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U.S. Citizenship
and Immigration
Services

134

[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: JUN 01 2005

IN RE:

Petitioner:

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:

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 Director, California Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a sole proprietorship that provides security services.¹ The petitioner does not state the beneficiary's proposed position for the petitioner. However, 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 manager.

The director determined that the petitioner had not established: (1) a qualifying relationship with the beneficiary's foreign employer; (2) that the beneficiary would be employed in a managerial or executive capacity for the United States entity; or, (3) that the beneficiary had been employed in a managerial or executive position for the foreign entity for one year prior to entering the United States as a nonimmigrant.

On appeal, counsel for the petitioner cites law dealing with numerous immigration classifications and numerous published and unpublished decisions that have no relevance to the matter at hand. Counsel also asserts that the director's decision is not reasonably specific, does not provide adequate sources for the reasons underlying the decision, does not provide an adequate basis for the reasons underlying the decision, and that there are alternative conclusions possible from the facts relied on by the director. Counsel specifically asserts that the claimed parent company was destroyed in a riot and thus the required documents cannot be obtained from Nigeria. Counsel references the petitioner's Articles of Incorporation and asserts that at "Page 6, the duties of the appellant as the CEO are clearly spelt out." Finally, counsel claims that the beneficiary would not have obtained a private security license without previous work experience.

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

¹ The petition was filed April 27, 2001. The record does not provide any documentary evidence that the petitioner was incorporated at that time. On March 19, 2002, the petitioner claims it filed Articles of Incorporation with the California Secretary of State under the new name Happy Day Protective Patrol, Inc. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act.

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 a September 5, 2002 response to the director's request for evidence, the beneficiary indicates that the name of the foreign entity [REDACTED] Center. The beneficiary indicates that the foreign entity does not

have an annual report, minutes of meetings, stock ownership, or "articles of corporation," either because the documents in Nigeria were destroyed due to political turmoil or because Nigerian law does not require them. The beneficiary does indicate that the foreign entity's list of owners is "not available because Family tree head was – killed I am on my own now try to establish and continues by business in the U.S. [sic]"

The information currently in the record does not establish who owns or owned the foreign entity. As footnoted above, the petitioner was not incorporated when the petition was filed. The beneficiary states in the response to the director's request for evidence, that "the fact now is that I am the only legal owner of my company since I have dissolve the names of the crooked and bad people and I am try to allow new members to come in so if they merrit to go into stck markets I have be very carefull in selecting new members because People today are very disshonest. [sic]" The petitioner also attaches the Articles of Incorporation filed with the California Secretary of State on March 19, 2002.

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 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 at 595. In this matter, the record contains no evidence that a foreign entity and the beneficiary's sole proprietorship are affiliated or in a subsidiary/parent relationship. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel's argument that the foreign entity's documentation was lost in the political turmoil is not substantiated by documentary evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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).

Moreover, first-preference immigrant status under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), requires that the beneficiary have a permanent employment offer from the petitioner. The Form I-140, Petition for Alien Worker indicates that the beneficiary entered the United States in April 1984 under a B-2 visa classification. A petitioner who is a nonimmigrant is not competent to offer permanent employment to an alien beneficiary for the purpose of obtaining an immigrant visa for the beneficiary under section 203(b)(1)(C) of the Act. *Matter of Thornhill*, 18 I&N Dec. 34 (Comm. 1981).

The evidence in the record does not establish a qualifying relationship between the petitioner and a foreign entity.

The second issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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.

The petitioner has not provided a definitive description of the beneficiary's proposed duties for the petitioner despite the director's request for a detailed description of the beneficiary's duties. The most that can be gleaned from the record is that the beneficiary is involved in the ownership of a protective services entity. Counsel's reference to the petitioner's attached articles of incorporation is not persuasive. First, counsel attaches not the petitioner's articles of incorporation, but the unsigned by-laws of an unidentified corporation.² Second, page six of the "articles of incorporation," to which counsel referenced, contains a generic description of duties of a chief executive officer. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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, Id.* Third, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. The AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The AAO also observes as a matter of record, that the beneficiary states that his purpose for coming to the United States "is to improve my Education in Business Administration's and in Business-Management's, English language, Accounting and all Business-in that I will continue operate's my own Business with the few Cash/money or living will" left by my parents [sic]." The beneficiary's own statement undermines his pursuit of this visa classification.

The third issue in this proceeding is whether the beneficiary had been employed in a managerial or executive capacity for the foreign entity. As the director noted, the petitioner references his mother's duties for the foreign entity in response to the director's request for the beneficiary's duties for the foreign entity. The record does not contain a definitive statement of the beneficiary's duties abroad. It is not clear that the beneficiary worked for a foreign entity prior to entering the United States in 1984. Counsel's assertion that the beneficiary would not have obtained a private security license without work experience is not persuasive. The record does not demonstrate that the beneficiary's prior work experience, if any, was in a managerial or executive capacity as required by the statute.

Counsel's citation to unpublished decisions is not probative. The unpublished, non-precedent decisions of the AAO are not binding authority. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all Citizenship and Immigration Service (CIS) employees, in the administration of the Act, unpublished decisions are not similarly binding. In addition, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished matters. Further, counsel does not provide explanations or analogies to the numerous decisions cited. The AAO notes for the record that it

² The AAO notes that the words [REDACTED] are penciled in on the first page of the by-laws. However, the document is not signed and appears to be a generic form commonly used by many corporations. The document is not distinguishable in any way as pertinent to the petitioner. Moreover as previously observed, the petitioner was not incorporated when the petition was filed.

is not required to follow the published decisions of district court decisions 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.

Finally, counsel's citation to *Omni Packaging, Inc. v. INS*, 733 F. Supp. 500 (D.C.P.R. 1990) for the proposition that denial of a third preference classification on the same facts as an L-1 visa and extension that were approved is an abuse of discretion is not persuasive. Counsel fails to note that the court in *Omni Packaging* revisited the issue and later determined that the Immigration and Naturalization Service had properly denied the immigrant petition and that it was not estopped from finding that the alien was not a manager or executive after having determined that he was manager or executive for purposes of issuing an L-1 visa. *See Omni Packaging, Inc. v. INS*, 930 F. Supp. 28 (D.C.P.R. 1996).

In this matter, the petitioner clearly has not established the beneficiary's eligibility for this visa classification. Counsel does not explain or identify the director's alleged failure to apply the facts to the relevant law. Counsel's attempt on appeal to cite extraneous law and irrelevant decisions to hide the basic facts that the record does not contain any relevant evidence establishing the beneficiary's eligibility is not favorably received by the AAO. Such an attempt borders on the frivolous and the filing by an attorney of an appeal that is summarily dismissed may constitute frivolous behavior as defined in 8 C.F.R. 292.3(a)(15).

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). In this matter the petitioner has not met that burden.

ORDER: The appeal is dismissed.