

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: **JUL 09 2014** OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

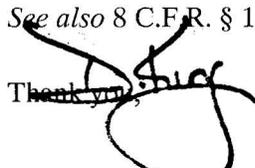
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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 North Carolina limited liability company that seeks to employ the beneficiary as its 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.

The director denied the petition, concluding that the petitioner failed to establish that the petitioner and the beneficiary's foreign employer have a qualifying relationship.

I. The Law

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.

II. Procedural History

The record shows that the petition was filed on January 4, 2013 and was accompanied by a supporting statement, dated January 2, 2013, in which the petitioner referred to the foreign entity, [REDACTED], as the petitioner's parent, claiming that [REDACTED] "indirectly owns and controls" the petitioner. The petitioner provided a pie graph showing that [REDACTED] holds 22.22% of the petitioner's stock, the beneficiary owns 33.33% of its shares, and [REDACTED] owns the remaining 44.45%. The petitioner further indicated that

owns 40% of the foreign entity while the beneficiary owns the remaining 60%, i.e., a majority, of the foreign entity's shares. In support of this claim, the petitioner provided the foreign entity's stock transfer ledger, which showed the original and current ownership breakdowns. With regard to the U.S. entity, the petitioner provided the following evidence:

1. A board resolution, dated January 2, 2012, which stated that as of January 2, 2013, the president of the U.S. entity, resolved that the petitioner would be owned as follows: will own 200 shares (44.45%); the beneficiary will own 150 shares (33.33%); and will own 100 shares (22.22%) of the petitioning entity's stock.
2. The petitioner's stock issuance/transfer ledger showing that stock certificate no. 1 was issued on October 1, 2008 giving 100 shares; stock certificate no. 2 was issued on February 10, 2012 giving the beneficiary 150 shares; and stock certificate no. 3 was issued on January 2, 2012 giving 200 shares of the petitioner's stock.
3. The petitioner's stock certificate nos. 1-3, which reiterated the above information with regard to the number of shares issued, but indicated that stock certificate no. 3 was issued on January 2, 2013, rather than on January 2, 2012, as indicated in the stock issuance/transfer ledger.
4. The petitioner's 2010 corporate tax return, complete with Schedule G, which identified as 100% owner of the petitioning entity.

On May 21, 2013, the director issued a request for evidence (RFE), finding that the record contains inconsistent information with regard to ownership of the U.S. entity. Specifically, the director pointed out that, contrary to the information provided above, showing that the petitioner has multiple owners, the petitioner's "reporting documents" showed as the petitioner's sole owner. Accordingly, the director asked the petitioner to provide evidence resolving this inconsistency.

In response, the petitioner resubmitted the documents list in nos. 1-3, above, and further provided a copy of the petitioner's 2012 tax return, which showed that 60% of the petitioner's stock is owned by the beneficiary while the remaining 40% is owned by , who was previously identified as the petitioner's sole stockholder. The petitioner also provided photocopies of two promissory notes – one dated February 10, 2012 from promising to pay the petitioner \$1,500 and another dated January 2, 2013 from promising to pay the petitioner \$2,000 – and a copy of the petitioner's bank statement for June 2012, showing that the petitioner deposited \$1,500 into its account on June 5, 2012.

The director reviewed the petitioner's submissions and determined that the petitioner failed to establish that it and the beneficiary's foreign employer are similarly owned and controlled. Specifically, the director noted that while the petitioner's ownership is divided among three individuals, none of whom owns the majority of the petitioner's stock, the foreign entity's ownership is shared by two people – the beneficiary, who owns the majority of the foreign entity's stock, and who owns 40% of the stock. Based on these respective ownership distributions, the director concluded that the petitioner and the beneficiary's foreign employer do not have a qualifying relationship.

On appeal, counsel disputes the director's decision, offering evidence of wire fund transfers from the petitioner to the foreign entity to establish that the foreign entity is the petitioner's largest creditor and thus, in effect, controls the petitioner. Counsel also provides a statement from an expert witness as a means of establishing that the petitioner and the foreign employer are affiliates.

Upon review, and for the reasons stated below, we find that the petitioner has failed to establish that a qualifying relationship exists between itself and the beneficiary's foreign employer.

III. Issue on Appeal

As indicated above, the issue to be addressed in this discussion is whether the petitioner provided sufficient evidence to establish that 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").

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 addition, the regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Assoc. Comm. 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). 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.*, 19 I&N Dec. 362. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

In the present matter, the petitioner originally claimed to be a subsidiary of the foreign entity, asserting that the foreign entity has indirect ownership and control of the U.S. entity "through its shareholders, who collectively own and control the majority of the [petitioner's] stock." The petitioner focused on the two individuals – [REDACTED] – who are common stockholders of both entities and who, through their combined ownership interests, are majority stockholders of and have control over both entities.

The petitioner has not provided adequate evidence to support the claim that it and the beneficiary's employer abroad are commonly owned and controlled. First, in reviewing the above regulatory definitions one key element that must be present in order for the term subsidiary to apply is that the owner of the subsidiary must be a parent, i.e., an entity that has control over the subsidiary through direct or indirect majority ownership and control or through 50% ownership and control. In the alternate, the subsidiary can be part of a 50-50 joint venture where the parent either owns half of the subsidiary and controls it or owns less than half and controls it. Given that the petitioner in this matter is owned directly by individuals, rather than a parent entity, the term subsidiary is not applicable to the facts presented.

Turning to the definition of the term "affiliate," subsection (A) does not apply because, as established above, the petitioner is not a subsidiary. Furthermore, even if we were to disregard use of the term subsidiary and focus on individual ownership, the facts presented herein do not establish that the same individual owns and controls the foreign and U.S. entities. While [REDACTED] owns the majority of the foreign entity's stock, the same individual owns only 33.33% of the U.S. entity.

On appeal, the petitioner offers evidence in the form of an operating agreement to establish that it issued two different classes of shares – voting and non-voting – to establish that while [REDACTED] owns less than a majority of the petitioner's shares, he nevertheless maintains control over the petitioner by virtue of owning the majority of the voting class of shares. However, despite the date shown in the operating agreement, it is not clear that the document was actually executed prior to the filing of this petition, particularly when considered in light of several significant anomalies that we observed during the course of our review of the record. First, despite the operating agreement, dated January 2, 2012, neither the petitioner's stock certificates nor the stock issuance ledger make any reference to two different classes of stock. Furthermore, looking to the board resolution, which was intended to establish the petitioner's three owners, the body of the document indicates that the resolution took place on January 2, 2013, while the resolution itself was dated January 2, 2012, exactly one year prior to the date the purported date of execution. We further note that while stock certificate no.3 was dated January 2, 2013, the same date indicated in the board resolution, the stock issuance ledger indicates that stock certificate no. 3, which purported to transfer 44.45% of the

petitioner's stock to [REDACTED] was actually issued on January 2, 2012, one year prior to the date indicated on the stock certificate itself. In fact, if the date shown in the stock issuance ledger were deemed accurate, it would appear that stock certificate no. 3 was issued prior to stock certificate no. 2, whose date of issue is shown as February 10, 2012. 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 the present matter, the petitioner has provided inconsistent documentation, which fails to establish precisely when the board's resolution went into effect with regard to the issuance of stock to a third shareholder. While the petitioner's 2012 tax return identified two stockholders with voting class stock, this information does not establish that the third stockholder – [REDACTED] – owned non-voting stock. If the third stock certificate was, in fact, issued on January 2, 2013 as claimed in the board resolution, this fact scenario would be consistent with the information contained within Schedule G of the petitioner's 2012 tax return, which would not reflect events that may not have taken place until the following tax year. In other words, if the third stockholder – [REDACTED] – acquired his ownership interest in the petitioner in 2013, there is no expectation that he would have been named as one of the petitioner's stock holders in 2012.

In addition, while the petitioner offered promissory notes to show that [REDACTED] were contractually bound to pay monetary consideration for their respective shares of the petitioner's stock, neither promissory note expressly stated what either [REDACTED] acquired in exchange for the amount of monetary liability specified in each note. Furthermore, there is no evidence to show that the \$1,500 deposit shown in the petitioner's June 2012 bank statement represents [REDACTED] satisfaction of the promissory note he signed on February 10, 2012. While the amount in the promissory note certainly matches the amount of the bank deposit, this correlation does not establish that there is necessarily a causal relationship between the promissory note and the bank deposit. Moreover, even if the petitioner were to establish a nexus between the note and banking transaction, there is little evidence to establish that the promissory note documented an exchange of stock issuances for monetary compensation.

Finally, looking to subsection (B) of the definition of affiliate, in order to qualify, the petitioner would have to establish that it and the beneficiary's foreign employer are owned and controlled by the same group of individuals such that each individual with ownership interest owns and controls approximately the same share or proportion of each entity. Here, as previously noted, the two groups of owners are not the same. While the foreign entity is owned by two individuals where one individual – the beneficiary – is a majority owner, the petitioning entity is owned by three individuals with no single individual owning a majority of the petitioner's stock. Despite the petitioner's submission of an operating agreement depicting two classes of stock where only class A stockholders have voting power, neither the petitioner's stock issuance ledger nor the stock certificates themselves corroborate the existence of a voting and an non-voting class of stock. Thus, absent other documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals control both entities. Thus, the companies are not affiliates as both companies are not owned and controlled by the same individuals. Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations.

IV. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.