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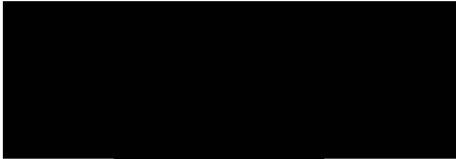
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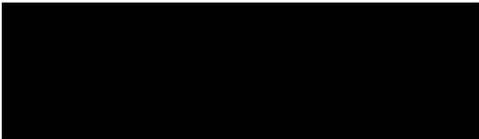


File: [Redacted] Office: NEBRASKA SERVICE CENTER Date: NOV 05 2008  
LIN 07 020 51120

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to  
the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner was incorporated as a limited liability company in the State of Florida in 2004, and claims to be engaged in real estate construction and development. It seeks to employ the beneficiary as its president 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. The petitioner claims that it is the wholly-owned subsidiary of [REDACTED] Venezuelan corporation.

The director denied the petition, determining that the petitioner had failed to establish that the petitioner and [REDACTED] organization are qualifying organizations. On appeal, counsel claims that the director: (1) did not sufficiently articulate the information or documentation requested in the request for evidence; (2) did not apply the correct standard of proof in adjudicating the petition; and (3) was incorrect in applying *Matter of Ho*.<sup>1</sup>

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 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 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.

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<sup>1</sup> 19 I&N Dec. 582 (BIA 1988).

The sole issue addressed by the director is whether the petitioner established that the U.S. entity and the beneficiary's prior employer have a qualifying relationship. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the proposed U.S. employer and the beneficiary's foreign 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 § 203(b)(1)(c) of the Act, 8 U.S.C. § 1153(b)(1)(c).

Additionally, the regulation at 8 C.F.R. § 204.5(j)(2) provides:

- (I) "Parent" means a firm, corporation, or other legal entity which has subsidiaries.
- (J) "Branch" means an operating division or office of the same organization housed in a different location.
- (K) "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.
- (L) "Affiliate" means
  - (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
  - (2) 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, or
  - (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

In this case, the petitioner claimed that the U.S. entity is the wholly-owned subsidiary of the foreign corporation. With the initial petition, the petitioner submitted a membership certificate dated April 21, 2004 indicating that the foreign entity, [REDACTED], is a member of the company.

The petitioner's initial evidence also included copies of the petitioner's Form 1065, U.S. Partnership Income Tax Return, for the years 2004 and 2005. On Schedule K-1 of each document, the petitioner listed two partners; namely, the beneficiary and his wife, [REDACTED]. It is noted that each claimed 50% ownership of the petitioner.<sup>2</sup>

On July 30, 2007, the director issued a request for additional evidence. Specifically, the director noted the discrepancies in ownership, and requested definitive documentation to establish that the petitioner and the [REDACTED] corporation maintained a qualifying relationship. In a response dated August 31, 2007, counsel submitted additional evidence. Specifically, the following documentation was submitted:

1. Petitioner's amended Form 1065 for 2004 and 2005, listing [REDACTED] as the sole owner of the petitioner;
2. Petitioner's Form 1065 for 2006;
3. "Copy" of the petitioner's Operating Agreement, with original signature of the beneficiary; and
4. Affidavit from the beneficiary dated August 31, 2007, in which he claims that [REDACTED] is and has always been the sole owner of the petitioner.

Upon review of the evidence submitted, the director concluded that the petitioner had not established the requisite relationship with the foreign entity. Specifically, the director noted numerous discrepancies and inconsistencies, and further noted that some of the evidence, such as the amended tax returns, appeared to have been prepared solely as a means to overcome the grounds for objection stated in the request for evidence.

On appeal, counsel claims that the director: did not sufficiently articulate the information or documentation requested in the request for evidence; did not apply the correct standard of proof in adjudicating the petition; and incorrectly applied a precedent decision.

Upon review of the record of proceeding, the AAO concurs that the petitioner has not established that it has the required qualifying relationship with the Venezuelan entity.

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 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In 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*, 19 I&N Dec. at 595.

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<sup>2</sup> Although not addressed by the director, the record contains a translated statement dated February 13, 2006, stating that the beneficiary is the sole owner of [REDACTED], with 5,000 shares. No mention is made of his wife; however, she is listed as a 50% partner of the U.S. petitioner on the 2004 and 2005 Schedule K-1 of the Form 1065s.

In this case, the petitioner initially provided two types of conflicting evidence: a membership certificate indicating that [REDACTED] was the sole owner of the petitioner, and tax returns indicating that instead, two individuals owned the petitioner. In an attempt to rectify this discrepancy, the petitioner submitted “amended” copies of Form 1065 for 2004 and 2005, indicating on Schedule K-1 that [REDACTED] was the sole owner.

The director doubted the validity of these documents, and upon review of the totality of the evidence, the AAO agrees with the director’s conclusions. First, the “amended” returns submitted in response to the request for evidence consist simply of unsigned documents which changed the owner as listed on Schedule K-1. Consequently, the director found, and the AAO concurs, that there is no proof that these are official documents that were filed with and accepted by the Internal Revenue Service (IRS) and, therefore, are of little probative value.

Counsel disagrees with the director’s findings, and argues that there is no requirement in the IRS code for “officially filing” tax returns. Regardless, these documents are submitted to overcome a presumption that individuals, and not the foreign entity, own the petitioner. In order to accept these documents as legitimate, it is not unreasonable to expect the petitioner to retain some evidence of filing (i.e., date-stamped copy, certified mail receipt, IRS printout) to demonstrate that these documents were not merely amended on paper to overcome the basis for the denial. Moreover, although a letter from the petitioner’s accountant is submitted on appeal to clarify the “errors” on the 2004 and 2005 returns, the accountant provides no documentation to support the claim that the amended returns were filed with the IRS on August 22, 2007. In addition, although the accountant claims that the copies of the amended returns are “true and correct copies,” these documents are not signed and therefore are insufficient to establish the foreign entity’s ownership.

The director concluded that these documents were prepared in response to the request for evidence, and counsel readily agrees on appeal that this was in fact the case. However, the director failed to articulate the basis for this statement. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot make material changes to a petition. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Absent sufficient evidence that these amended returns were actually filed with the IRS, there is nothing in the record to suggest that these documents were prepared merely to respond to and possibly overcome the director’s basis for denial as outlined in the request for evidence.

The petitioner also relies on an affidavit by the beneficiary, who claims that the foreign entity, [REDACTED] is and always has been the sole owner of the U.S. entity. The petitioner, however, has failed to corroborate this statement with sufficient documentary evidence to support the claim. As previously stated, the amended tax returns, which are unsigned, undated, and accompanied by no proof of filing with the IRS, will not corroborate this statement. Moreover, the “copy” of the petitioner’s operating agreement submitted in response to the RFE contains an original ink signature by the beneficiary, and indicates in small font that the document was printed by the petitioner’s current counsel. It appears, therefore, that this document was

recently created and executed to address the director's concern that an operating agreement was not submitted by the petitioner. While the petitioner acknowledges that an operating agreement is not required in the State of Florida for limited liability companies and there was no original operating agreement created by the petitioner, the subsequent creation of this document to address a perceived deficiency in the evidence by the director is of minimal evidentiary value. Nevertheless, the record contains no evidence, other than one membership certificate, to corroborate the claim of the beneficiary. 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)).

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. at 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

Finally, the director noted that if the beneficiary's contention that [REDACTED] had always been the sole owner of the petitioner, then the petitioner's consist filing of a partnership tax return, reserved when an entity has two or more members, was questionable. The petitioner, counsel, and the petitioner's accountant all allege that the filing of the partnership return was accidental. Specifically, they allege that since the beneficiary and his wife own the foreign entity, they in turn own the U.S. entity. This assertion, however, is not acceptable.

It is a well established fact that a corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). The petitioner confirms in the record that [REDACTED] is a Venezuelan corporation. Therefore, the fact the petitioner consistently filed a partnership tax return naming individuals as its owners, despite its claims before the AAO that a corporate entity was its sole owner, raises serious doubts to the legitimacy of the entire petition.

As stated by the director, it is incumbent 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). In this matter, though the director specifically articulated the discrepancies upon which he based the denial, counsel on appeal fails to rectify these issues, and instead attacks the director's reliance on the decision of *Matter of Ho*. On appeal, counsel incorrectly states that there is only one piece of evidence which creates a discrepancy, and claims that relevant and probative documentation has been submitted to resolve the discrepancy. Interestingly, counsel does not identify the one

item to which he refers. As discussed above, the AAO notes a large number of discrepancies which have not been explained.

Additionally, as noted by the director, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Specifically, the discrepancies in the initial evidence, and the insufficient response to the request for evidence, require the AAO to stringently review the evidence of record. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). For example, as discussed at length above, the petitioner failed to provide documentation that its amended tax returns were actually filed and accepted by the IRS, yet contended that the documents were in fact "true and correct copies." Therefore, the AAO concludes that the director's reliance on *Matter of Ho* was proper in this matter, and based upon the precedent set therein, the AAO concludes that the petitioner has failed to satisfy its burden of proof in this matter.

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. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.