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U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 26 2005
SRC 03 135 53276

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:

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, Director
Administrative Appeals Office

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

The petitioner is a Texas corporation claiming to be engaged in retail trade and investment.[1] It seeks to employ the beneficiary as its vice president. 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 following separate findings: 1) the petition was improperly filed; 2) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's employer abroad; and 3) the beneficiary would not be employed in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

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 first issue in this proceeding is whether the instant petition was properly filed. In the denial dated December 3, 2004, the director concluded that the petition was improperly filed and based this conclusion on

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[1] It should be noted that, according to the Texas Comptroller of Public Accounts, the petitioner is not currently in good standing in Texas due to its failure to satisfy all state tax requirements. Therefore, regardless of whether the petitioner's tax issues can be easily remedied or not, it raises the critical issue of the company's continued existence as a legal entity in the United States.

the fact that the petition and the job offer were both signed by the beneficiary. While the director's observation is accurate with regard to these facts, her conclusion is unsupported by any statutes or regulations. With regard to initial evidence, 8 C.F.R. § 204.5(j)(3)(i) states that the petition must be accompanied by a statement from an authorized official of the petitioning United States employer. The regulation does not prohibit the beneficiary from signing the supporting statement so long as it can be established that the beneficiary is an authorized official. In addition, while the regulation at 8 C.F.R. § 204.5(j)(5) requires that the petitioner submit a valid job offer describing the beneficiary's prospective position and although it is understood that an authorized official will sign this letter on the petitioner's behalf, the regulation does not specify who this individual should be, nor does it specifically prohibit the beneficiary from assuming the role of the signatory. As the evidence of record suggests that the beneficiary is an authorized official with sufficient signatory powers to sign documentation on behalf of the petitioner, the director's statement with regard to this issue will be withdrawn.

The second issue in this proceeding is whether the petitioner has a qualifying relationship with the beneficiary's foreign employer.

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 the statement appended to the petition, the petitioner stated that it is a subsidiary of MS Investment Group (MSIG), located in Pakistan. The petitioner also submitted a stock certificate and its stock transfer ledger indicating that MSIG owns 1,000 of the petitioner's issued shares.

On September 1, 2004, the director issued a request for additional evidence (RFE) instructing the petitioner to submit further documentation establishing the ownership and control of the U.S. and foreign entities.

In response, the petitioner provided a letter from the petitioner's counsel dated November 21, 2004. Counsel stated that the foreign entity is a sole proprietorship, which is entirely owned by the beneficiary. Documentation was submitted in support of this assertion. Counsel stated that the petitioner is a wholly

owned subsidiary of the foreign entity and referred to the petitioner's issued stock certificate and stock transfer ledger as evidence of the claimed parent/subsidiary relationship between MSIG and the petitioner.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary similarly owns both the U.S. and foreign entities. The director suggested that the petitioner failed to establish that it has an affiliate relationship with the foreign entity based on the definition of the term *affiliate* as provided in 8 C.F.R. § 204.5(j)(2). While the director accurately concluded that the petitioner has not established that the beneficiary directly owns the U.S. petitioner in the same way he owns the foreign entity, a review of the record indicates that the petitioner has maintained a different claim regarding its ownership. Namely, the petitioner claims to be a subsidiary whose issued shares are owned by the foreign entity, not by the beneficiary directly. The director further noted that the petitioner issued only 1,000 shares of its stock even though it was authorized to issue a total of 1,000,000 shares.

As subsequently noted by counsel on appeal, the fact that the petitioner was authorized to issue 1,000,000 shares does not mean that the petitioner is prohibited from issuing only 1,000 shares, particularly in light of Article 5 of the petitioner's articles of incorporation, which clearly establishes the petitioner's right to commence doing business upon issuing $1,000 worth of its shares. While the director could have requested additional evidence in the form of the petitioner's list of its shareholders, such a request was not made. The petitioner's failure to submit specific evidence that was never requested by the director cannot be used to assume facts not in the record of proceeding. Additionally, while the director properly observed that the petitioner's stock certificate was not signed by the beneficiary, this factor is irrelevant in determining the petitioner's ownership, assuming the stock certificate is otherwise valid. Accordingly, the director's conclusion regarding the issue of a qualifying relationship is hereby withdrawn.

The third issue in this proceeding is whether the beneficiary would be employed in a managerial or executive capacity.

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 support of the petition, the petitioner composed a broad list of proposed duties and responsibilities of the beneficiary under an approved petition. In the director's RFE, the petitioner was instructed to submit a detailed description of the beneficiary's proposed job duties, including the percentage of time to be spent on each of the duties. The petitioner was asked to discuss who would provide the product and/or services of the business. The petitioner was also instructed to submit evidence of its staffing levels by providing the position titles, duties, and educational levels of its employees. Quarterly tax returns and employee W-2 wage and tax statements were requested as well.

The petitioner responded with the same list of duties and responsibilities as initially provided in support of the petition. In an effort to comply with the director's request, the petitioner assigned a percentage of time to each item on the following list:

- Oversees the management/decision-making aspects of the retail and investment operations[,] such as formulating policy, directing, and coordinating activities of MS Investment Group and [the petitioner]; [10%]
- Establishes and approves policies and objectives of MS Investment Group and [the petitioner's] operations in consultation with the high-level management and in accordance with the charters; [10%].
- Approves company budget and investment projects; [5%]
- Appoints other members of the managing team (e.g., the accountants and finance manager and the business development manager); [6%]
- Approves public relation policies; [5%]

- Approves hiring of professional services; [5%]

- Confers with the [p]resident and MS Investment Group to plan business objectives, to develop organizational policies to coordinate functions and operations between divisions and departments of the corporations, and to establish responsibilities and procedures for attaining objectives; [10%]

- Reviews activity reports and financial statements of all operations to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions; [7%]

- Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity of both [of] the corporations; [10%]

- Plans and develops investment, retail, and public relations policies designed to improve [the] image of the group and relations with customers, employees, and [the] public; [7%]

- Evaluates [the] performance of managers for compliance with established policies and objectives of the group and contributions in attaining objectives; [5%]

- Organizes and implements sales promotions, merchandise selection, formulates methods of cost-containment; [5%]

- Confers with the Royal Oaks Country Store personnel in order to review its business activity in order to ascertain its current status and to discuss the necessary changes in goals and objectives; [5%]

- Using company objectives to formulate policy for subordinate personnel. Such areas of policy include employment compensation and employee services. Analyzes wage, salary reports, and other information to determine an overall competitive wage plan; [10%]

The petitioner also submitted two of its quarterly tax returns and its annual corporate tax return for 2003. However, the petitioner failed to provide the requested employee W-2 wage and tax statements for the year the petition was filed. Therefore, even though the petitioner provided an organizational chart and a separate description of duties for each employee named in the chart, it failed to provide documentation to show that the employees claimed in the chart were actually employed by the petitioner at the time the petition was filed. Furthermore, the petitioner claimed only three employees on its Form I-140. Thus, either the organizational chart and list of employees reflects a personnel structure that did not exist at the time the petition was filed or, in the alternate, the petitioner has amended its original claim without providing a valid reason for doing so. It is noted that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, any employees that had not yet been hired by the petitioner at the time the petition was filed cannot be considered in reaching a decision regarding the petitioner's eligibility. Additionally, 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 the instant matter, the petitioner has failed to resolve or even to acknowledge the considerable inconsistency in the claims made by the petitioner regarding the number of employees it had at the time the petition was filed.

In the denial, the director noted that a number of the documents signed by the beneficiary identify the beneficiary's position title as something other than that of vice president, which the petitioner claims is the beneficiary's current and proposed position. The director stated that the beneficiary's signature in the capacity of president contradicts the petitioner's claim regarding the proposed position title as well as the petitioner's organizational chart, which identifies Nadir Noorali as the petitioner's president. As previously stated, the petitioner must resolve any inconsistencies in the record by independent objective evidence. *See Matter of Ho*, 19 I&N Dec. at 591-92.

Counsel addresses the director's comments regarding the petitioner's inconsistent use of various position titles in reference to the beneficiary. Counsel points out that exhibit no. 15 does not identify Nadir Noorali as the company's president. However, the record shows that Mr. Noorali was identified as the company's president in other submissions, including the petitioner's organizational chart and employee list. Thus, in light of these submissions, the director's assumption regarding exhibit no. 15 is corroborated by the record of proceeding.

Counsel further states that corporate officer positions may have changed since the year 2000 and urges the AAO to focus on present day officer positions. However, in reviewing exhibit nos. 13 and 14, the AAO finds that counsel's assertions are without merit or credibility. If the beneficiary were employed as the company's president in 1999 and 2000, as indicated by the beneficiary's signature in the capacity of president in several of the petitioner's documents, it is unclear why, as the company progressed in its stage of development, the beneficiary would be demoted to the position of vice president. Furthermore, in the initial support statement, which was submitted with the petition, the petitioner clearly stated that the beneficiary was previously appointed as its vice president and wished to retain the beneficiary in the same position title. No mention was made of any shifts in position title and no explanation was provided for purportedly demoting the beneficiary from the position of president to vice president. 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 Obaigbena*, 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). Thus, not only does counsel fail to adequately address the director's valid concerns regarding the stated discrepancies in the beneficiary's position title, but counsel also renders his own credibility questionable by introducing facts that have not been put forth by the petitioner and which are not supported by the evidence of record.

While the director also discusses the two quarterly wage reports submitted in response to the RFE, it is important to note that the wage reports reflect wages that were paid at least one year after the filing of the petition. Thus, the 2004 quarterly wage reports would not give Citizenship and Immigration Services (CIS) and accurate assessment of the total wages paid or the number of employees working directly for the petitioner at the time the petition was filed in April of 2003. Although the AAO would have been better able to gauge the petitioner's personnel structure from the W-2 wage and tax statements issued by the petitioner in 2003, the petitioner failed to submit this requested documentation. As such, the AAO is unable to determine whether the eight individuals claimed in the petitioner's organizational chart were actually employed by the petitioner at the time the petition was filed and, if so, which individuals were employed on a full-time basis. As previously noted by the director, an employee who primarily performs the tasks necessary to produce a

product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Furthermore, 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)). Thus, while the petitioner claims that the beneficiary would be relieved from having to perform nonqualifying tasks, this claim cannot be verified without documentary evidence. Although the petitioner generated an organizational chart with managerial position titles as the beneficiary's subordinates, the record lacks sufficient documentary evidence to establish who, namely, was employed by the petitioning organization when the petition was filed.

Counsel asserts that CIS placed undue emphasis on the size of the petitioner's staff and refers to a federal district court decision in support of his assertion. *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570 (N.D. Georgia 1988). However, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. Furthermore, contrary to counsel's argument, CIS cannot ignore the petitioner's personnel structure in determining the beneficiary's eligibility for classification as a multinational manager or executive. While this determination cannot be reached by solely focusing on the size of the petitioner's personnel at the time of the petition's filing, this factor may and should be considered in determining the petitioner's capability in relieving the beneficiary from having to consistently perform nonqualifying tasks. If the petitioner has little or no support staff, it is not capable of providing the beneficiary with such relief, and CIS has no basis upon which to conclude that the beneficiary would primarily perform qualifying duties, regardless of the beneficiary's purported job duties.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. Although the beneficiary's description of duties suggests that the beneficiary directs the company through managerial employees, the record lacks sufficient evidence to establish who, in fact, was employed at the petitioning entity during the time the petition was filed. Thus, the record lacks conclusive proof that the petitioner has a sufficient staff to actually perform the daily operational tasks that the beneficiary is charged with overseeing. The record strongly suggests that the petitioner's sole business operation is the Royal Oaks Country Store. Thus, the beneficiary's subordinates, even if documented, would consist of the store's employees. Regardless of the position titles of the beneficiary and his alleged subordinates, the petitioner has not established that it has achieved a level of complexity where the beneficiary would focus primarily on duties of a qualifying nature. Rather, the record indicates that a preponderance of the beneficiary's duties would be directly providing the services of the business. Based on the evidence furnished, it cannot be found that the beneficiary would be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Additionally, while not addressed in the director's denial of the petition, the RFE instructed the petitioner to submit further information regarding the beneficiary's job duties abroad. Although the petitioner submitted a broad list of the beneficiary's responsibilities in response to the director's request, the job description lacked sufficient detail to convey a thorough understanding of what actual duties the beneficiary carried out on a day-to-day basis during his employment abroad. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y.

1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). As the petitioner failed to specifically define the beneficiary's duties, the AAO cannot affirmatively conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground discussed in the above paragraph, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused it discretion with respect to all of the AAO's enumerated grounds. 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).

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.