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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

[Redacted]

HG

FILE:

[Redacted]

Office:

[Redacted]

Date:

AUG 12 2010

SRC 01 226 50115

IN RE:

Petitioner:

[Redacted]

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:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

[Redacted Signature]

Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved on October 28, 2002. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the petitioner was issued a notice of his intention to revoke the approval of the preference visa petition, specifying the grounds for the intended revocation. [REDACTED] ultimately revoked the approval of the petition. [REDACTED] on appeal. The appeal will be dismissed [REDACTED].

The petitioner is a Texas corporation that claimed to be the parent entity of 872175 Ontario Limited, the beneficiary's foreign employer, which is located in Canada. The petitioner initially filed the Form I-140 seeking to employ the beneficiary as its president. Accordingly, the petitioner endeavored 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. Upon further review of the record, the director determined that the petitioner failed to establish that the petitioner has, and had at the time the Form I-140 was filed, a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel challenges the revocation, asserting that section 204(j) of the Act precludes U.S. Citizenship and Immigration Services (USCIS) from revoking approval of the petitioner's Form I-140 and further contends that the beneficiary meets the portability criteria.

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 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 in this proceeding is whether the petitioner had a qualifying relationship with the beneficiary's foreign employer at the time the Form I-140 was filed and, if so, whether the petitioner has maintained a qualifying relationship.

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.

Additionally, it necessary to point out that the petitioner's burden of proving eligibility is not discharged until the immigrant visa is issued. [REDACTED], 1308 (9th Cir. 1984). Federal regulations affirmatively require an alien to establish eligibility for an immigrant visa up to and including the time an application for adjustment of status is filed or when the visa is issued by a United States consulate. 8 C.F.R. § 245.1(a); 22 C.F.R. § 42.41.

Accordingly, section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary of Homeland Security 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." (Emphasis added.)

Regarding revocation on notice, the Board of Immigration Appeals (the Board) has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

In the present matter, in support of the Form I-140, the petitioner provided an undated letter claiming to be the parent entity of [REDACTED]. In an effort to corroborate this claim, the petitioner provided a notarized Certificate of Corporate Relationship, which was executed on June 5, 2001 by [REDACTED] who identified himself as the petitioning entity's director and stated that [REDACTED] is the petitioner's wholly-owned subsidiary.

On March 18, 2002, the director issued a request for evidence (RFE) asking the petitioner to specify the relationship between it and the beneficiary's foreign employer. The director also pointed out that [REDACTED] Ontario Ltd. was not named as one of the beneficiary's foreign employers and therefore questioned whether or not the beneficiary was employed by the company that is being claimed as the petitioner's wholly owned subsidiary.

In response, the petitioner provided [REDACTED] stating at Item 6 that the company was authorized to issue an unlimited number of common shares. The petitioner also provided Certificate No. 2, dated January 5, 1999, which shows that [REDACTED] issued one common share of its stock to InvestCorp Holdings Ltd. The petitioner also provided several affidavits, including an affidavit executed by the beneficiary on May 8, 2002, in which the beneficiary referred to the parent-subsidary relationship between the petitioner and the beneficiary's Canadian employer and further claimed that he was president of the Canadian entity from August 1996 to August 1999 and later became president of the petitioning entity. In a separate affidavit, which was executed on May 9, 2002, [REDACTED] corporate accountant of [REDACTED] claimed that [REDACTED] is a wholly owned subsidiary of InvestCorp Holdings, Inc., the petitioning entity.

On January 11, 2010, the director issued a notice of intent to revoke (NOIR) the approval of the Form I-140, noting that the documents previously submitted do not establish that [REDACTED] and the petitioner have a qualifying relationship. Specifically, the director pointed out that Certificate No. 2, which was submitted in response to the RFE, established that InvestCorp Holdings, Ltd., not the petitioning entity, was the recipient of the single common share. The director emphasized the petitioner's use of the abbreviation "Ltd." as part of the name of the recipient company, pointing out that, unlike the recipient that is identified in the stock certificate, the petitioning entity uses the abbreviation "Inc." rather than "Ltd." as part of its corporate name. The director determined that the petitioner failed to provide the evidence requested in the RFE with regard to the petitioner's purported qualifying relationship with [REDACTED] and further noted that evidence in the form of affidavits, where affiants attest to facts regarding the qualifying relationship, are insufficient as a means of corroborating the petitioner's claim. Lastly, the director observed that the petitioner failed to provide evidence of its ability to pay the beneficiary's proffered wage, a regulatory requirement that is specified at 8 C.F.R. § 204.5(g)(2). Based on these findings, the director concluded that the petitioner's Form I-140 was erroneously approved and that the approval must therefore be revoked.

In response to the NOIR, the petitioner's counsel provided a statement dated February 11, 2010, asserting that evidence previously submitted in response to the RFE was sufficient to establish the beneficiary's requisite period of qualifying employment abroad. Counsel stated that from August 1996 to August 1999 the beneficiary was president of [REDACTED] which she claimed is wholly owned by the petitioner. Counsel referred to the previously submitted Certificate of Corporate Relationship, asserting that this document "clearly establishes" that a qualifying relationship exists between the petitioner and [REDACTED]. Counsel also referred to the previously submitted sworn affidavits from the beneficiary and [REDACTED].

relying on their respective statements as adequate proof of the claimed qualifying relationship between the petitioner and [REDACTED]

Counsel went on to state that the beneficiary has ported to a new employer since the filing of his Form I-485, Application to Register Permanent Resident or Adjust Status, and asserts that USCIS is precluded from revoking the prior approval of the petitioner's Form I-140 based on the premise that the beneficiary meets the criteria specified at section 204(j) of the Act. Counsel further contends that since neither counsel nor the beneficiary was interviewed by USCIS, neither party was adequately advised of "the context" or the reason why USCIS seeks to revoke approval of the petitioner's Form I-140. Counsel also submitted the petitioner's corporate tax returns from 2001-2008, copies of numerous service memoranda regarding the application of section 204(j) of the Act, and copies of numerous administrative and district court decisions addressing the delayed adjudication of the beneficiary's Form I-485.

On March 3, 2010, the director issued a decision revoking approval of the petitioner's Form I-140, basing this decision on the petitioner's failure to resolve inconsistencies with regard to the foreign entity's ownership, which precludes a finding that a qualifying relationship exists between the beneficiary's foreign and U.S. employers.

On appeal, counsel submits a statement dated April 16, 2010, which repeats, verbatim, all of the arguments that were initially raised in response to the NOIR.

As a preliminary issue, it is noted that the AAO cannot address counsel's objection to USCIS's untimely adjudication of the beneficiary's Form I-485. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). The AAO only has jurisdiction over adjustment applications "when denied solely because the applicant failed to establish eligibility for the bona fide marriage exemption contained in section 245(e) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(JJ) (as in effect on February 28, 2003). As the AAO does not have the authority to consider the adjudication of the beneficiary's Form I-485, the issue of whether or not the Form I-485 was timely adjudicated will not be addressed on appeal.

As stated above, the primary issue in the present matter is the lack of documentary evidence establishing the existence of a qualifying relationship between the petitioner and [REDACTED]. As the director properly noted both in the NOIR and in the final revocation notice, the petitioner has submitted documents that are either insufficient to meet the evidentiary standard or are simply inconsistent with the petitioner's claim. Specifically, the petitioner was advised that affidavits are not an adequate form of evidence, as they are merely extensions of the petitioner's own claim. The petitioner was also advised that information contained in [REDACTED] stock certificate does not establish that the petitioner is the parent entity that owns the single share, which Certificate No. 2 purported to issue.

Additionally, even if the petitioner were named as owner of the single share such that there was no factual inconsistency, as general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of

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. See *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

In the present matter, the petitioner has not indicated the whereabouts of Certificate No. 1, thus failing to establish whether or how many other shares [REDACTED] may have issued in addition to the single share issued [REDACTED] and to whom such additional shares may have been issued. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Regardless, the petitioner has failed to submit sufficient evidence to meet the initial evidence requirement specified at 8 C.F.R. § 204.5(j)(3)(i)(C). Despite USCIS's numerous attempts to advise the petitioner and counsel of the inconsistent and deficient documents used to establish the beneficiary's alleged qualifying relationship with the beneficiary's foreign employer, counsel continues to refer to the very documents that USCIS has deemed to be deficient. The petitioner has failed to resolve the inconsistency between its claim—that it is the parent entity to [REDACTED]—and Certificate No. 2, which named InvestCorp Holdings, Ltd., rather than petitioner, as owner of one common share of [REDACTED]. As previously stated by the director, the petitioner must 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). Moreover, the petitioner has provided no evidence to establish whether 872175 Ontario Ltd. issued stock other than the single share specified in [REDACTED].

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362; *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 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.

In the present matter, the petitioner has not established itself as having any ownership interest in [REDACTED], where the beneficiary alleges he was employed prior to his employment with the petitioning entity. [REDACTED] has the petitioner established that it shares sufficient common ownership with [REDACTED] to make the two entities affiliates. In light of the petitioner's failure to establish that it and the beneficiary's foreign employer are commonly owned and controlled, the AAO cannot conclude that the petitioner has the requisite qualifying relationship to establish eligibility for the immigration benefit sought herein.

Additionally, with regard to counsel's reliance on section 204(j) of the Act to challenge the revocation, the AAO finds counsel's arguments to be without merit. First, with regard to counsel's general reliance on previously issued service memoranda, the AAO notes that USCIS memoranda merely articulate internal guidelines for service personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." [redacted] (5th Cir.1987)). That being said, counsel uses faulty reasoning in asserting that USCIS's authority to revoke its prior approval of a Form I-140 should somehow be limited when an adjustment applicant is adversely affected by the untimely adjudication as a result of changing jobs while such application is still pending. The court in *Jugendstil, Inc. v. USCIS*, 571 F.3d (9th Cir. 2009), expressly rejected such reasoning when it stated the following:

Nothing in the legislative history, the statutory text, or common sense suggests that Congress intended applicants to have the ability, simply by changing jobs, to shield from revocation the agency's erroneous previous approval of an I-140 petition.

As discussed above, the director properly and for good cause revoked approval of the petitioner's Form I-140, which was clearly approved in error. The petitioner has failed to establish eligibility for the immigration benefit sought. As such, the revocation of the approval of the petitioner's Form I-140 will not be withdrawn.

Additionally, while not expressly addressed in the director's decision, the record lacks sufficient evidence to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. See 8 C.F.R. § 204.5(j)(3)(i)(B). Nor did the petitioner provide sufficient evidence to establish, at the time of filing, that the beneficiary would be employed in a qualifying capacity within the petitioning U.S. entity. See 8 C.F.R. § 204.5(j)(5). The record lacks sufficient job descriptions of either position and therefore fails to establish that the beneficiary's employment abroad and his employment with the U.S. entity has and would consist primarily of managerial- or executive-level tasks. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional grounds of ineligibility discussed above, the AAO finds that this petition was erroneously approved.

The revocation of the approval of the petition will be affirmed based on the above findings, with each considered as an independent and alternative basis for denial. 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 appeal is dismissed.