



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

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

MATTER OF 2-S-, INC.

DATE: OCT. 21, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, which sells and services video surveillance systems, seeks to permanently employ the Beneficiary as its chief financial officer 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, Service Center, denied the petition, concluding that the evidence of record did not establish that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by not considering case law regarding shared ownership and control.

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):

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- (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 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.

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. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Med. Syss., Inc.*, 19 I&N Dec. 362 (BIA 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 Int'l*, 19 I&N Dec. at 595.

In the initial filing, the Petitioner stated that the Beneficiary “established [the petitioning company] in 2005, and owns 50% of the company, while the other 50% is owned by her husband . . . , both being the only shareholders of the company.” The Petitioner identified the Beneficiary’s last foreign employer as [REDACTED] and stated that the Beneficiary’s spouse is [REDACTED] sole shareholder. The Petitioner stated that the two companies are “affiliates [because the Beneficiary’s spouse] owns a controlling interest in each one.”

The Petitioner also submitted a chart showing the Beneficiary and her spouse as half-owners of the petitioning company, and copies of the Petitioner’s IRS Forms 1120, U.S. Corporation Income Tax Returns, for 2008 through 2010. On each of these returns, the Petitioner stated that the Beneficiary and her spouse each owned 50% of the Petitioner’s voting stock.

The Director issued a request for evidence (RFE) on March 21, 2012, asking for additional documentation of a qualifying relationship between [REDACTED] and the Petitioner.

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In response, the Petitioner submitted copies of previously submitted documents and new materials. [REDACTED] the Petitioner's director of engineering, stated that one of these documents is the "Common Stock Record for [the petitioning company] showing 50% shareholding by" the Beneficiary's spouse. The "Common Stock Record" does not show the name of the company, but it does include the following information:

Cert. Number	Stockholder	Date Acquired	No. of Shares
1	[The Beneficiary's spouse]	05/31/2005	50
2	[The Beneficiary]	05/31/2005	50

The document also has column headings regarding transfer of shares, but the columns are blank, indicating that there has been no transfer of shares since their initial issuance.

[REDACTED] also repeated the assertion that the Beneficiary's spouse owns 100% of [REDACTED] and 50% of the petitioning company. [REDACTED] production manager at [REDACTED] stated that the Beneficiary's spouse "directly owns 50% of the shares of" the petitioning company.

In a supplemental submission, the Petitioner resubmitted copies of its 2008-2010 tax returns, showing that the Beneficiary and her spouse each own 50% of the Petitioner's shares. The Petitioner repeated the assertion that the Beneficiary's spouse "owns 100% of [REDACTED] and 50% of" the Petitioner.

On September 29, 2015, the Director issued a second RFE, asking for copies of "all stock certificates, stock ledger, proof of stock purchase. . . , meeting minutes, Complete Articles of Incorporation, or other documentation that establishes ownership and control." In response, the Petitioner stated:

The owner of [REDACTED] in Canada is [the Beneficiary's spouse] (100% shareholder). The owner of the Petitioner . . . is [REDACTED] (100% Shareholder). [REDACTED] . . . is a Canadian company whose sole shareholders are [the Beneficiary's spouse] (50% shareholder) and the Beneficiary . . . (50% shareholder).

The Petitioner submitted copies of the following documents:

- The Petitioner's articles of incorporation and related filings, dated between May 18 and 31, 2005
- The Petitioner's undated bylaws
- Share certificate number 1, dated May 31, 2005, indicating that [REDACTED] owns 100 shares of the petitioning company
- The Petitioner's common stock record, identifying [REDACTED] as the sole shareholder with 100 shares as of May 31, 2005. The columns relating to transfer of shares are blank.
- An affidavit from the Petitioner's corporate counsel, stating that the Beneficiary and her spouse are "the ultimate beneficial owners of" the petitioning company, through holding shares in [REDACTED]

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- An “ownership structure” chart, showing the Beneficiary and her spouse as joint owners of [REDACTED] which, in turn, owns all shares in the petitioning entity
- [REDACTED] articles of incorporation, filed August 28, 2003, identifying the Beneficiary and her spouse as the directors of that corporation
- Share certificates, issued August 28, 2003, indicating that the Beneficiary and her spouse each own 50 shares of [REDACTED]

The Petitioner listed its prior submissions, but did not acknowledge that many of those submissions claimed that the Beneficiary and her spouse directly owned the petitioning company, rather than indirectly through [REDACTED]. The 2015 RFE response was the first time the Petitioner stated that [REDACTED] rather than the Beneficiary and her spouse, owned the petitioning company.

The Director denied the petition, finding that the Petitioner had not shown that the Beneficiary had yielded control of the petitioner to her spouse.

On appeal, the Petitioner cites case law in support of the assertion that the Beneficiary’s spouse has *de facto* control over the Petitioner, superior to the Beneficiary’s authority. The Petitioner also contends that the Beneficiary’s spouse has negative control over the Petitioner, because he can block the Beneficiary’s actions. This last assertion conflicts with the other arguments, because, by the same logic, the Beneficiary also has negative control over the Petitioner.

Before we can make any findings regarding control, we must first establish ownership. In this case, the Petitioner has made conflicting claims of ownership. At the time of filing and in response to the first RFE, the Petitioner asserted that the Beneficiary and her spouse each directly owned 50% of the petitioning entity. When asked to produce share certificates and other evidence to confirm that claim, the Petitioner asserted that the Beneficiary and her spouse own the company indirectly through their shared ownership of [REDACTED] but did not acknowledge that this new information is inconsistent with the Petitioner’s prior claims.

In particular, the first submitted version of the common stock record raises serious questions. As noted above, it does not identify the company to which it pertains, but the Petitioner’s director of engineering specifically and unambiguously stated that it was the Petitioner’s own common stock record. The Petitioner’s new evidence indicates that [REDACTED] obtained all of the Petitioner’s shares on May 31, 2005, but the first version of the common stock record does not mention [REDACTED] and neither version reported any subsequent transfer of shares. If the more recent submissions regarding [REDACTED] are authentic and accurate, then the initially submitted common stock record cannot be the Petitioner’s authentic common stock record as claimed.

Furthermore, [REDACTED] cannot be the unnamed company to which the first common stock record relates. The [REDACTED] share certificates state that the Beneficiary and her spouse purchased their shares on August 28, 2003, at the time of [REDACTED] incorporation. The common stock record indicates that they purchased their shares almost two year later, on May 31, 2005.

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Given the above information, the first version of the common stock record either relates to a still-identified third company, or is a fabrication. Either way, the Petitioner's repeated submission of this document, along with multiple claims that the Beneficiary and her spouse each directly own 50% of the petitioning company, raises grave questions of credibility.

By signing Form I-140, the Petitioner took responsibility for the contents of the petition and attested to the accuracy of its evidence. The statute provides for the approval of immigrant petitions only upon a determination that "the facts stated in the petition are true." Section 204(b) of the Act, 8 U.S.C. § 1154(b). False, contradictory, or unverifiable claims inherently prevent a finding that the petitioner's claims are true. See *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Systronics Corp. v. I.N.S.*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988).

The Petitioner has put forth two different claims regarding its ownership. The Petitioner has not resolved the inconsistency with independent, objective evidence pointing to where the truth lies. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). We cannot begin to address the issue of control when the record contains contradictory claims about the ownership of the company.

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

III. 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 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 2-S-, Inc.*, ID# 47808 (AAO Oct. 21, 2016)