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By

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: DEC 09 2005
SRC 04 131 51479

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:



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

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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 operating as an importer, distributor, and tour service provider. It seeks to employ the beneficiary as its multinational 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 failed to meet the necessary regulatory requirements and denied the petition on the following separate grounds: 1) the petitioner failed to establish that it had been doing business for one year prior to filing the I-140 petition; 2) the record lacks evidence that the beneficiary was employed abroad or would be employed in the United States in a qualifying managerial or executive capacity; 3) the petitioner failed to establish that the foreign company continues to do business; 4) the petitioner failed to establish its ability to pay the beneficiary's proffered wage; and 5) the petitioner failed to submit evidence of a qualifying relationship with the claimed foreign entity.

On appeal, counsel disputes the director's decision and submits evidence in an effort to cure the deficiencies discussed by the director. Contrary to counsel's assertions, the director did not violate 8 C.F.R. § 103.2(b)(8) by failing to request further evidence before denying the petition, since the director pointed to clear "evidence of ineligibility" in her decision. Specifically, the director noted that the petitioner had been incorporated for less than one year at the time of filing and accordingly had not been doing business for at least one year prior to filing the petition, contrary to 8 C.F.R. § 204.5(j)(3)(i)(D). Although counsel alleges on appeal that the petitioner might have been doing business as a sole proprietorship, the question is *not* whether the alien beneficiary has been doing business as an individual, but whether the petitioning corporation, [REDACTED] had been doing business for a full year. 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). As will be discussed, because the petitioner had not existed for a full year at the time of filing, it is impossible that it could have been doing business for a full year as required by the regulations. Thus, in accordance with 8 C.F.R. § 103.2(b)(8), a request for evidence would not have cured the "evidence of ineligibility."

Even if the director had violated the terms of 8 C.F.R. § 103.2(b)(8), it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence. At this time, the AAO will consider the supplemental evidence that has been submitted and render a decision accordingly.

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 petitioner met the requirements of 8 C.F.R. § 204.5(j)(3)(i)(D), which states that the petitioner is required to submit evidence that the prospective United States employer has been doing business for at least one year. As previously noted, the petitioner corporation had not existed for a full year at the time of filing and therefore could not have been doing business for the required period. For this reason alone, the petition must be denied and the appeal dismissed. Regardless, the AAO will examine the petitioner's evidence that was submitted to establish that it had been doing business.

The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

The petitioner has submitted a number of invoices and bank statements reflecting transactions that took place from October 2003 through January 2004. While this evidence indicates that the petitioner has been doing business since October 2003, there is no indication that the petitioner was doing business in March 2003, when the petition was filed, or the one year prior that date, as required by 8 C.F.R. § 204.5(j)(3)(i)(D). 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). The evidence submitted does not establish that the petitioner was doing business during the relevant time period.

The second issue in this proceeding is whether the petitioner has established that the beneficiary's employment abroad and proposed employment in the United States meet the statutory definitions of 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 Part 6 of the I-140 petition, the petitioner stated that the beneficiary's proposed duties would include managing the U.S. subsidiary, hiring employees, handling the petitioner's daily activity, signing documents, and negotiating trade agreements. No other information was submitted in regard to the beneficiary's proposed position and no information at all was submitted in regard to the beneficiary's past duties with the claimed parent entity abroad.

On appeal, the petitioner provided the following statement regarding the beneficiary's proposed job duties:

Manages the whole company in [an] executive level. Hire[s] and [f]ire[s] employees. Sing[s] [p]urchase and [s]ales contract[s] for business. Coordinate[s] with executives in Nepal to expand the business. Make[s] company policies and regulations. Do[es] the business planning for the company on the whole.

The petitioner also submitted an organizational chart, which provided position titles, but did not name the individuals who occupy any of the positions in the chart and indicated that two of the four listed positions are currently unfilled. Although the petitioner provided a separate list of employees listing each individual's name, position title, and brief job description, the position titles in the organizational chart do not match those given in the separate list of employees.

The director indicated that the petitioner's failure to provide a description of the beneficiary's job duties abroad was among the grounds for denying the petition. However, no information has been submitted to cure this deficiency. Nor has the petitioner submitted any documentation to establish that the beneficiary was employed by the claimed parent entity abroad for the requisite minimum period of one year. 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)).

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). 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). In the instant matter, the petitioner has provided little more than brief statements regarding the beneficiary's general responsibilities supplemented by conclusory assertions regarding the beneficiary's employment capacity. The petitioner has failed to assign specific duties to the beneficiary's broad responsibilities and therefore has failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity.

As the petitioner has failed to provide any information at all regarding the beneficiary's former employment with the claimed foreign parent entity, the AAO cannot conclude that the petitioner was employed abroad in a qualifying managerial or executive capacity as required by 8 C.F.R. § 204.5(j)(3)(B). For this additional reason, the petition must be denied and the appeal dismissed.

The third issue in this proceeding is whether the claimed foreign parent entity continues to do business. On appeal, the petitioner submitted a number of invoices from 2003 and 2004, which suggest that the foreign entity has continued to engaged in "the regular, systematic, and continuous" course of business since the establishment of the U.S. entity and thereafter. Therefore, the petitioner has overcome the director's conclusion with regard to this issue and the decision of the director is withdrawn as it relates to this issue.

The fourth issue in this proceeding is whether the petitioner established its ability to pay the beneficiary's proffered wage. The regulations at 8 C.F.R. § 204.5(g)(2) states the following, in pertinent part:

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.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner has submitted the beneficiary's Form 1040 personal tax return for 2003 showing that the beneficiary was compensated \$36,000 the year during which the petition was filed. As such, the petitioner has overcome the director's conclusion with regard to this issue and the decision of the director is withdrawn as it relates to this issue.

The fifth and final issue in this proceeding is whether the petitioner has a qualifying relationship with a foreign entity.

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 instant matter, the petitioner seemingly claims to be a subsidiary of the claimed foreign entity, although it has submitted no statements specifically making this claim. In support of this claim, the petitioner has

submitted foreign documents indicating that [REDACTED] owns the foreign entity. However, the petitioner has submitted no evidence regarding its own ownership. As previously stated, 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. at 165.

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 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 instant matter, the petitioner's failure to submit relevant evidence and information establishing that [REDACTED] owns and controls a majority of the U.S. entity prevents the AAO from being able to determine that the two entities share similar ownership and control.

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 its 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).

Finally, prior to the entry of this decision, the AAO notes that the director denied the petition to extend the beneficiary's L-1A status. *See* SRC 03 206 50591 (denied on March 23, 2004). Accordingly, the denial of this immigrant petition is consistent with the director's treatment of the petitioner's nonimmigrant petition.¹

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.

¹ Although the beneficiary's extension petition was denied on March 27, 2004, and the beneficiary thereby lost his lawful nonimmigrant status, the beneficiary filed a Form I-485 Application to Adjust Status on April 7, 2004. As an alien who was not maintaining lawful nonimmigrant status at the time of filing, the beneficiary was ineligible to file for adjustment of status. 8 C.F.R. § 245.1(b)(9). Counsel for the beneficiary incorrectly claimed that the beneficiary was in lawful status since the petitioner intended to file a motion to reconsider with an appeal in the alternative. At the time the I-485 was filed, this statement was both speculative and legally incorrect. Under CIS regulations, a motion does not stay the execution of any decision or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).