



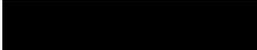
U.S. Citizenship
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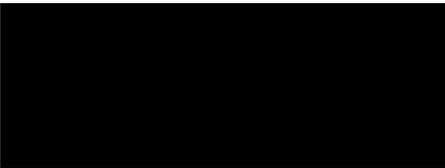


File:  Office: TEXAS SERVICE CENTER Date: **JAN 24 2006**
SRC 04 108 52959

IN RE: Petitioner: 
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:



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 visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Florida in March 2001. It provides business technology consulting services. It seeks to employ the beneficiary as its chief financial officer and director of consulting. 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 May 24, 2005, determining that the petitioner had not established a qualifying relationship between the U.S. company and the beneficiary's foreign employer.

On appeal, counsel for the petitioner references Citizenship and Immigration Services (CIS) prior approvals of the beneficiary's L-1A intracompany transferee classification and concludes that CIS has previously determined that a qualifying relationship existed between the petitioner and the beneficiary's foreign employer. Counsel contends that the petitioner enjoys an affiliate relationship with the beneficiary's foreign employer and cites three cases in support of her conclusion that the petitioner and the beneficiary's foreign employer are affiliated as defined in the regulatory definition.

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 is affiliated 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.

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 facts in this matter are not in dispute. The petitioner states that the beneficiary owns 25 percent of the petitioner, the beneficiary's brother owns 30 percent of the petitioner, a third individual owns 25 percent of the petitioner, and a fourth individual owns 20 percent of the petitioner. Counsel observes that the beneficiary and his brother together own a majority interest in the petitioner, that the beneficiary and his brother hold two of the three officer's positions for the petitioner, and that the beneficiary and his brother control the petitioner. The petitioner also states that the beneficiary owns 40 percent of the foreign entity, his brother owns 26 percent of the foreign entity, two individuals each own 15 percent of the foreign entity, and two individuals each own 2 percent of the foreign entity. Counsel observes that the beneficiary is the director general of the foreign entity and that the beneficiary and his brother control the foreign entity.

The director determined that the ownership and control of both the petitioner and the foreign entity did not satisfy the criteria set out in the definition of an affiliate. The director specifically determined that the same group of individuals did not own and control both the petitioner and the foreign entity.

On appeal, counsel for the petitioner disagrees with the director's interpretation of Part B of the definition of affiliate. Counsel cites: (1) *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Comm. 1981) wherein the beneficiary owned 93 percent of the foreign entity and 60 percent of the petitioner; (2) *Matter of Chartier*, 16 I&N Dec. 284 (BIA 1977) wherein the BIA found that "the Service itself has consistently interpreted section 101(a)(15)(L) generously, so as to facilitate intracompany transfers;" and (3) *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. 1373 (N.D. Cal 1990), wherein the Court found that two companies may be affiliated even though they are not owned by the exact same individuals. Counsel asserts that the adjudicating officers who approved the beneficiary's eligibility as an intracompany transferee, the cited BIA decisions, the cited federal court decision, and Congressional intent support the position that the petitioner in this matter and the foreign entity are affiliates.

Counsel's assertion is not persuasive. First, *Matter of Tessel* is not on point. The petitioner does not claim and the record does not substantiate that one individual owns a majority interest in both the petitioner and the foreign entity. Counsel's assertion that *Sun Moon Star Advanced Power, Inc. v. Chappel*, is analogous to the matter at hand is also not persuasive. In the *Sun Moon Star* decision, the Immigration and Naturalization Service (now CIS) refused to recognize the indirect ownership of the petitioner by three brothers, who held shares of the company as individuals through a holding company. The decision further noted that the same group of individuals did not own the two claimed companies. The court found that the Immigration and Naturalization Service decision was inconsistent with previous interpretations of the term "affiliate" and contrary to congressional intent because the decision did not recognize indirect ownership. After the enactment of the Immigration Act of 1990, the Immigration and Naturalization Service amended the regulations so that the current definition of "subsidiary" recognizes indirect ownership. See 56 Fed. Reg. 61111, 61128 (Dec. 2, 1991). Accordingly, the basis for the court's decision has been incorporated into the regulations. However, despite the amended regulation and the decision in *Sun Moon Star*, neither legacy Immigration and Naturalization Service nor CIS has ever accepted a random combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies.

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

In this matter four individuals own the U.S. entity and six individuals own the foreign entity and in neither instance does one individual own a majority interest. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals control both entities. Thus, the companies are not affiliates as both companies are not owned and controlled by the same individuals. Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations. Although counsel implies that the familial relationship between two brothers is sufficient to establish control of both entities, a familial relationship does not constitute a qualifying relationship under the regulations. Again, the record does not contain any evidence that the two brothers are

legally bound to vote in concert. The petitioner has not established a qualifying relationship with the beneficiary's foreign employer. For this reason, the petition may not be approved.

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 similar definitions of qualifying relationships/organization. *See* 8 C.F.R. § 204.5(j)(2) and 8 C.F.R. § 214.2(l)(1)(ii). Although the regulatory definitions are similar, the question of overall eligibility requires a comprehensive review of all of the provisions, not just these definitions. 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, as the AAO observed above, the director was justified in departing from the previous nonimmigrant approvals in this matter; as such, the director should review the previous nonimmigrant approvals for revocation pursuant to 8 C.F.R. § 214.2(l)(9)(iii).

Beyond the decision of the director, the petitioner did not establish that the beneficiary would be employed in a managerial or executive capacity for the United States petitioner. *See* §§ 101 (a)(44)(A) and (B). The petitioner indicated that the beneficiary's duties as chief financial officer would include:

- Responsib[ility] for strategic planning of financials & for the investments of the organization & their viability.
- Control cash flow.
- Manage administrative personnel.
- Responsib[ility] for accounting & managing of payables & receivables.

The petitioner further indicated that the beneficiary's duties as director of consulting would include:

- Responsib[ility] for strategic planning of business area, including short & long-term business plan, implementation & on-going control.
- Responsib[ility] for planning & managing marketing plan for PeopleSoft consulting.
- Manage consultants & consulting teams.
- Responsib[ility] for development of projects & delivery, including scope, organization, deliverables, roles, project plans, staffing & contracts.
- Manage training budget & business area bottom line as well as results.
- Manage partner relationships.

The petitioner provided three Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement for 2004, the year in which the petition was filed. The petitioner issued an IRS Form W-2 to the beneficiary in the amount of \$94,850.62, to the beneficiary's brother in the amount of \$17,758.53, and to a third individual in the amount of \$8,945.38. The petitioner indicated that the beneficiary's brother held a bachelor's degree in information technology and that the third individual served as a part-time administrative assistant. The petitioner stated that it employed numerous consultants who worked on behalf of the petitioner but were employed in Mexico.

The AAO determines that the description of the beneficiary's duties for the petitioner is general and does not establish that the beneficiary spent the majority of his time performing managerial or executive duties. 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. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this

case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise. Neither has the petitioner provided evidence that it has continuously employed individuals subordinate to the beneficiary that hold managerial, supervisory, or professional positions.

Moreover, the record does not substantiate that the beneficiary was relieved of performing the daily operational tasks associated with the petitioner's consulting business. Although the petitioner indicates that it employed consultants in Mexico, the petitioner has not explained the necessity of the beneficiary's employment in the United States to supervise these individuals. 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. at 604. 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)).

The petitioner has not established that the beneficiary's position with the United States entity will be primarily managerial or executive. 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 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.