

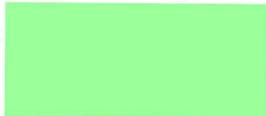
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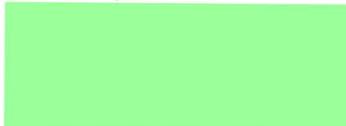
U.S. Citizenship
and Immigration
Services



DATE: **MAY 08 2014** OFFICE: TEXAS SERVICE CENTER

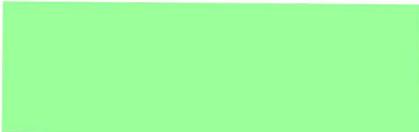
FILE: 

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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, Texas Service Center. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice of his intention to revoke the approval of the preference visa petition and his reasons therefore. The director ultimately revoked the approval of the petition and the matter subsequently came under review with the Administrative Appeals Office (AAO) on appeal. The appeal was dismissed and the matter is now before the AAO on a motion to reopen and reconsider. The petitioner's motion will be granted and the matter will be reopened for consideration of the newly submitted documents. However, the AAO will affirm the underlying decision dismissing the appeal.

The petitioner is a Texas corporation claiming to be a subsidiary of [REDACTED] the beneficiary's claimed overseas employer. The petitioner seeks to employ the beneficiary permanently as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

I. Factual and Procedural Background

The record shows that the petitioner filed a Form I-140 on August 12, 2002 and that the petition was approved on January 13, 2004. However, subsequent to further review of the record the director determined that the petitioner had failed to provide sufficient evidence establishing eligibility and thus issued a notice of his intent to revoke (NOIR) the approval of the petition. Based on information provided by the beneficiary at his adjustment interview with a U.S. Citizenship and Immigration Services (USCIS) officer, the director determined that the petitioner does not have a qualifying relationship with the beneficiary's claimed employer abroad and revoked approval of the petition.

On appeal, counsel reiterated the petitioner's original claim regarding its alleged parent-subsidary relationship with the beneficiary's foreign employer, asserting that the petitioner had previously submitted its articles of incorporation, which showed the petitioner's issuance of 1,000 shares of its stock to the beneficiary's foreign employer. Counsel further challenged the validity of the interview conducted by a U.S. Citizenship and Immigration Services (USCIS) officer, claiming that the director's adverse findings were refuted by the documentation the petitioner submitted in response to the NOIR. Counsel maintained that even if the beneficiary were the sole owner of the petitioning entity, this factor would not render the petitioner ineligible for a first preference visa petition. Lastly, counsel attempted to invoke the protection of section 106(c) of AC-21 based on the passage of more than 180 days since the date the Form I-140 was approved and further contended that equitable grounds preclude USCIS from revoking the petition based on the fact that the director did not raise any questions regarding the issue of a qualifying relationship in the RFE, which was issued prior to the approval of the petition.

In our decision dismissing the appeal, this office addressed counsel's claims and assertions. First, we determined that the document upon which counsel relied as supporting evidence of the petitioner's entire ownership claim was undated and signed only by the beneficiary with no accompanying signature of anyone representing the foreign entity, which was claimed as the petitioner's sole shareholder. Next, we addressed matters that were discussed at the beneficiary's interview with USCIS, pointing out that notes taken at the interview, which included the beneficiary's responses to questions posed by USCIS, were included as part of the official record, which showed contradictory statements made by the beneficiary with regard to the

petitioner's ownership. Finally, we rejected counsel's attempt to invoke the protection of section 106(c) of AC-21, pointing out that the petitioner's failure to establish eligibility, which resulted in revocation of the prior petition approval, indicated that the petition was not valid and thus not entitled to protection under section 106(c) of AC-21.¹ We also dismissed counsel's assertion that the director is precluded from raising an issue in the NOIR if that issue had not been previously raised at the time of the petition's original adjudication. Specifically, we pointed to USCIS's legal right to correct an error, which in this case stemmed from the service's approval of a petition that did not merit such favorable action. We further noted that, notwithstanding the USCIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the ultimate burden of establishing eligibility for the benefit sought remains with the petitioner and that such burden is not discharged until the immigrant visa is issued, which in the present matter it was not. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

The petitioner now files a motion to reopen and reconsider accompanied by supporting evidence in the form of affidavits, a stock certificate and stock transfer ledger, a corporate resolution from the foreign entity, the foreign entity's financial statement, the petitioner's organizational chart, and the petitioner's original supporting statement.

We find that the evidence submitted does not overcome the findings issued in our decision, dated September 16, 2011.

II. 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

¹ The problematic issues presented by this case are primarily the result of immigration procedures that have arisen since the enactment of section 106(c) of AC21. USCIS implemented the "concurrent filing" process on July 31, 2002 whereby an employer may file an employment-based immigrant visa petition and an application for adjustment of status for the alien beneficiary at the same time. See 8 C.F.R. § 245.2(a)(2)(B) (2004); see also 67 Fed. Reg. 49561 (July 31, 2002). USCIS implemented the concurrent filing process as a convenience for aliens and their U.S. employers; USCIS in no way suggested that an unadjudicated I-140 could be the basis for I-485 approval under the portability provisions of section 106(c). Prior to this date, only immediate relatives and family-based preference cases could concurrently file a visa petition and an adjustment application. At the time that Congress enacted AC21, no alien could assert that a denied or unadjudicated immigrant visa petition "shall remain valid" through the passage of 180 days, since the application for adjustment could not be filed until after the petition was approved by USCIS. It is presumed that Congress is aware of INS regulations at the time it passes a law. See *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 primary issue to be addressed in this decision is whether the petitioner has a qualifying relationship with the beneficiary's claimed employer abroad.

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 the present matter, the issue regarding the petitioner's qualifying relationship is two-fold. First, the petitioner did not submit sufficient evidence to support the claim that the beneficiary's foreign employer is the petitioner's sole shareholder. Second, what little evidence the petitioner did provide regarding its ownership

was deemed unreliable because of the beneficiary's contradictory statements. As discussed in our prior decision, the petitioner provided undated minutes of an organizational meeting, signed by the beneficiary, showing that the [REDACTED] was issued 1,000 shares of the petitioner's stock out of an authorized 100,000 shares. This evidence was later contradicted by the beneficiary himself in a February 23, 2009 adjustment of status interview during which the beneficiary responded to a question posed by the interviewing USCIS officer, indicating that that he, the beneficiary, was the petitioner's sole stockholder. Although the petitioner provided three sets of documents – a corporate resolution stating that it is the subsidiary of a foreign entity, a notarized statement from the foreign entity's managing director denying that the beneficiary is the sole owner of the petitioning entity, and the beneficiary's own sworn statement claiming that he is not the petitioner's sole owner – in an effort to resolve the inconsistency surrounding the petitioner's ownership, neither the statements nor the corporate resolution represent contemporaneous evidence created at the time of the alleged transfer of shares. Rather, all three documents were created in response to the director's adverse findings and fail to resolve the inconsistency the beneficiary created by making a prior statement that contradicted the original claim. Moreover, in our prior decision, we determined that, credibility issues aside, the petitioner failed to provide sufficient documentary evidence of its claimed qualifying relationship with the beneficiary's employer abroad.

In support of the current motion, the petitioner provided the following documents:

1. A signed statement from the foreign entity's managing director, [REDACTED] reiterating claims made in his May 26, 2009 statement pertaining to the beneficiary's ownership interest in the foreign entity. Mr. [REDACTED] reiterated the claim that the petitioner is directly owned by the foreign entity and not by the beneficiary.
2. A copy of the beneficiary's May 27, 2009 affidavit and a new affidavit from the beneficiary, executed on October 18, 2011, reiterating claims made in the first affidavit. Namely, the beneficiary denied having made contradictory statements regarding the petitioner's ownership. Rather, the beneficiary claimed that he made statements claiming to control, rather than own, the petitioning entity.
3. The petitioner's stock certificate and corresponding share transfer ledger.
4. The petitioner's minutes of an organizational meeting, which took place on October 19, 2000.
5. A copy of the foreign entity's corporate resolution executed on May 26, 2009.
6. A net income statement of the foreign and U.S. entities for the tax year ending June 30, 2008.

The above listed documents do not overcome the adverse findings discussed in our decision, issued on September 16, 2011. While the petitioner provided several documents that had not been previously submitted, none of the evidence imparts new knowledge or can in any way be deemed sufficient to overcome the issue of the beneficiary's inconsistent statements with regard to the petitioner's ownership. Despite the petitioner's submission of its stock certificate and transfer ledger, as previously noted, neither document is sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. Moreover, given the factual inconsistency created by the beneficiary during his adjustment of status interview, internally created documents, including the petitioner's stock certificate, stock transfer ledger, and the petitioner's minutes of organizational meeting, carry less evidentiary weight and are not sufficient to reconcile or resolve the discrepancy concerning the petitioner's ownership. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). While the petitioner's corporate resolution document is duly noted, we cannot overlook the fact that it is not new

evidence, as it was previously submitted, and that it was apparently created as the direct result of adverse findings issued in the director's notice of intent to revoke. As indicated in our prior decision, neither third party statements that reiterate the petitioner's original claim, nor the beneficiary's own statements denying having made contradictory claims during his interview with a USCIS officer are sufficient to overcome the inconsistency that the beneficiary in fact created.

Lastly, while the petitioner provided the foreign entity's financial statement claiming the petitioning entity as the foreign entity's subsidiary, this claim cannot be verified. Moreover, this statement carries minimal evidentiary weight as it was not audited and, as with several other supporting documents, was also generated in response to the director's notice of intent to revoke.

Counsel's assertion that the "revocation is against the weight of the evidence" is without merit given the beneficiary's interview response in which he cast doubt on previously made claims pertaining to the petitioner's ownership. Contrary to counsel's contention, USCIS is under no obligation to furnish a video or audio tape of the interview when, as previously explained, detailed notes from the interview have been made part of the record. As previously pointed out, section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." Notwithstanding the USCIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984). The factual inconsistency discussed above constitutes good and sufficient cause and thus is enough to warrant revocation of the petition's approval.

Counsel's arguments and the petitioner's documents in support of the motion have been considered and addressed. We again find that the statements the beneficiary made at the time of his adjustment interview further undermine the credibility and validity of the petitioner's claims. The additional evidence provided in support of this motion did not resolve the inconsistency or to support the original claim that was made at the time of filing. Accordingly, in view of these findings, the prior decision dismissing the appeal will not be disturbed.

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 motion is dismissed.