U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29139434

Date: DEC. 27, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Multinational Managers or Executives)

The Petitioner is a restaurant business that seeks to permanently employ the Beneficiary as its president 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 of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner and the Beneficiary's foreign employer have a qualifying relationship as claimed. The matter is now before us on appeal.[1] 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

An immigrant visa is available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate. Section 203(b)(1)(C) of the Act.

The Form I-140, Immigrant Petition for Alien Worker, must include 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 one year in the three 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 one year. *See* 8 C.F.R. § 204.5(j)(3).

[1] We decline the Petitioner's request for oral argument. 8 C.F.R. § 103.3(b).

II. QUALIFYING RELATIONSHIP

The issue to be addressed in this decision is whether the Petitioner provided sufficient evidence demonstrating that it has a qualifying relationship with [redacted] (from here, [redacted]) the Beneficiary's employer abroad. To establish a "qualifying relationship," the Petitioner must show that it and the Beneficiary's foreign employer are the same employer (i.e., a U.S. entity with a foreign office) or that they are 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).

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. *See, e.g.*, *Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (Comm'r 1988); *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). 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 Int'l*, 19 I&N Dec. at 595.

The Petitioner states that it and the Beneficiary's foreign employer have a parent-subsidiary relationship and that the latter is the parent owning 55% of the Petitioner's stock. *See* 8 C.F.R. § 204.5(j)(2) (for definition of "subsidiary"). Despite acknowledging the Petitioner's submission of its stock membership certificate, corresponding the stock transfer ledger, and a stock purchase agreement, the Director concluded that the record does not establish that the foreign entity owns and controls the Petitioner as claimed. The Director noted that the funds used to purchase the Petitioner's stock originated from the Beneficiary's bank account, rather than the account of the foreign entity, and therefore questioned the means by which the Petitioner's stock was purchased.

Likewise, we also question the source of funds used to purchase the Petitioner's stock. First, we point to an anomaly regarding the number of shares the Petitioner intended to issue and the shares the parent entity intended to purchase through a stock purchase agreement, which both parties executed on August 5, 2019. Namely, section I of the agreement states the following regarding the "Stock Issuance and Subscription": "Upon signing this Agreement, Subscriber subscribes and purchases One Thousand and Forty One (1223) shares of common stock . . . for a total subscription price and amount of $500,000.00 to be paid to Company as provided herein." The inconsistency between the written iteration – "One Thousand and Forty One" – and the numerical iteration – 1223 – undermines the validity of the document and the sales and purchase transaction the agreement purported to execute.

Further, section II of the purchase agreement outlines a payment schedule, which requires the subscriber of the Petitioner's shares – in this case, [redacted] – to pay an initial sum of $50,000 "within 5 (Five) days upon the execution of this Agreement" with the remaining purchase price "to be paid as a lump sum or in installments to the Company within 30 (Thirty) days after the signing of this Agreement." The Petitioner provided its August 2019 bank statement showing a deposit of $50,000 into its account on August 6, 2019. We note, however, that the source of the deposited funds was not identified, thereby indicating that it may not have been [redacted]. We further note that the deposited amount matches a withdrawal slip which contains the Beneficiary's bank account number

and a date showing that the withdrawal took place the day after the stock purchase agreement was executed. As such, the record indicates that the Beneficiary, not the foreign entity, paid the deposit.

The record also does not show that the remaining balance of $450,000 was deposited into the Petitioner's account in compliance with the payment schedule that the purchase agreement outlined. Rather, the Petitioner's bank statements for September and October 2019 show one fund transfer of $100,000 from the Beneficiary's account on September 27 followed by three transfers of $127,500, $100,000, and $122,500 from the same account on October 2, 8, and 11, respectively. Thus, even if we were to accept that these transfers represent installments paid on behalf of the foreign entity in exchange for the Petitioner's stock, the dates of the deposits show that the payments did not follow the purchase agreement's payment schedule, which requires that the balance owed must be paid in full, whether as a lump sum or in installments, within 30 days of signing the agreement.

In this case, the agreement was signed on August 5, 2019, but the final fund transfer did not take place until October 11, 2019, which is 67 days after the agreement was signed. Given this apparent breach of the express conditions for compensating the Petitioner for its issued shares as well as the anomaly regarding the specific number of shares to be sold via the purchase agreement, we question the validity and reliability of that agreement. Without a valid stock purchase agreement, we further question whether the foreign entity is the intended purchaser and does, in fact, own a majority of the Petitioner's stock, as claimed. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (establishing that a petitioner's assertions must be supported with relevant, probative, and credible evidence).

Further, the Petitioner provided a sworn statement in which the Beneficiary described [redacted] fund transfer arrangement for the purpose of purchasing 55% of the Petitioner's issued stock. The Beneficiary claimed that "[d]ue to the current foreign currency transfer policy of China," [redacted] did not directly transfer funds to the Petitioner. Instead, [redacted] relied on the Beneficiary as an intermediary in the sale/purchase transaction, getting the Beneficiary to transfer funds from her own account and reimbursing her in ten installments.

We note, however, that the record contains no evidence of a contractual agreement between the Beneficiary and [redacted] memorializing the terms and details of the arrangement described above. *See id.* And although the Beneficiary's sworn statement lists the dates of her outgoing and incoming fund transfers, the dates of the outgoing transfers do not correspond with [redacted] purported reimbursement transfers to the Beneficiary. As noted earlier, the Beneficiary made a total of four fund transfers and all four took place in the two-week period ending on October 11, 2019. However, of the ten fund transfers [redacted] sent to the Beneficiary, six took place between October 24 and December 18, 2019. Thus, not only did these fund transfers take place well outside the 30-day period listed in the purchase agreement, but they also did not correspond with the Beneficiary's outgoing fund transfers to the Petitioner.

The Petitioner also provided a document titled "Resolutions Adopted by Unanimous Written Consent of Members of [the Petitioner]," which lists [redacted] and [redacted] as the Petitioner's two members owning 55% and 45% of the Petitioner's stock, respectively. Although this document reiterates the Petitioner's claim regarding [redacted] ownership interest, its signature page contains an anomaly that leads us to question the document's validity. More specifically, while the Beneficiary, on behalf of [redacted], signed the document on January 7, 2022, the date next to

[redacted] signature is January 7, 2020. Not only does the latter predate [redacted] signature by two years, but, as the Director noted, it also appears to be at odds with the line in the document that states the resolution is "Dated to be effective as of the 7th day of January, 2022." It is unclear why one member would have signed the resolution two years prior to its intended execution date. We also note that the only membership certificate on record was issued to [redacted] on January 5, 2020. The record contains no membership certificate for [redacted] nor does the Petitioner's stock transfer ledger reflect [redacted] claimed 45% ownership interest.

The Petitioner must resolve any anomalies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material incongruities, such as those described above, may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

On appeal, the Petitioner objects to the Director's finding that a qualifying relationship does not exist between the Petitioner and the Beneficiary's foreign employer. The Petitioner argues that the two entities have a parent-subsidiary relationship and contends that the Director made "cursory conclusions" while overlooking evidence and "alleging inconsistencies that are immaterial or have been reconciled with objective and competent evidence." We disagree.

First, regarding the Petitioner's reference to unpublished AAO decisions that it cites in support, we note that while 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on USCIS, unpublished decisions are not similarly binding.

In addition, the Petitioner provided multiple translated documents that are not in compliance with applicable regulatory requirements. The regulation at 8 C.F.R. § 103.2(b)(3) states that any document in a foreign language must be accompanied by a full English language translation from a translator who has certified that the translation is complete and accurate, and that the translator is competent to translate from the foreign language into English.

Here, the Petitioner provided foreign bank receipts accompanied by corresponding English language translations showing [redacted] ten fund transfers to the Beneficiary in 2019. However, the receipts were not accompanied by a translator's certification attesting to the completeness and accuracy of the translation or the competency of the translator to translate the documents from Chinese into English. Likewise, the Petitioner provided [redacted] audited financial statements for 2021 and for the six-month period of January to June 2022, but neither was accompanied by the required translator's certification.[2]

Accordingly, because the Petitioner did not submit a properly certified English language translation of the document, we cannot meaningfully determine whether the translated material is accurate and thus supports the Petitioner's claims regarding [redacted] claimed purchase of the Petitioner's stock. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013); *Matter*

[2] The Petitioner also provided a translation titled "Regulations of the People's Republic of China on Foreign Exchange Administration" that was accompanied by a single paragraph stating the following: "The English version is for reference only. In case of discrepancy or ambiguity of meaning between this English translation and the Chinese version, the latter shall prevail." Neither the foreign document nor the translator's certification accompanied this document.

of Skirball Cultural Ctr., 25 I&N Dec. 799, 806 (AAO 2012); *Matter of Ho*, 19 I&N Dec. 582, 588-89 (BIA 1988); *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966); *Matter of D-Y-S-C-*, Adopted Decision 2019-02 (AAO Oct. 11, 2019).

The Petitioner further argues that the Director erred "by dismissing the IRS Tax Form 8832, Entity Classification Election," asserting that the form constitutes "competent and objective evidence" of [redacted] ownership interest in the Petitioner. We disagree with the Petitioner's reliance on Form 8832 as conclusive evidence of [redacted] ownership interest.

Although the form in question does list [redacted] as the Petitioner's foreign owner, the information in the form was provided by the Petitioner and as such, the form does not, by itself, serve as objective evidence of the Petitioner's ownership. That said, we also note that the Petitioner completed Part 1, No. 4 of the Form 8832, which pertains to an eligible entity that "has only one owner." The Petition, meanwhile, has stated that it has two owners – [redacted] and [redacted] – thereby leading us to question which of its claims, if any, accurately reflects the Petitioner's ownership. *See Matter of Ho*, 19 I&N Dec. at 591-92.

We also note that Form 8832 does not address the critical question concerning the means by which [redacted] ownership was acquired. As ownership is a critical element of this visa classification, a director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. The Director may determine that additional evidence is needed and as such, may request that the Petitioner submit such evidence. 8 C.F.R. § 204.5(j)(3)(ii). The Director is not precluded from requesting proof of stock purchase or evidence pertaining to the means by which stock was acquired. *See* 8 C.F.R. § 103.2(b)(8)(iii) (establishing the Director's discretion to request evidence other than initial evidence to show eligibility). Here, the Director sought further evidence establishing that the foreign entity paid for ownership of the Petitioner's stock. However, the record does not contain sufficient evidence showing that [redacted] furnished consideration in exchange for its claimed ownership of the Petitioner.

Moreover, the credibility of the evidence is not enhanced by the claim that wire transfers were transacted through the Beneficiary so that the company could circumvent China's currency transfer laws. Although under 8 C.F.R. § 103.2(b)(2)(i), a petitioner may submit secondary evidence if the required documents do not exist or cannot be obtained, this office will not accept a petitioner's illicit activity as an excuse. *See*. The Petitioner cannot hide financial transactions from its home country and then expect this office to accept the activity as an excuse for the lack of evidence. The nonexistence or unavailability of required evidence creates a presumption of ineligibility. *Id.*

In addition, the record contains an IRS Form 1120S, U.S. Income Tax Return for an S Corporation, which accounts for the Petitioner's income in 2021. We note, however, that to qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Internal Revenue Code, § 1361(b), 26 U.S.C. § 1361(b)(1) (2016) (emphasis added). Accordingly, the Petitioner's claim that it is majority owned by a foreign corporation is inconsistent with the 2021 tax return. This additional discrepancy, as well as those previously enumerated, must be resolved in order to establish that [redacted] and the Petitioner have a parent-subsidiary relationship, and

accordingly, the required qualifying relationship, as claimed. *See Matter of Ho*, 19 I&N Dec. at 591-92.

In sum, the Petitioner has provided deficient evidence that does not credibly show [redacted] as purchaser of the Petitioner's stock. Accordingly, for the reasons discussed above, the Petitioner has not established that it has a qualifying relationship with the Beneficiary's foreign employer as required by 8 C.F.R. § 204.5(j)(3)(i)(C).

III. ADDITIONAL DEFICIENCIES

Lastly, our review of the record shows additional deficiencies that either were not addressed or were not fully addressed in the Director's decision.

First, the Petitioner's submission of a Certificate of Amendment shows that [redacted] address was changed to a U.S. address. The Director noted this change in the denial, finding that the U.S. address is problematic for the purpose of establishing that [redacted] owns and controls the Petitioner. Keeping in mind that the Petitioner must be a multinational entity to qualify for the immigrant classification it seeks in this matter, the issue of whether the Petitioner's claimed parent entity continues to do business abroad is critical to the Petitioner's eligibility. *See* 8 C.F.R. § 204.5(j)(2) (for definitions of "doing business" and "multinational"). In other words, if [redacted] change of address reflects a changed location for conducting business, the Petitioner may no longer fit the definition of multinational.

On appeal, the Petitioner states that "many foreign companies have 'branches' in the United States," thus arguing that the foreign entity's new U.S. mailing address does not compromise its eligibility. While it is possible for the foreign entity to set up a branch office in the United States, the Petitioner did not provide supporting evidence demonstrating that this was the case in the present matter. *See Matter of Chawathe*, 25 I&N Dec. at 376. As such, the record is unclear as to whether the foreign entity continues to conduct business abroad, a factor that is critical to the Petitioner's ability to demonstrate its status as a multinational entity.

Because the identified issue is critical to the Petitioner's eligibility and the record as presently constituted is inconclusive on that issue, the Petitioner would be ineligible for this classification even if it resolves the deficiencies concerning its qualifying relationship with [redacted]. The Petitioner must resolve this issue in any further filings.

The record also lacks sufficient evidence establishing that the Petitioner has the ability to pay the Beneficiary's proffered wage. Per 8 C.F.R. § 204.5(g)(2), the prospective U.S. employer must meet the following provisions:

> Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either

in the form of copies of annual reports, federal tax returns, or audited financial statements.

The priority date for the petition in this matter is August 12, 2022, the date the petition was filed, and the Beneficiary's proffered wage is listed as $80,000 per year. However, the Petitioner has not provided evidence in the form of copies of annual reports, federal tax returns, or audited financial statements establishing its ability to pay as of the listed priority date.

While the additional deficiencies discussed above are not grounds for our dismissal of this appeal, the Petitioner will be required to address such deficiencies in any future filings, whether in further pursuit of the instant petition or with regard to any other employment-based petition where the above-listed issues are relevant to eligibility.

ORDER: The appeal is dismissed.