stubs for November and December 2012 showing that the beneficiary was compensated a total of \$12,500, which when prorated works out to be the beneficiary's proffered wage, for the two months during which she worked for the petitioner in 2012. However, establishing that the petitioner had the ability to pay in November and December of 2012 does not relieve the petitioner of the burden of having to establish that it had the ability to pay in May 2012 when the instant petition was filed. As the petitioner has not provided evidence of its ability to pay as of the Form I-140 filing date, the instant petition cannot be approved.

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.