U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-A-B-W-, INC.

DATE: FEB. 14, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an auto body repair shop, seeks to permanently employ the Beneficiary as executive director of a joint venture, which the Petitioner sought to create with the Beneficiary's foreign employer. The Petitioner has petitioned for the Beneficiary 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, concluding that the evidence of record did not establish that: (1) the entity that filed the petition is the intending employer; (2) the Petitioner has a qualifying relationship with the Beneficiary's foreign employer; (3) the Beneficiary has been employed abroad in a managerial or executive capacity; (4) the Beneficiary will be employed in the United States in a managerial or executive capacity; (5) the prospective employer has been doing business for at least 1 year prior to the petition's filing date; and (6) the prospective employer has the ability to pay the Beneficiary's proffered wage.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by disregarding evidence and misinterpreting existing law.

Upon *de novo* review, we will dismiss the appeal. As discussed in greater detail below, we find that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer. Because a qualifying relationship is a fundamental requirement for establishing eligibility and the Petitioner has not established that it meets this fundamental criterion, we hereby incorporate and need not address the Director's findings with regard to whether the Beneficiary has been and will be employed in a managerial or executive capacity.

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 that the Form I-140 must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least 1 year in the 3 years preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least 1 year.

II. U.S. EMPLOYER

The first issue we must address, in order to give proper context to the rest of our decision and to the evidence of record, is the identity of the intending U.S. employer.

The Petitioner, [redacted] claims to have formed a 50-50 joint venture with the Beneficiary's last foreign employer, [redacted] In a letter in support of the petition, the Petitioner stated that it "has offered [the Beneficiary] a position as Executive Director. . . . It is our plan to utilize his expertise at [redacted] Joint Venture." The Petitioner stated that, although it will employ the Beneficiary, the Beneficiary would exercise his managerial or executive authority over the joint venture.

Several aspects of the Director's decision rest on the presumption that the joint venture would be the Beneficiary's U.S. employer. The Petitioner, on appeal, disputes this finding, repeating the assertion that the Petitioner itself would employ the Beneficiary.

Several lines of evidence in the record support the finding that the Petitioner, rather than the joint venture, is the entity that seeks to employ the Beneficiary. Form I-140 identifies [redacted] by name and by Federal Employer Identification Number as the intending employer, and

the Petitioner has submitted supporting evidence, such as the Petitioner's income tax returns, linking the Petitioner, rather than the joint venture, to the job offer.

We withdraw the Director's finding that the joint venture is the intending employer. This finding affects other conclusions by the Director. Specifically, the Director found that the Petitioner had not established that the intending employer had been doing business for at least 1 year prior to the filing of the petition, as required by 8 C.F.R. § 204.5(j)(3)(i)(D). This finding, however, rested on the presumption that the joint venture is the intending employer. Because that presumption was incorrect, this ground for denial cannot stand and is hereby withdrawn.

The Director also found that neither the Petitioner nor the joint venture had established the ability to pay the Beneficiary's salary, as required by 8 C.F.R. § 204.5(g)(2). Based on our review of the Petitioner's 2013 tax return, we agree with the Director's finding that the Petitioner does not have the ability to pay the Beneficiary's salary of $50,000.[1] The Petitioner will need to address and submit additional evidence of its ability to pay the proffered wage in any future filing.

III. QUALIFYING RELATIONSHIP

The Director determined that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer.

On appeal, the Petitioner asserts that the joint venture agreement has established a qualifying "subsidiary relationship" between all relevant parties.

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).

The regulation at 8 C.F.R. § 204.5(j)(2) 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 deciding factors in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *See Matter of Church Scientology International*, 19 I&N Dec.

[1] Based on the discussion above with respect to the intended employer, we withdraw the Director's finding that the joint venture is unable to pay the proffered wage, as it is immaterial to the outcome of this decision.

593 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 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 International*, 19 I&N Dec. at 595.

A. Relationship Between the Petitioner and the Beneficiary's Foreign Employer

The record demonstrates that the Petitioner's president, owns all issued shares of the company. articles of incorporation indicate that owns 51% of the foreign company, and the Beneficiary owns the remaining 49%, and the Petitioner does not claim or document any subsequent change in ownership. Therefore, there is no shared ownership between the two companies.

The Petitioner asserted that a qualifying relationship exists because the Petitioner and have entered into a 50-50 joint venture called Joint Venture, which it claimed is a subsidiary of the Petitioner and of [2]

The Director issued a notice of intent to deny, raising several concerns about the petition. One issue raised by the Director was that the petitioning entity is not a parent, subsidiary, affiliate, or branch of the foreign company that had employed the Beneficiary.

In response, the Petitioner cited several precedent decisions, all concerning how ownership affects a qualifying relationship, but the Petitioner did not show that any of the cited cases permit a qualifying relationship when there is no shared ownership or control between the foreign entity and the petitioning U.S. employer.

The Director denied the petition, in part because the Petitioner and the Beneficiary's foreign employer share no common ownership or control.

On appeal, the Petitioner contends that "the petitioner and employer listed on the Form I-140 petition is the subsidiary, not Joint Venture. . . . A qualifying subsidiary relationship exists between the petitioner and the foreign entity." The only way both of these assertions could be true would be if owned and controlled the petitioning company, which is not the case.

[2] The Petitioner did not submit any evidence that the joint venture exists as a legal entity. Instead, the Petitioner stated "the existence of the corporate relationship has been properly updated on the website." The Petitioner submitted a copy of a letter to dated June 22, 2013, asking that company to update its database to reflect the existence of a "corporate relationship . . . based on an unregistered Joint Venture Agreement" between the Petitioner and

The Petitioner focuses on the parent-subsidiary relationships between itself and the joint venture and between the foreign entity and the same joint venture. By statute and regulation, however, the parent-subsidiary relationship must exist between the petitioning entity and the Beneficiary's employer abroad. The petitioning entity here is not the joint venture itself but rather one of the partners or owners of the joint venture.

When two entities create a third entity as a joint venture, each of the first two entities has a parent-subsidiary relationship with the joint venture entity, but no such relationship exists between the two parent entities. In this case, there is no shared ownership or control between the Petitioner and the Beneficiary's employer abroad. Therefore there is no qualifying relationship between the two entities based on the regulatory definitions of "affiliate" or "subsidiary" and applicable case law.

In addition, by focusing on the regulatory definition of the term "subsidiary," the Petitioner overlooks relevant statutory provisions. Section 203(b)(1)(C) of the Act expressly requires that a beneficiary seeking admission and classification as a multinational manager or executive must demonstrate at least 1 year of employment abroad "by a firm or corporation or other legal entity or an affiliate or subsidiary thereof" and the foreign national's admission to the United States must be for the purpose of "continu[ing] to render services to the same employer or to a subsidiary or affiliate thereof." The Petitioner must provide evidence that "[t]he 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." 8 C.F.R. § 204.5(j)(3)(1)(C).

The above provisions require us to apply the regulatory definition of the term "subsidiary" to the relationship, if any, between the Petitioner and the Beneficiary's employer abroad. As discussed above, the evidence presented in support of this petition does not show that the Petitioner shares any common ownership and control with the Beneficiary's foreign employer. Therefore, the Petitioner has not demonstrated that it has a qualifying relationship with the Beneficiary's foreign employer.

B. The Joint Venture

We further note that the Petitioner asserts that the Beneficiary will render services to the claimed joint venture, Joint Venture, not to the petitioning entity, The record does not establish that the joint venture is a qualifying subsidiary of the Beneficiary's foreign employer.

The regulation at 8 C.F.R. § 204.5(j)(1) requires the Form I-140 to be filed by the prospective U.S. employer. Here, the Petitioner explained that the Beneficiary plans to come to the United States to perform services for Joint Venture. The Petitioner asserts that 50% interest in the joint venture creates a parent-subsidiary relationship. But, as discussed above, the joint venture is neither the petitioner nor the prospective employer. Therefore, any parent-subsidiary relationship between the joint venture and would have no bearing on the question of whether the Petitioner, has a qualifying relationship with

In addition, the record does not establish that the joint venture agreement between the Petitioner and resulted in the formation of a legal entity that could serve as a subsidiary of both entities. The Petitioner acknowledges that the joint venture is "unregistered," and so it is not a "legal entity."

Neither the Act nor regulation defines the phrase "joint venture." However, precedent case law states that the term "joint venture" applies to "a business enterprise in which two or more economic entities from different countries participate on a permanent basis." *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (quoting a definition from Endle J. Kolde, *International Business Enterprise* (Prentice Hall, 1973)). In order for a 50-50 joint venture enterprise to meet the definition of "subsidiary" at 8 C.F.R. 204.5(j)(2), it must be "an entity" that is owned by 50-50 by two parent entities who exercise equal control over "the entity." An entity is defined as an organization that has a legal identity apart from its members or owners. *Black's Law Dictionary* 612 (9th Ed. 2009). The unregistered joint venture does not meet this standard. Thus, the Director properly found that the evidence of record does not establish that the joint venture exists as a legal entity in the United States. Without such status, we cannot consider the joint venture to be a subsidiary of either the Petitioner or the Beneficiary's foreign employer.

In sum, the record does not establish that the Beneficiary's foreign employer has a qualifying relationship with any U.S. entity. Without such a qualifying relationship, the Beneficiary cannot qualify as a multinational manager or executive under section 203(b)(1)(C) of the Act. While the Petitioner might intend that the Beneficiary provides services to a business created by a joint venture agreement, that business is not a legal entity and, therefore, not a qualifying employer for the purpose of this visa classification. Regardless of whether the actual employer is the Petitioner or the joint venture, the record does not establish that either has a qualifying relationship with the Beneficiary's foreign employer.

Accordingly, the Petitioner has not established eligibility for the benefit sought, based on the lack of evidence of a qualifying relationship between the Petitioner and the Beneficiary's employer abroad.

IV. CONCLUSION

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of M-A-B-W-, Inc.*, ID# 97882 (AAO Feb. 14, 2017)