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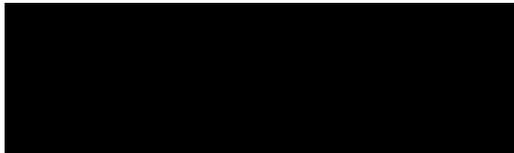
U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass. Ave., 3rd Floor
425 Eye Street N.W.
Washington, D.C. 20536



DEC 17 2003

FILE: WAC 01 259 58813 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
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:



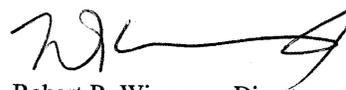
INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner was incorporated in 1995 in state of Delaware and is claimed to be a branch of [REDACTED] located in Canada. The petitioner is engaged in the grocery wholesale business. It seeks to employ the beneficiary as its purchasing 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 determined that the petitioner had not established that the beneficiary had been or would be employed in a managerial or executive capacity. The director also determined that the petitioner failed to establish the existence of a qualifying relationship between the U.S. and foreign entities.

On appeal, counsel submits a statement and additional evidence refuting the director's findings.

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 first two issues in this proceeding are whether the beneficiary has worked the required one year in a qualified managerial or executive position abroad and whether she has been and will be performing managerial or executive duties in the United States.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is

directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the initial filing, the petitioner provided the following statements in regard to the beneficiary's past and present duties:

[The beneficiary's] employment with [the foreign entity] began in 1990, when she was hired as the Commodity Buyer in [the foreign entity's] Calgary office. In that capacity, she was responsible for the purchasing function for a select group of products. She identified new products and negotiated contracts with vendors within specific product areas. She worked with manufacturers to develop cooperative

funding programs and market them to the client base. She maintained procurement records for items or services purchased, costs, delivery, product quality and performance, and inventories.

Since her L-1A transfer to Las Vegas, she has helped develop [the petitioner's] yearly business plan as part of the division's management team. She is responsible for managing and coordinating activities involved with procuring products for distribution. She is responsible for the management of purchasing functions for a full line of merchandise. She negotiates contracts with vendors, maintains merchandise income levels at or above plan, provides training to the sales department, reviews requisitions and confers with vendors to obtain product and service information.

On December 21, 2001, the director instructed the petitioner to submit the foreign entity's organizational chart describing its managerial hierarchy and staffing levels, and showing the *current* names of its executives and managers within each department. The petitioner was asked to identify the beneficiary's position and to provide the list of employees under her supervision. In regard to the U.S. entity, the petitioner was instructed to submit its own organizational chart also identifying the beneficiary's position, a more detailed description of her job duties, and a list of all of the employees under the beneficiary's supervision. The petitioner was asked to provide brief job descriptions, education levels, and the salaries or wages of all of the beneficiary's subordinates.

In response to the director's request for evidence concerning the foreign entity, the petitioner submitted organizational charts for all of its foreign offices. In the denial the director stated that the petitioner failed to include the beneficiary's name on any of the foreign organizational charts or to provide the names, job descriptions, and educational levels of any of the beneficiary's subordinates within the foreign organization.

On appeal, counsel explained that the Calgary entity's organizational chart did not contain the beneficiary's name because of the director's specific request was for a chart with "the *current* names of all executives, managers"

(Emphasis added). Since the beneficiary has been employed in the United States since 1997, the beneficiary is not currently employed with a foreign entity and her name, therefore, was rightfully omitted from any of the foreign organizational charts. The petitioner also provided a copy of the approval notice for the petitioner's prior request to extend the beneficiary's status as an L-1A nonimmigrant from September 2000 to September 2002. Contrary to the inference in the denial, the director did not request that the petitioner submit a foreign entity organizational chart dating back to the time of the beneficiary's employment with that entity. The petitioner's failure to submit specific evidence that was never requested by the director cannot be used to discredit a petitioner's claim. Consequently, the portion of the denial that deals with the director's conclusion regarding the beneficiary's position abroad is hereby withdrawn.

In regard to the beneficiary's duties in the United States, the petitioner responded to the director's request for additional evidence by submitting the U.S. entity's organizational chart and the beneficiary's job description in her capacity as purchasing manager. As the director subsequently quoted verbatim that job description, the AAO will not repeat the description in this decision. The petitioner's organizational chart identifies the president as the head of the Las Vegas office's hierarchy, and four subordinate positions including three managers (one of whom is the beneficiary), and a controller. The chart does not identify any positions that are subordinate to the three managers or the controller even though the Las Vegas office's department of human resources states in its Monthly Headcount Report Form that it has a total of 158 employees. Counsel merely explains in a separate statement that the beneficiary supervises two employees—a buyer and an assistant buyer—neither of whom, as previously stated, appear on the petitioner's organizational chart. Counsel stated that the petitioner is looking for someone to fill the position of assistant buyer.

The director denied the petition, noting that the petitioner failed to provide a brief description of duties or educational levels of the beneficiary's subordinates. The director concluded that the petitioner failed to submit sufficient evidence to establish that the beneficiary's duties in the United States are primarily managerial or executive.

On appeal, the petitioner submits job descriptions for the beneficiary's two subordinate employees. However, where a petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, the AAO will not consider evidence submitted on appeal for any purpose. Rather, the AAO will adjudicate the appeal based on the record of proceedings before the director. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). If the petitioner desires further consideration of such evidence, the petitioner may file a new petition. As the petitioner in the instant case failed to submit the description of duties and education levels of the beneficiary's subordinates, as requested in the request for additional evidence, the portion of the brief that addresses this issue, as well as exhibits I through L, will not be considered.

The petitioner also states on appeal that the requested information regarding the beneficiary's subordinates is not required to determine whether the beneficiary performs qualifying duties as the beneficiary is not necessarily a personnel manager, but rather is a function manager who is in charge of the purchasing department. However, as previously stated by the director, the petitioner must establish that the beneficiary is managing or directing the management of a function rather than actually performing that function herself. In the instant case, the only two positions in the purchasing department, other than the beneficiary's position, are those of a buyer and an assistant buyer. The newly submitted organizational chart does not show any administrative or clerical positions within the purchasing department. Therefore, it is unclear who was performing those tasks, especially when the position of assistant buyer was unfilled, as was the case when the petitioner responded to the request for additional evidence. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Furthermore, in examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the instant case, the entire description consists of subject headings, and brief and often confusing phrases, which are used to describe duties that apply to each heading. Most of the terminology used in the description is industry-specific and

does not convey, in layman's terms, a comprehensible description that can be understood by someone who does not work in the food wholesale industry. The remainder of the job duties are described in terms that are too general and vague to convey an understanding of exactly what the beneficiary will be doing on a daily basis. The summary of the beneficiary's duties does not indicate who, if not the beneficiary herself, performs the essential duties of the purchasing department. As previously pointed out, the petitioner failed to provide job descriptions for the beneficiary's two subordinate positions, which are the only positions that are part of the purchasing department. Therefore, it cannot be determined that either the buyer or assistant buyer sufficiently relieve the beneficiary of having to perform non-qualifying duties.

Counsel also asserts that as a result of having approved the petitioner's prior nonimmigrant petition for L-1A non-immigrant status and subsequent approval to extend that status, CIS is "estopped from making the incorrect allegations offered as the reasons for denying the I-140 Petition." However, the director's decision does not indicate whether he reviewed the prior approval of the nonimmigrant petition referred to by counsel. The record of proceeding does not contain copies of the visa petition that is claimed to have been previously approved. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director. CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988).

The AAO, is not bound to follow the contradictory decisions of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), aff'd 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).

Furthermore, the AAO, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of CIS from undertaking a lawful

course of action that it is empowered to pursue by statute or regulation. See *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted to it by the Secretary of Homeland Security. See *Delegation of Authority*, March 1, 2003. Accordingly, AAO has no authority to address the petitioner's equitable estoppel claim.

On review, the record contains insufficient evidence to demonstrate that the beneficiary has been and will be employed in a primarily managerial or executive capacity. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel or that she will be relieved from performing non-qualifying duties. The AAO is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

The remaining issue in this proceeding is whether the petitioner has established that it has a qualifying relationship with a foreign entity.

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.

The director concluded that the petitioner failed to establish that Jupiter Partners, LLC owns the petitioning entity, as claimed.

On appeal, counsel states that the director is under the mistaken understanding that the foreign and U.S. entities are two separate entities and claims instead that the U.S. entity is a branch of the Canadian entity. However, if that were the case, the petitioner should have submitted evidence that the foreign entity is licensed to do business in the United States. Instead, the petitioner submitted a certificate of incorporation indicating that the petitioner was incorporated in the State of Delaware in 1995. The petitioner's incorporation suggests that it is an entity separate from its foreign counterpart rather than a branch of that entity. As such, 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 immigrant visa classification. *Matter of Church Scientology International*, supra at 593; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant visa proceedings). 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*, supra at 595.

In the instant case, the petitioner has provided only the petitioner's certificate of incorporation addressing the issue of its ownership. However the petitioner has not established that the foreign and U.S. entities are commonly owned and controlled. As previously noted, simply going on record without supporting documentary evidence is not sufficient for the

purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.*

Counsel also asserts that because CIS had not previously addressed this issue, doing so in the denial violates the petitioner's due process rights. That assertion has no merit. In the instant case, the petitioner is granted an automatic right to appeal the decision of a service center. Therefore, the petitioner is given an opportunity to establish eligibility in a proper forum, that being the AAO. The fact that the director did not indicate in the request for additional evidence that he would later address the issue of a qualifying relationship in the denial in no way precludes the petitioner from establishing eligibility for the desired immigration benefit. Although CIS often issues a notice requesting additional evidence prior to denying a petition, there are no statutes, regulations, or case law precedents that guarantee the petitioner that the only issues in a potential denial will be those that were previously addressed in the request for additional evidence. Consequently, it is concluded that the petitioner has failed to establish that it has a qualifying relationship with a foreign entity. For this additional reason, this petition cannot be approved.

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.