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FILE: [REDACTED]
SRC 05 030 52162

Office: TEXAS SERVICE CENTER

Date:

NOV 23 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

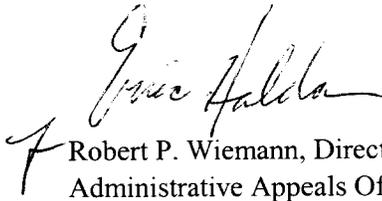
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant petition. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a limited liability company organized in the State of Florida in August 2001. It operates a service station. It seeks to employ the beneficiary as its general 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 a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner submits a brief.

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 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 issue in this proceeding is whether the petitioner has established a qualifying relationship between the petitioner and the foreign entity. 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.

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.

The record contains some evidence that the limited liability company has two members and that [REDACTED] owns a 51 percent interest in the petitioner and that the beneficiary owns a 49 percent interest in the petitioner. The record contains one translated document pertaining to the foreign entity. The document bears a date of December 11, 1998, the name of [REDACTED] and his date of birth and identity number, a business address, an indication that the "main activity" is sports events promoter beginning December 1, 1998, and an indication that the tax filing system requested is "self employed." The document also contains numerous parts that have been left blank. For example, after the words "sole proprietor" the translator has indicated that the space was not filled in. Likewise, after the words "number of personnel employed in your activity" the space is left blank. A review of a copy of the original document appears to correspond with the translated version.

On February 24, 2005, the director requested documentary evidence showing the degree of common ownership between the petitioner and the beneficiary's foreign employer. The director noted that the documents submitted did not address the foreign entity or its type of business.

On May 16, 2005, counsel for the petitioner re-submitted the translated document and asserted that this document was a registration form for a sole proprietorship and that Marcelo Navone was the 100 percent sole proprietor.

On May 23, 2005, the director denied the petition, determining that the foreign document submitted did not establish that the foreign company shared common ownership with the United States entity. The director concluded that the record did not establish the ownership of the foreign company and that the petitioner had not shown a qualifying relationship between itself and the foreign entity.

On appeal, counsel for the petitioner contends that the foreign document submitted is the only form of evidence available to demonstrate the ownership of the foreign corporation due to Argentine law and regulations. Counsel asserts that this document and the petitioner's limited liability operating agreement establish that [REDACTED] is the 100 percent owner of the foreign entity and the 51 percent owner of the United States petitioner. Counsel argues that the petitioner and the foreign entity are affiliates.

Counsel's assertions are not persuasive. The translated document is not sufficient to establish the ownership and control of the foreign entity that employed the beneficiary. First, in immigration proceedings, the law of a foreign country is a question of fact that must be proven if the petitioner relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). The petitioner has not provided any substantiating evidence that the laws of Argentina require only one partially completed document to suffice for the registration of a sole proprietorship.

The record does not establish a qualifying relationship between the petitioner and the beneficiary's claimed foreign employer. For this reason, the petition will not be approved.

Beyond the decision of the director, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity for the U.S. petitioner. The petitioner provided a general description of the beneficiary's duties, indicating in its May 2005 response to the director's request for more evidence on this issue that:

The Beneficiary has full authority in establishing sales goals for each quarter of the year, establishes the methods by which to meet these goals and exercises a wide range of discretionary authority in the daily operations of the business by making major decision regarding the products offered, the number of employees the company will hire, contracts with major distributors as to pricing and distribution among other things.

The petitioner also noted that the beneficiary oversees and supervises all managers in charge of the gas stations, meets with the managers, determines gas prices, handles bank accounts, prepares shareholder reports, meets with accountants, and manages relations with gas and grocery distribution companies. The petitioner also indicated that the beneficiary supervised one station manager who oversaw the hiring and firing of the cashier and gas station attendants.

The description of the beneficiary's duties is not comprehensive and does not convey an understanding of what the beneficiary does on a daily basis. 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). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The few details of the beneficiary's actual duties suggest that the beneficiary is responsible for negotiating contracts with distributors, performing administrative functions, and supervising a station manager. First, the beneficiary's performance of routine operational tasks such as handling the bank account and buying gasoline and grocery products are not duties that are traditionally considered managerial or executive. 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). Second, although the petitioner indicates that the "station manager" oversees a cashier and gas station attendants, the record does not provide evidence substantiating the employment of these individuals. 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)). Moreover, the brief description of the station manager's duties is not sufficient to elevate his position to that of an individual performing primarily managerial, supervisory, or professional tasks. If the beneficiary's primary duty is supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. The record does not establish that the "station manager" is a supervisory, professional, or managerial employee.

Based on the current record, the AAO is unable to determine that the beneficiary's duties comprise primarily managerial or executive duties. For this additional reason, the petition will not be approved.

Also beyond the decision of the director, the petitioner has not provided evidence that the beneficiary was actually employed by the foreign entity claiming a qualifying relationship with the petitioner. The AAO acknowledges that the petitioner has provided a description of the beneficiary's claimed duties for the foreign entity, but the description is not sufficiently detailed to clarify what the beneficiary did on a daily basis. Moreover, the record does not contain substantive evidence that the claimed foreign entity actually employed the beneficiary. Again, 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. at 1103. Moreover, the record is not sufficiently clear to understand the beneficiary's purported position and duties and how these duties relate to the foreign entity's business as a sports event promoter. Again, 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. For this additional reason, the petition will not be approved.

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).

The AAO acknowledges that CIS approved other petitions that had been previously filed on behalf of the beneficiary. With regard to the similarity of the eligibility criteria, the AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

In general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Accordingly, many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Moreover each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The approval of a nonimmigrant petition does not guarantee that CIS will approve an immigrant petition filed on behalf of the same beneficiary. As the evidence submitted with this petition does not establish eligibility for the benefit sought, the director was justified in departing from previous nonimmigrant approvals by denying the immigrant petition.

In addition, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that 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).

Further, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The petitioner has not provided evidence or argument on appeal sufficient to overcome the director's decision.

Finally, the AAO observes that the director was justified in departing from the previous nonimmigrant approvals in this matter; the director should review the previous nonimmigrant approvals for revocation pursuant to 8 C.F.R. § 214.2(l)(9)(iii).

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.