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U.S. Citizenship
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Services

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FILE: [REDACTED]
SRC 02 216 50701

Office: TEXAS SERVICE CENTER Date: FEB 01 2006

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 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 Georgia corporation operating as a holding company for a restaurant business. 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 on the following independent grounds of ineligibility: 1) the petitioner failed to establish its ability to pay the beneficiary's proffered wage; 2) the petitioner failed to submit evidence to show that it is doing business; and 3) the petitioner failed to establish that the beneficiary has been employed in the United States in a qualifying 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 petitioner established its ability to pay the beneficiary's proffered wage at the time of the filing of the I-140 petition.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner indicated in Part 6 of the Form I-140 that the beneficiary would be compensated \$48,000 per year under an approved petition. However, the initial evidence submitted did not establish that the petitioner had the ability to pay the beneficiary's proffered wage.

Accordingly, the director issued a request for evidence dated September 29, 2004 instructing the petitioner to submit copies of its tax returns for 2002 and 2003 as well as all of the corresponding W-2 statements and/or 1099's issued during those two years.

In response, the petitioner provided a letter from its general manager dated December 20, 2004 stating that based on the terms of the compensation agreement between the beneficiary and the foreign entity, the foreign entity will continue to pay the beneficiary's salary.

In regard to the requested documentation, the petitioner provided its 2002 tax return, which indicated that no officers were compensated that year and that no salaries or wages were paid. The return also showed that the petitioner had no taxable income for that year, even though the petition was filed on July 30, 2002. The petitioner also submitted its 2003 tax return, which also indicated that no officers were compensated that year and that no salaries or wages were paid. This time, the petitioner showed an income of \$1,363, far less than the beneficiary's proffered wage.

Additionally, the petitioner submitted 2002 and 2003 tax returns for DeeJay Enterprises, Inc., the petitioner's wholly owned subsidiary. While both returns showed that an officer was compensated and that salaries and wages were paid, there is no indication that the beneficiary was employed by either the petitioner or its subsidiary despite the claim that the beneficiary was admitted to the United States in 2001 under an L-1A visa classification to work as the petitioner's vice president. The record does not indicate that the petitioner issued a W-2 statement for the beneficiary in 2002 or 2003; nor is the beneficiary's name included in any of the submitted quarterly wage reports.

After a review of the submitted documentation, the director concluded that the petitioner failed to establish its ability to pay the beneficiary's proffered wage and denied the petition on April 27, 2005.

On appeal, counsel reiterates the general manager's explanation regarding the beneficiary's agreement with the foreign entity with regard to payment of her salary. However, regardless of the current source of the beneficiary's salary, the regulation at 8 C.F.R. § 204.5(g)(2) specifically requires the prospective United States employer to establish its ability to pay the beneficiary's proffered wage. The petitioner is not relieved of this burden merely by stating that the foreign entity pays the beneficiary's wage.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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 instant matter, although the petitioner states that it currently employs the beneficiary under the L-1A visa classification, by its own admission, the petitioner does not pay the beneficiary's wage.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084.

As the petition's priority date falls on July 30, 2002, the AAO must examine the petitioner's 2002 tax return. As previously stated, the petitioner's IRS Form 1120 for calendar year 2002 indicates that the petitioner had no taxable income the year the I-140 petition was filed. Therefore, the petitioner's tax return does not help establish the petitioner's ability to pay a proffered wage of \$48,000 per year.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage. In the present matter, Schedule L of the petitioner's 2002 tax return indicates that the petitioner's assets equal the dollar amount of its liabilities, which strongly suggests that the petitioner did not have the liquid assets to pay the beneficiary's proffered wage at the time the petition was filed.

Based on the submitted documentation, the petitioner has failed to establish by a preponderance of the evidence its ability to pay the beneficiary's proffered wage as required by 8 C.F.R. § 204.5(g)(2).

The second issue in this proceeding is whether the petitioner is 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."

In the instant matter, the petitioner claims to be a holding company that does business via its subsidiary, Deejay Enterprises, Inc. While the petitioner submitted incorporation documents for itself and its subsidiary, the only evidence submitted to suggest that the petitioner has been doing business consists of several purchase invoices that account for transactions that took place in February and April of 2002.

In the Request for Evidence, the director noted that additional evidence was required to establish that the petitioner is doing business.

In response, the petitioner provided numerous invoices from October, November, and December of 2004 showing the purchase by its subsidiary of wine and food products to be used for food preparation and/or sale within the petitioner's subsidiary. The petitioner also provided a number of utility bills in response to the director's indication that such documents are an appropriate indicator of whether a company is doing business.

Upon review, the director concluded in the denial that the petitioner did not submit sufficient evidence to establish that it is doing business as defined by 8 C.F.R. § 204.5(j)(2).

On appeal, counsel disputes the director's conclusion and provides additional utility bills to establish that the petitioner is doing business as claimed. Notwithstanding the director's suggestion to the contrary, the AAO notes that utility bills are not an appropriate indicator of whether a petitioner is engaged in the regular course of business. In the instant matter, the petitioner also claims to be engaged in the restaurant business via its wholly owned subsidiary. However, whether a petitioner's subsidiary is doing business is not probative of whether a petitioner itself is doing business and is not merely a shell or paper company. Thus, the petitioner's prior submission of its subsidiary's invoices showing the purchase of wine to be sold in its subsidiary and proof of purchase of food products used to prepare food that would be sold by the subsidiary are not sufficient indicators that the *petitioner* is currently doing business. Accordingly, the petitioner has not overcome this ground of the director's denial.

The third issue in this proceeding is whether the beneficiary has been employed as an L-1A intracompany transferee in a capacity that is managerial or executive.

The director concluded that the petitioner's failure to establish that the beneficiary has been compensated by any company directly leads to the finding that the beneficiary has not been employed by the petitioner in a managerial or executive capacity.

Regardless of whether the director's conclusion is correct, the matter of the beneficiary's prior employment in the United States is irrelevant in the instant matter. While the regulations at 8 C.F.R. § 204.5(j)(3)(i) clearly instruct the petitioner to submit evidence establishing that the beneficiary was employed *abroad* by a qualifying entity in a managerial or executive capacity, and while 8 C.F.R. § 204.5(j)(5) further instructs the petitioner to provide a specific job description to establish that the beneficiary's prospective employment will be in a managerial or executive capacity, there is no requirement that the petitioner submit any information with regard to current employment under an L-1A visa classification. The matter of the beneficiary's L-1A employment is part of an entirely separate proceeding and need not be considered when determining the petitioner's eligibility to classify the beneficiary as a multinational manager or executive.

Furthermore, even if the AAO were to apply the director's conclusion to the beneficiary's proposed position, the petitioner's failure to establish its ability to pay the beneficiary's proffered wage is not an accurate indicator of whether the beneficiary has been or would be employed in a qualifying managerial or executive capacity. When 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 matter, there is no indication that the director properly considered any job descriptions prior to reaching his conclusion. While

the job description in the instant matter may, in fact, be deficient, the director cannot rely on the petitioner's ability to pay in order to reach that conclusion; nor should the director base a denial, even in part, on assumptions made regarding facts that are part of an entirely separate proceeding. As the director's final ground for denying the petition was invalid, it is hereby withdrawn.

Notwithstanding the withdrawal of the director's third ground for denial, the fact remains that the petitioner failed to establish its ability to pay the beneficiary's proffered wage. Based on this determination, the petition cannot be approved.

Additionally, though not directly addressed in the denial, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner is required to submit evidence that the prospective United States employer has been doing business for at least one year. While the director addressed the issue of whether the petitioner is currently doing business, there is no indication that the director considered whether the petitioner was doing business as of July 30, 2001, one year prior to the date the I-140 petition was filed.

In the instant matter, the only indication that the petitioner may have been doing business prior to filing the petition consists of a handful of purchase invoices from its subsidiary reflecting transactions that took place in February and April of 2002. Even if both sets of invoices establish that the petitioner and not just its subsidiary were doing business prior to filing the petition, there is no indication that the petitioner was doing business between July of 2001 and February of 2002 and from May 2002 to July of 2002. The invoices submitted only account for two months out of a total 12-month period. As such, the petitioner has not submitted sufficient evidence to establish that the petitioner was doing business for a full year prior to filing the petition.

Though also beyond the director's decision, the petitioner is required to establish that the beneficiary's employment abroad prior to her entry to the United States as a nonimmigrant as well as her prospective employment under an approved I-140 petition have been and would be within a managerial or executive capacity pursuant to 8 C.F.R. § 204.5(j)(3)(i)(B) and (5), respectively.

In the instant matter, the petitioner provided no information regarding the beneficiary's employment with the foreign entity. With regard to the beneficiary's proposed employment, the description is entirely too vague to convey an understanding of what the beneficiary would actually be doing on a day-to-day basis. As previously stated, when 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). 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). The petitioner's failure to provide specific job descriptions of the beneficiary's foreign employment and proposed position in the United States prevents the AAO from affirmatively concluding that the beneficiary has been and would be employed in a qualifying managerial or executive capacity.

As a final note, with regard to the beneficiary's L-1 nonimmigrant classification, which resulted from previously approved Form I-129 nonimmigrant petitions, it should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. 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 addition, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and CIS normally accords the petitions a less substantial review. See 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). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30 (recognizing that CIS approves some petitions in error).

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 prior nonimmigrant approvals do not preclude CIS from denying an extension petition. See e.g. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1 petitions. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory 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).

Finally, 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).

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 grounds discussed above, 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 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).

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.