U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF USAM-W-A-D-M-, INC. DATE: FEB. 28, 2017

CERTIFICATION OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a Florida corporation, seeks to employ the Beneficiary for the purpose of performing services for the benefit 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 and certified his decision to us for review.[1] The Director found that the evidence of record did not establish that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer or that the joint venture that the foreign employer and the Petitioner attempted to create is a legal entity. Additionally, based on the primary conclusion that the Petitioner did not establish that it has a qualifying relationship with a foreign entity, the Director further determined that the Petitioner did not establish that: (1) the Beneficiary worked for a qualifying entity for 1 of 3 years prior to filing the petition; (2) the Beneficiary was employed in a managerial or executive capacity for a qualifying entity abroad; (3) the Beneficiary would be employed in a managerial or executive capacity for a qualifying entity in the United States; and (4) the joint venture had been doing business for 1 year prior to filing the instant petition.[2]

Upon *de novo* review, we will affirm the Director's decision and the petition will be denied. 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. Our discussion regarding the issue of a

[1] The Director may certify decisions to us when the case involves an unusually complex or novel issue of law or fact. 8 C.F.R. § 103.4(a); *see also* USCIS Policy Memorandum PM-602-0087, *Certification of Decisions to the Administrative Appeals Office (AAO)* 2 (Jul. 2, 2013), https://www.uscis.gov/laws/policy-memoranda. Here, the Director identified the joint venture arrangement and resulting qualifying relationship issue as the complex or novel issue for review on certification.

[2] Although the Director's decision included a heading at section IV for "Ability to Pay" and a heading for "Doing Business" which included a recitation of the relevant regulatory provisions, he did not make a specific finding that the Petitioner was not doing business for a full year prior to filing the petition or a finding that the Petitioner does not have the ability to pay the Beneficiary's proffered wage. Therefore, we will not address these issues.

qualifying relationship will be two-fold, focusing on the relationship between the Petitioner and the foreign employer as well as each entity's relationship with the claimed joint venture. Further, given that a qualifying relationship is a fundamental requirement for establishing eligibility and the Petitioner has not established that it meets this fundamental criterion, we hereby affirm and will not further address the Director's findings with regard to the grounds cited in numbers 1-3 above.[3] Finally, while we agree with the Director's determination that the joint venture was not doing business for 1 year, this issue is irrelevant for reasons discussed below and we will not incorporate the Director's adverse finding.

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 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, Immigrant Petition for Alien Worker, 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.

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[3] While we acknowledge that the Director's decision did not solely focus on the qualifying relationship issue to the exclusion of other eligibility factors, we find that the Director's foremost conclusion – that the Petitioner does not have a qualifying relationship with the Beneficiary's employer abroad – ultimately precludes approval of the petition, thus indicating that discussion of other statutory and regulatory grounds for finding ineligibility would be superfluous.

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 Beneficiary's intended U.S. employer.

The Petitioner, claims to have formed a 50-50 joint venture with the Beneficiary's last foreign employer, In a letter in support of the petition, the Petitioner stated that the joint venture, is the Beneficiary's intended employer in the United States and claimed that the Beneficiary would act as "the designated representative for [the foreign employer]" by exercising veto power over the joint venture on behalf of the foreign employer. Despite claiming that it has the ability to pay the Beneficiary's proffered wage, the Petitioner indicated that the Beneficiary was coming to the United States to perform services for the joint venture.

The Director subsequently issued a request for evidence (RFE) noting that the wording in the Petitioner's cover letter suggested that the Petitioner was offering the Beneficiary employment on behalf of the joint venture, thus causing the Director to question whether the petition was properly filed by the entity that actually intended to employ the Beneficiary.

Although the Director's decision was inconsistent in its designation of the U.S. employer, at times indicating that the intended employer is the petitioning entity while at other times indicating that the intended employer is the joint venture, we note that several aspects of the Director's decision rest on the presumption that the joint venture, rather than the Petitioner, would be the Beneficiary's U.S. employer. In its response to the certification, the Petitioner claims that the Beneficiary will assume the "highest-most position offered by as Executive Director of the Joint Venture," thereby indicating that the Petitioner would be the Beneficiary's U.S. employer.

The record contains evidence that supports a finding that the Petitioner, rather than the joint venture, is the entity that seeks to employ the Beneficiary. First, Form I-140 identifies by name and by Federal Employer Identification Number as the intending employer. Second, the Petitioner has submitted supporting evidence, such as the Petitioner's income tax return, linking the Petitioner, rather than the joint venture, to the job offer.

We therefore withdraw the Director's implied 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 record shows that the petitioning employer, was doing business for a full year prior to filing the petition.

III. QUALIFYING RELATIONSHIP

In the certified decision, the Director determined 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).

The regulation at 8 C.F.R. § 204.5(j)(2) contains the following relevant definitions:

> *Affiliate* means:
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> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
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> (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;
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> . . . .
>
> *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.

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. 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 evidence of record demonstrates that [redacted] is the Petitioner's sole owner while the Beneficiary owns the majority of the shares issued by the foreign entity in China. The Petitioner does not claim or document any subsequent change in the foreign entity's ownership. Therefore, there is no shared ownership between the two companies.

The Petitioner's claimed qualifying relationship with the Beneficiary's foreign employer is based on two competing assertions: (1) that by virtue of participating in a 50-50 joint venture with the Beneficiary's foreign employer, a qualifying relationship was created between the joint venture's two parent entities; and (2) that the joint venture itself, which the Petitioner deems as a legal entity, is a subsidiary of the Beneficiary's foreign employer.

The Petitioner submitted a document titled "Joint Venture Agreement" in which the Petitioner and the Beneficiary's foreign employer memorialized their mutual intent to come together for the purpose of "combining their time, talent, and resources in selling their products and services in select markets in the U.S." The Petitioner did not submit evidence to show that the joint venture was established as a legal entity.

In the certified decision, the Director concluded that a joint venture agreement between the Petitioner and the Beneficiary's foreign employer does not result in a qualifying relationship between the two joint venture participants, and therefore the Petitioner could not satisfy this eligibility requirement. Further, the Director determined that the joint venture agreement between the Petitioner and the Beneficiary's employer abroad was invalid based on unresolved inconsistencies regarding the execution date of the agreement. Finally, the Director found that even if the joint venture agreement were to be deemed valid, the Petitioner did not provide evidence to demonstrate that a legal entity or business enterprise was created as a result of the agreement.

The Petitioner's response to the certified decision consists of 38 supporting exhibits and a brief contesting the Director's findings. The Petitioner contends that the "validly created joint venture" between the Petitioner and the Beneficiary's foreign employer is sufficient to create a qualifying relationship in which the joint venture assumes the role of a subsidiary. The Petitioner refers to the joint venture as a legal entity and asserts that the Director's conclusion to the contrary is not consistent either with the regulations or with the evidence on record. The Petitioner does not contend that it shares common ownership and control with the Beneficiary's foreign employer, but rather focuses on the parent-subsidiary relationship between the joint venture and each of its owners.

We find that there is no statute or regulation to support the Petitioner's supposition. As properly noted in the Director's decision, while a petitioner and a foreign employer can each form a parent-

subsidiary relationship with the joint venture entity they create, a U.S. petitioner and foreign employer do not derive a qualifying relationship with one another by virtue of their individual parent-subsidiary relationship with the joint venture entity. Here, the record indicates that owns the Petitioner, while the Beneficiary owns the majority of the shares issued by the foreign entity. As such, the Petitioner and the Beneficiary's employer abroad do not share common ownership and control, and there is no qualifying relationship between the two entities based on the definitions of "affiliate" and "subsidiary" at 8 C.F.R. § 204.5(j)(2) or based on applicable case law.

B. The Joint Venture

As previously discussed, the Petitioner has asserted that the Beneficiary will render services to the claimed joint venture business, not to the petitioning entity, As discussed above, we have determined that the Petitioner, and not the joint venture, is the proposed U.S. employer. However, the Petitioner has also questioned whether a joint venture must be established as a legal entity in order for it to serve as a U.S. employer or for the purposes of establishing a qualifying relationship with the owners of the joint venture. The Director has certified this issue to us for review.

For the reasons discussed below, we agree with the Director's determination that a joint venture must be established as a legal entity in order to establish a qualifying relationship with its parent entities and in order to serve as a qualifying U.S. employer for the purpose of this classification.

Neither the Act nor regulation provides a definition of 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)). Further, both the Uniform Partnership Act (UPA), Article 2 § 201(a), and the Florida Revised Uniform Partnership Act, § 201, require that the partnership, which the Petitioner and the Beneficiary's foreign employer claim to have formed through the purported execution of a joint venture agreement, must be an entity that exists separate from the partners that comprise the partnership. 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).

While the Petitioner claims that the joint venture was formed under the UPA, it has not provided evidence to support this assertion. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof, particularly when supporting documentary evidence would reasonably be available. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)); *see also Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

Here, the record lacks evidence to show that either the Petitioner or the Beneficiary's foreign employer created an entity when they attempted to execute the joint venture agreement; nor is there any evidence that the Petitioner or the Beneficiary's foreign employer took any other steps, such as applying for a federal employer identification number, obtaining physical premises, or hiring employees, to demonstrate that the joint venture is an entity capable of doing business in the United States. Thus, the Director properly pointed out that the evidence of record does not establish that has been established as a legal entity in the United States. Without such status, the joint venture cannot be deemed a subsidiary of either the Petitioner or the Beneficiary's foreign employer and is therefore precluded from meeting the criteria as a qualifying joint venture for purposes of this visa petition. *See* 8 C.F.R. § 204.5(j)(2)(defining "subsidiary" as "a firm, corporation or other legal entity of which a parent owns . . . 50 percent of a 50-50 joint venture and has equal control and veto power over the entity").

Moreover, as evidence to show the creation of a joint venture, the Petitioner provided two joint venture agreements with two different dates of execution. As discussed in the denial, the joint venture agreement originally provided in response to the Director's request for evidence (RFE) actually predated the Petitioner's corporate existence, thus indicating that one party to the joint venture agreement lacked the capacity to execute the document. The Petitioner addresses this anomaly, claiming that the original document, which was dated May 1, 2012, was actually a draft, while the subsequent joint venture agreement, which was dated July 1, 2012 and provided in its entirety in response to the RFE, was the properly executed agreement. However, we note that the burden is 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). Thus, the explanation that the Petitioner now offers, after the Director pointed to the anomaly in his decision, is insufficient to resolve the noted inconsistency.

In sum, the record does not establish that the Beneficiary's foreign employer has a qualifying relationship with any U.S. entity and the Beneficiary therefore 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 provide services to a business created by a joint venture agreement, this business is not a legal entity and as such it cannot be deemed a qualifying employer for the purpose of this visa classification. Regardless of whether the Petitioner or the joint venture business is the actual intended employer, the record does not establish that either has a qualifying relationship with the Beneficiary's foreign employer.

Accordingly, we agree with the Director in finding that the Petitioner is ineligible for the benefit sought based on the lack of evidence of a qualifying relationship between the Petitioner and the Beneficiary's foreign employer.

IV. CONCLUSION

In light of the above, we find that denial of the petition was warranted for the above stated reasons. 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. Here, that burden has not been met.

ORDER: The initial decision of the Director, Texas Service Center, is affirmed, and the petition is denied.

Cite as *Matter of USAM-W-A-D-M-, Inc.*, ID# 102803 (AAO Feb. 28, 2017)