



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

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF Q-M-, INC.

DATE: AUG. 15, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a wholesaler of roofing and construction materials, seeks to permanently employ the Beneficiary as its multinational operations manager under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director, Texas Service Center, denied the petition. The Director concluded that the evidence of record did not establish that: (1) the Petitioner has a qualifying relationship with the Beneficiary's foreign employer; or (2) the Beneficiary will be employed in the United States in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional materials and asserts that the Director erred by selectively considering the evidence of record.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

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 the alien 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.

A United States employer may file Form I-140, Immigrant Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. A labor certification is not required for this classification.

The regulation at 8 C.F.R. § 204.5(j)(3) states:

(3) Initial evidence—

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:
  - (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
  - (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
  - (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
  - (D) The prospective United States employer has been doing business for at least one year.

## II. QUALIFYING RELATIONSHIP

The Director denied the petition based, in part, on a finding that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer.

To establish a "qualifying relationship" under the Act and the regulations, a 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* section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(3)(i)(C).

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The pertinent regulations at 8 C.F.R. § 204.5(j)(2) define the relevant terms. Generally, the term “affiliate” means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual; [or]
- (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. . . .

The same regulation defines a “subsidiary” as:

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.

#### A. Evidence of Record

The Petitioner filed the Form I-140 petition on February 12, 2015. The Petitioner identified the Beneficiary’s last foreign employer as [REDACTED] and stated that the U.S. company is a subsidiary of the foreign entity because the foreign entity owns 51% of the Petitioner’s shares.

A notarized, untranslated Spanish-language document dated February 24, 2011, indicated that the Beneficiary owned 99 out of 100 shares of the foreign company. The Petitioner also submitted a copy of Spanish-language meeting minutes (with a capsule English translation) dated January 17, 2012, indicating that the Beneficiary had transferred 51 of his 99 shares to the Petitioner, giving the U.S. company a controlling ownership interest in the foreign company.

The Petitioner submitted a copy of its 2013 IRS Form 1120, U.S. Corporation Income Tax Return. On that return, Schedule K, line 5a, asked whether the petitioning company owned “50% or more of the total voting power . . . of any foreign or domestic corporation.” The Petitioner answered “no.”

The Director issued a request for evidence (RFE), asking for “additional documentation to show [the petitioning] company has a qualifying relationship to the foreign entity claimed.”

In response, the Petitioner submitted a new, complete, certified translation of the meeting minutes dated January 17, 2012. The Petitioner also submitted a [REDACTED] report which provided details about the petitioning company, but not ownership information of its claimed subsidiary.

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The Director denied the petition in part because the Petitioner did not establish that it had a qualifying relationship with the Beneficiary's foreign employer. In denying the petition, the Director found that "the United States employer and the foreign employer are unrelated business entities," because "[S]chedule K of the petitioner's U.S. Corporation Income Tax Return (Form 1120), does not indicate that the U.S. company has any ownership in the foreign entity."

On appeal, the Petitioner states that an oversight led to an error on the Petitioner's income tax return. The Petitioner submits a copy of its 2014 IRS Form 1120 tax return, reflecting 51% ownership of the foreign entity, and an affidavit from [REDACTED] president of the petitioning company.

## B. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that it has a qualifying relationship with the foreign entity.

The regulation and case law confirm that ownership and control are the factors that determine whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification.<sup>1</sup> 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.<sup>2</sup>

As general evidence of a petitioner's claimed qualifying relationship, meeting minutes, tax returns, and an affidavit are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificates, stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of all 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.<sup>3</sup> Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The regulations specifically allow the Director to request additional evidence in appropriate cases.<sup>4</sup> As ownership is a critical element of this visa classification, the Director properly inquired into the means by which ownership was acquired.

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<sup>1</sup> See *Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r. 1982).

<sup>2</sup> *Matter of Church Scientology Int'l*, 19 I&N Dec. at 595.

<sup>3</sup> See *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 1632.

<sup>4</sup> See 8 C.F.R. § 204.5(j)(3)(ii).

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In his affidavit on appeal, [REDACTED] states: “On January 17, 2002 [sic] . . . , [the Petitioner] purchased 51% of [the foreign company’s] stock.” He adds that the Petitioner’s accountant was not aware of this information when she prepared the company’s 2013 tax return.

[REDACTED] specifically stated that the Petitioner “purchased” the foreign company’s stock. The Petitioner, on appeal, does not submit any documentation of the sale. Instead, in the appellate brief, the Petitioner states: “a petitioner need only document that a transfer [of stock] occurred . . . and neither the purchase price for the stock, nor proof of actual transfer of funds to purchase the stock are important.”

To support the above assertion, the Petitioner cites an unpublished AAO decision from 2002. The Petitioner does not submit a copy of the decision to show that the circumstances in the two cases are sufficiently similar to warrant comparison. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Furthermore, although [REDACTED] stated that the Petitioner “purchased” shares in the foreign company, the 2012 meeting minutes themselves, as translated, refer to the Beneficiary’s “decision to donate” the shares to the Petitioner. This is not a minor or insignificant discrepancy, and the Petitioner does not resolve it by stating that it is not required to produce evidence of payment.

The certified translation of the 2012 meeting minutes states that the Beneficiary “had in his possession the certificates representing the shares of its members.” The translation also referred to the “donation contracts” relating to the transfer of 51 shares from the Beneficiary to the petitioning U.S. employer. The Petitioner has not, however, submitted copies of the share certificates or donation contracts. Therefore, the Petitioner has not submitted credible evidence of the ownership of the foreign company.

We note that the Petitioner’s own submissions call into question the reliability of the meeting minutes. The petition in this proceeding is not the first immigrant petition that the Petitioner has filed on the Beneficiary’s behalf. In support of an earlier petition, the Petitioner submitted translated meeting minutes, showing a transfer of 51 shares from the Beneficiary to the U.S. petitioner. Those minutes, however, are dated January 22, 2013, more than a year after the date on the meeting minutes submitted with the present petition. Thus, the Petitioner has provided two different dates for the same transfer of shares. Given these conflicting dates, at least one set of meeting minutes cannot be authentic.

The discrepancy cannot be attributed to a translation error; the divergent dates are found within the Spanish-language documents as well as in the translations.<sup>5</sup> Also, in a letter dated March 29, 2013, [REDACTED] the administrative manager of the foreign entity, stated: “back in

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<sup>5</sup> This discrepancy is not, itself, a basis for dismissal of the appeal. But, by undermining the reliability of the meeting minutes, it demonstrates why the minutes alone are not sufficient evidence of the transfer of the shares. The Petitioner’s submission of two incompatible versions of the meeting minutes could also, in future proceedings, raise questions of willful misrepresentation of a material fact.

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January 22, 2013 a Meeting of the Shareholders took place . . . to transfer certain shares of the Mexican Corporation . . . to [the Petitioner].”

Furthermore, the earlier filing included a letter dated December 18, 2012, in which [REDACTED] stated that the Beneficiary “is . . . the majority shareholder owning 99% of shares in the [foreign] corporation.” [REDACTED] did not indicate, at the time, that any shares had changed hands earlier in 2012. This information contradicts the Petitioner’s claim, in the current petition, that the Beneficiary had transferred 51 shares to the Petitioner in January 2012. If the Beneficiary still owned 99 shares as of December 18, 2012, then the transfer cannot have taken place in January 2012, and the 2012 meeting minutes cannot be authentic. We note that this comes from materials submitted by the Petitioner itself, and therefore it is not information unknown to the Petitioner.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that it has a qualifying relationship with the foreign entity.

### III. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based in part on a finding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity. The Petitioner does not claim that the Beneficiary will be employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in a managerial capacity.

The regulation at 8 C.F.R. § 204.5(j)(5) requires the Petitioner to submit a statement which indicates that the Beneficiary is to be employed in the United States in a managerial or executive capacity. The statement must clearly describe the duties to be performed by the Beneficiary.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term “managerial capacity” as “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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

#### A. Evidence of Record

On the Form I-140, the Petitioner indicated that it had 32 current employees in the United States. The Petitioner submitted an organizational chart reflecting more than 32 positions, as well as 32 IRS Forms W-2, Wage and Tax Statements, for 2014.

The Director denied the petition, stating that the Petitioner had not “established that the beneficiary’s duties and those of his claimed subordinates elevate him . . . to a primarily managerial or executive position.” The Director also found that “the petitioner lacks the organizational complexity to warrant the employment of the beneficiary in a primarily executive of managerial capacity.”

On appeal, the Petitioner states that the Petitioner “had 32 employees on payroll as of the date of filing” and that its “reasonable needs . . . clearly indicate the need for a Multinational Operations Manager.”

#### 1. Analysis

The Director did not explain how an organization with over 30 documented employees “lacks . . . organizational complexity.” The Petitioner’s organizational chart shows several layers of authority within the company, with offices in several cities in Texas. Vacant positions within the organization do not, in this case, reduce the organization’s complexity to a point that it cannot justify the employment of a manager.

In addition to the Beneficiary’s job descriptions, quoted above, the Petitioner submitted over 30 pages of job descriptions for the Beneficiary’s subordinates. The Director did not discuss these materials in the denial notice, and offered no explanation or support for the conclusion that these job descriptions are inadequate.

When a USCIS officer denies a petition, the officer must explain the specific reasons for denial.<sup>6</sup> The denial notice in this case does not meet this requirement. It cannot suffice to cite regulations

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<sup>6</sup> *See* 8 C.F.R. § 103.3(a)(1)(i).

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and case law without providing context to show how those provisions relate and apply to the matter at hand.

The materials submitted to establish the Beneficiary's managerial role are not facially deficient. Absent an explanation for the Director's findings, those findings cannot stand. We will still dismiss the appeal, however, based on the previously described deficiencies in the Petitioner's evidence regarding its claimed qualifying relationship with the foreign company. Our withdrawal of one ground for denial does not change the outcome of the decision as a whole.

#### IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above reason. 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 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of Q-M-, Inc.*, ID# 17943 (AAO Aug. 15, 2016)