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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

PUBLIC COPY



U.S. Citizenship and Immigration Services

[Redacted]

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FILE: [Redacted] OFFICE: NEBRASKA SERVICE CENTER Date: DEC 22 2010

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)

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 \$630. 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Illinois¹ corporation that seeks to employ the beneficiary as its technical manager. Accordingly, the petitioner endeavors 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.

The director denied the petition based on the conclusion that the petitioner and the beneficiary's foreign employer do not have a qualifying relationship. On appeal, counsel disputes the director's conclusion and submits a brief in support of his assertion.

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.

The primary issue in this proceeding is whether the petitioner has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign proposed U.S. employers are the same employer (i.e. a U.S. entity with a foreign office) or that the two entities are related as a "parent and subsidiary" or as

¹ Although the record does not contain the petitioner's incorporation documents, the record includes a document titled "Business Transfer Agreement And Assignment" in which the petitioner was referred to as an Illinois corporation.

"affiliates." See generally § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); see also 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

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.

In support of the Form I-140, [REDACTED] the petitioner's office manager, provided a letter dated May 8, 2008 on behalf of the petitioner stating that it has a research and development center and an engineering services center in India. Although Mr. [REDACTED] claimed that the petitioner has a qualifying relationship with a foreign office and that evidence was being submitted with the petition to corroborate this claim, the record was devoid of such documentation. Rather, the petitioner's initial supporting documents included the petitioner's organizational chart, an organizational chart belonging to [REDACTED] and a letter dated November 21, 2006 from Mr. [REDACTED] in his capacity as office manager of [REDACTED] stating that the beneficiary was employed with that U.S. entity since July 12, 2006. In a letter dated December 1, 2005, [REDACTED] general manager of [REDACTED] stated that the beneficiary was working for the foreign entity since August 30, 2001 and that the beneficiary "was deputed onsite" from April 3, 2004 until May 9, 2005 after which he was sent to work at an "offshore office" on July 1, 2005. It is noted that the "offshore office" where the beneficiary was claimed to be employed prior to his entry into the United States was not specifically named. The petitioner also did not discuss the specific information regarding its ownership or the ownership of the beneficiary's foreign employer, whose identity was not provided.

Accordingly, the director issued a request for evidence (RFE) dated February 19, 2009 asking the petitioner a series of questions to help determine whether a qualifying relationship exists between the petitioner and the beneficiary's foreign employer. Specifically, the petitioner was asked whether [REDACTED] owns all of its stock, whether Indus was the beneficiary's foreign employer prior to his entry to the United States, and whether Mr. [REDACTED] currently has ownership interest in [REDACTED]. The petitioner was expressly instructed to provide evidence to establish that as of the filing date of the instant Form I-140 it had and continues to have a

relationship wherein it shares common ownership and control with the foreign entity that previously employed the beneficiary.

In response, Mr. [REDACTED] on behalf of the petitioner, provided a letter dated March 16, 2009 in which he stated that Mr. [REDACTED] owns all of the petitioning entity's stock, that the beneficiary was employed by [REDACTED] for over three years, and that Mr. [REDACTED] no longer has ownership of [REDACTED]. With regard to the latter response, Mr. [REDACTED] stated that Mr. [REDACTED] had an ownership interest in [REDACTED] until 2006, before [REDACTED] "[s]pun off." The following documents were also submitted with the petitioner's RFE response:

1. A letter dated January 29, 2008 on the petitioning entity's letterhead documenting a board of director's meeting that took place on 04.01.2007 in which Mr. [REDACTED] declared himself eligible to acquire equity shares of [REDACTED]
2. A letter dated January 29, 2008 titled "Consent Letter," in which Mr. [REDACTED] gave his consent to purchase 9,999 equity shares of [REDACTED]
3. A document titled "Business Transfer Agreement and Assignment," executed on January 1, 2007. The parties to the contract included [REDACTED] a Delaware corporation, [REDACTED] the petitioning entity, [REDACTED] the foreign entity where the beneficiary was previously employed, and [REDACTED]. The document indicated that [REDACTED] had 1,500 unissued shares, which constituted all of its authorized shares, that the beneficiary was [REDACTED] president, and that Mr. [REDACTED] gave up any right to [REDACTED] common stock. With regard to the petitioning entity, Mr. [REDACTED] was referred to as sole shareholder, officer, and director. Clause No. 3 shows that in exchange for Mr. [REDACTED] release of any claim to [REDACTED] common stock, [REDACTED] assigned all of its rights to the consulting agreement it had with [REDACTED] to the petitioning entity. Clause No. 4 of the agreement indicates that, with the exception of the [REDACTED] consulting agreement, all remaining assets of [REDACTED] continue to exist and remain property of Indusrad.
4. A certificate of incorporation, a memorandum of association, and articles of association all belonging to [REDACTED]

In a decision dated June 15, 2009, the director concluded that the documentation on record failed to establish the existence of a qualifying relationship between the petitioner and the beneficiary's foreign employer. The director observed that while a foreign entity had been created with the intention that it would be a successor-in-interest to another company, the successor-in-interest principle does not apply in this instance. The director further pointed out that the foreign entity that was recently created did not exist at the time of the beneficiary's employment abroad and that the beneficiary therefore was not employed abroad by the same entity or by an affiliate, parent, or subsidiary of the U.S. petitioner.

On appeal, counsel asserts that U.S. Citizenship and Immigration Services misinterpreted the relationship between the petitioner, Indusrad, and the foreign entity that previously employed the beneficiary. He claims that a "corporate transfer" occurred when Mr. [REDACTED] ownership interests transferred from [REDACTED] to the petitioner. Counsel claims that the petitioner was the recipient of Indusrad's rights, obligations, and assets by means of the Business Transfer Agreement and Assignment and that this transfer enabled the petitioner to become Indusrad's successor-in-interest and to thereby maintain a qualifying relationship with the

beneficiary's foreign employer. Counsel's argument, however, is without merit, as the documentation provided does not establish that the petitioner is a successor-in-interest.

The generally accepted definition of a successor-in-interest is: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." Black's Law Dictionary 1473 (8th Ed. 2004). A mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *Id.*; see also *Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. While the merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law, the purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business in the same manner with regard to the assets sold.² See generally 19 Am. Jur. 2d Corporations § 2170 (2010).

Considering the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes. However, in order to do so, the petitioner must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor and the essential business functions must remain substantially the same as before the ownership transfer.

In the present matter, the Business Transfer Agreement and Assignment, which counsel purports is the main conduit for establishing a successor-in-interest relationship, indicates that the only right transferred to the petitioner was [REDACTED] master consulting agreement with [REDACTED] Clause No. 4 of the agreement clearly states that the remaining "assets of Indusrad shall remain the property of [REDACTED] There is no indication anywhere in the agreement between [REDACTED] and the petitioner that [REDACTED] ownership interest in the beneficiary's foreign employer was among the assets that passed to the petitioner.

Moreover, counsel's current claim on appeal is entirely inconsistent with the March 16, 2009 letter that Mr. [REDACTED] provided in response to the RFE. More specifically, in the RFE response, Mr. [REDACTED] expressly stated that while Mr. [REDACTED] previously had an ownership interest in [REDACTED] the entity that employed the beneficiary abroad, his ownership interest ceased some time in 2006. If counsel's current claim were valid and the petitioner did in fact become Indusrad's successor-in-interest, then any ownership interest [REDACTED] may have had in the beneficiary's foreign employer would have transferred to the petitioning entity. However, as previously noted, the very terms of the Business Transfer Agreement and Assignment expressly

² The mere assumption of immigration obligations, or the transfer of immigration benefits, derived from approved or pending immigration petitions or applications will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business in the same manner.

establish that the specific nature of the transfer was limited to Indusrad's master consulting agreement with [REDACTED]. Clause No. 4 specifically states that [REDACTED] assets and liabilities do transfer to the petitioner, but only to the extent that such assets and liabilities are directly associated with the consulting agreement. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Additionally, while Clause No. 5 in the Business Transfer Agreement and Assignment makes specific provisions for the creation of an Indian subsidiary to be 100% owned by the petitioning entity, the newly created foreign entity cannot be deemed as the same entity or the affiliate, parent, or subsidiary of the entity that previously employed the beneficiary abroad. 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)).

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 the 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 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 record indicates that the individual who previously had an ownership interest in the entity that employed the beneficiary abroad no longer had an ownership interest in that entity at the time the Form I-140 was filed. As eligibility must be established at the time of filing, the petitioner cannot rely on a previously existing qualifying relationship to meet the criteria specified at 8 C.F.R. § 204.5(j)(3)(i)(C). See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). While the record indicates that the petitioner is a multinational entity by virtue of having ownership in a newly created foreign corporation, the fact that the petitioner does not share common ownership and control with the beneficiary's foreign employer precludes approval of the instant petition.

The petition will be denied for the above stated reasons, 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.