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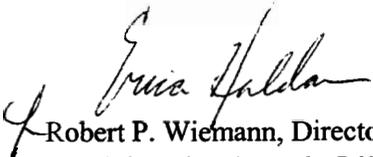
IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

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:
[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, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an organization incorporated in the State of Florida in January 1997. It claims to operate a "Subway" franchise and to investigate investment opportunities. It seeks to employ the beneficiary as its general manager/business development. 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 August 23, 2005 determining that the petitioner had not established that it was conducting business in a regular, systematic, and continuous manner. The director based her decision on the petitioner's claim that it operated one franchise and that the franchise agreement had an initial term of 20 years with an option to extend. The director concluded that a company doing business on a conditional or term basis was not doing business as required but was operating as an agent.

On appeal, counsel for the petitioner asserts that: (1) the director erred when determining that the beneficiary's employment is temporary, seasonal or term employment; and (2) the director erred when determining that the petitioner was operating as an agent. Counsel submits a brief and documentation in support of the appeal.

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 that it was doing business when the petition was filed.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

* * *

- (D) The prospective United States employer has been doing business for at least one year.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*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 a December 22, 2004 letter appended to the petition, the petitioner indicated that it operated a "Subway" fast food service and was researching opportunities to invest in additional "Subway" franchises. The petitioner also provided its Articles of Organization; a Florida Annual Resale Certificate for Sales Tax for Subway [REDACTED] which included the petitioner's name; 2004 financial statements for the petitioner-Subway [REDACTED] the petitioner's 2002 and 2003 Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, identifying Subway [REDACTED] in the name portion of the return; and 2003 and 2004 IRS Forms 941, Employer's Quarterly Federal Tax Return, listing the petitioner-Subway [REDACTED] as the employer.

On May 2, 2005, the director requested a copy of the franchise agreement between [REDACTED] Restaurant and the petitioner as well as any other pertinent documentation that detailed who owned and controlled the franchise.

In a July 22, 2005 response, the petitioner provided a copy of a franchise agreement dated February 1, 1994 between [REDACTED] a Florida corporation, and [REDACTED] an individual, for a "Subway Sandwich Shop" to be located in the State of Florida. The petitioner also provided: a copy of a January 17, 1993 letter advising of a transfer of Franchise [REDACTED] to [REDACTED] an August 10, 1993 Subway Enrollment Application indicating that [REDACTED] was self-employed but also listing [REDACTED] as Isac [REDACTED] employer and indicating that [REDACTED] was [REDACTED] owner; a contract for sale and purchase of a "Subway Sandwich Shop" dated February 1, 1994 between [REDACTED] buyer and two individuals as sellers; a conveyance to Isac Efraim for his purchase of fixtures, goods, and the lease pertaining

to a Subway Sandwich Shop, dated February 1, 1994; and other documentation listing Isac Efraim as the buyer of the Subway Sandwich Shop franchise [REDACTED]

As noted above, the director denied the petition on August 23, 2005 determining that the petitioner as a franchisee could not be considered as conducting business in a continuous, systematic, and regular fashion.

On appeal, counsel for the petitioner asserts that the Subway Sandwich Shop has been operating since 1997 and is a successful business and will continue to be successful. Counsel also notes that the petitioner "also manages [REDACTED] other Subway franchise – Franchise [REDACTED]" managed the operations of an additional restaurant, Captain Shrimp Seafood House and Genuine Broaster Chicken, and on August 1, 2005 [the petitioner] purchased 100% of the shares of Monster Burger, Inc., the company operating the restaurant in **Lauderhill, Florida.** Counsel attaches, among other items, copies of a franchise agreement between "Doctor's [REDACTED]" and [REDACTED] for Subway Franchise 28624, copies of Monster Burger, Inc.'s share certificate number 2 to show that [REDACTED] transferred 100 shares to the petitioner on August 1, 2005.

Counsel's assertion and evidence is not persuasive. Preliminarily, the AAO observes that the director did not correctly analyze the deficiencies in the record regarding the issue of the petitioner's doing business. Likewise, counsel does not adequately address the deficiencies in the director's reasoning on appeal. However, generally, the AAO will find that a company that conducts business as a franchisee may be considered doing business in a continuous, systematic, and regular manner. In this matter, however, the petitioner has not established that it is doing business as a franchisee or otherwise.

The record of proceeding does not include a management agreement or other documentation establishing that the petitioner manages the Subway franchise # [REDACTED]. The documentation in the record reflects that an individual owns and operates the franchise. The AAO acknowledges that the owner of Subway franchise [REDACTED] references the petitioner's name on some official documents; but referencing the petitioner is insufficient to establish that the petitioner manages, operates, or otherwise conducts Subway franchise [REDACTED]'s business. 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 record lacks documentary evidence that the petitioner manages or operates Subway franchise # [REDACTED].

Counsel's submission of a second Subway franchise agreement and other evidence that Isac Efraim owns other restaurants is not pertinent to the matter at hand for the same reasons discussed above. Counsel's assertions that the petitioner manages these other restaurants are also not persuasive. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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).

Finally, counsel's submission of documentation to establish that the petitioner purchased shares in a restaurant in August 2005, eight months after the petition was filed is not pertinent to the record of proceeding in this matter. 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).

A proper analysis of the record of proceeding in this matter reveals that the petitioner has not established that it was conducting business as a manager of franchised sandwich shops or other restaurants. The petitioner has not established a legal connection between itself and the business conducted at the Subway franchises or other restaurants when the petition was filed. For this reason, the petition will not be approved.

Beyond the decision of the director, the petitioner has not established a qualifying relationship between the petitioner and the beneficiary's foreign employer. *See* 8 C.F.R. § 204.5(j)(2). The petitioner claims that Turfe [REDACTED] owns the majority of its outstanding shares. The petitioner provides stock certificate number 5 issued to [REDACTED] Ltda. in the amount of 5,100 shares on January 7, 1997 to establish this fact. However, the IRS Forms 1120, included in the record of proceeding indicate on Schedule E that an officer, identified only by a social security number, owns 100 percent of the petitioner's outstanding shares. Thus, the record is inconsistent and insufficient to establish a qualifying relationship between the petitioner and the beneficiary's foreign employer. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). For this additional reason, the petition will not be approved.

In addition, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity for the U.S. petitioner. *See* 101(a)(44)(A) and (B) of the Act. The petitioner indicates in its December 22, 2004, letter submitted in support of the petition, that the beneficiary "will continue to conduct and control all operations and strategic management activities, in the US." The petitioner added:

He will set and review corporate objectives for its expansion, coordinate the purchasing of new franchises, product development, directing the expense control of the company, including outsourcing services, personnel evaluation and hiring and firing, he will review financial statements and analysis of the company, identify and develop business opportunities and project feasibility.

[The beneficiary] will continue to develop guidelines and policies to be adhered by managerial, sales and support personnel. He will be responsible to identify new business opportunities in the US and he will serve as liaison between vendors and distributors. This position is a highly managerial and executive position as he will be responsible for the general management and business development of [the petitioner].

The petitioner also provided an organizational chart showing the beneficiary's proposed position of general manager/business development over "Subway [REDACTED]" which included two shift managers and three sales associates and an outsourced accounting position.

The petitioner's description of the beneficiary's duties is vague and does not provide a comprehensive understanding of the beneficiary's duties on a daily basis. In addition, the petitioner indicates that the beneficiary will identify new business opportunities in the United States and serve as a liaison between vendors and distributors. This information suggests that the beneficiary will perform operational tasks rather than managerial or executive tasks. 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). Moreover, evidence in the record including the petitioner's organizational chart, the identify of the employees working at the sandwich shop, and the sandwich shops hours of operation, when considered together, suggests that the beneficiary will assist in the daily tasks necessary to operate the sandwich shop or at most, act as a first-line supervisor of non-professional employees. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *Id.* For this additional reason, the petition will not be approved.

Further, the petitioner has not established that the beneficiary was employed in primarily a managerial or executive capacity for the foreign entity. Although the petitioner indicates that the beneficiary held the executive position of vice-president and that he is "uniquely qualified to assume core duties" for the petitioner, the petitioner has not provided a detailed description of the beneficiary's duties for the foreign entity. 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). Titles alone are not informative and do not establish the actual duties of the beneficiary. 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). 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).

Lastly, the AAO acknowledges that the beneficiary received an L-1A nonimmigrant visa petition approval prior to filing this petition. 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, it must be noted that many Form I-140 immigrant petitions are denied after Citizenship and Immigration Services (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). The AAO is not bound or estopped by the previous decisions of the service center director. 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).

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. *See* 8 C.F.R. § 103.8(d). 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.

Further, 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).

In this instance, the petitioner's lack of actual business, the deficient descriptions of the beneficiary's duties for both the petitioner and the foreign entity, and the petitioner's lack of a qualifying relationship with the foreign entity demonstrate the beneficiary's ineligibility for this visa classification when the petition was filed.

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.