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Date: **OCT 23 2006**

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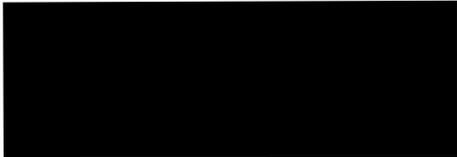
IN RE:

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 F. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner was established in 2003 in the state of New York. The petitioner claims to be engaged in the business of designing furniture and 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 denied the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity; and 2) the petitioner failed to provide sufficient documentation to establish that the beneficiary's foreign employer with whom the petitioner claims to have a qualifying relationship continues to exist and conduct business.

With regard to the first issue, the director made various observations based on the documentation provided by the petitioner. First, the director noted that the petitioner's 2004 corporate tax return showed that the petitioner paid a total of \$28,900¹ in salaries and wages and further stated that no officers were compensated. The director also observed that the tax return showed the beneficiary's title to be that of construction manager rather than general manager as originally claimed in the petitioner's Form I-140. Finally, the director noted that the beneficiary's 2004 salary of \$6,000 for approximately eight months of work was not commensurate with that of a managerial position.

On appeal, counsel submits a brief claiming that the director's observations were based on erroneous information mistakenly provided by the individual who prepared the petitioner's taxes. The petitioner provides amended tax return Form 1120X as well as the beneficiary's amended tax return Form 1040X to show that the claimed errors had been corrected and that the corrections had been submitted to the Internal Revenue Service.

However, the regulation at 8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part:

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

In requiring that the petitioner identify "any erroneous conclusion of law or statement of fact" the error must be one made by the director in denying the petition. In the instant matter, the director's observations reflected the information provided by the petitioner. Thus, the appeal is in large part based on mistakes made by an agent of the petitioner, not the director. The director's comments were accurate observations of the record as before her at the time the denial was issued.

¹ The director's decision actually states that the petitioner paid "\$28,9000" in wages and salaries. The AAO acknowledges that the director made a typographical error by adding an additional zero to the correct amount of \$28,900, which was provided in the petitioner's 2004 tax return.

While counsel also generally disagrees with the director's conclusion with regard to the second ground of ineligibility, no additional evidence is provided to adequately address the director's concerns. Rather, counsel provides a sworn affidavit signed by the beneficiary in which the beneficiary essentially mirrors the information provided in counsel's brief. The AAO notes that 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)).

Additionally, the AAO notes that the record shows a number of inadequacies that were not addressed in the director's decision. First, the record lacks any showing that the beneficiary was employed abroad in a qualifying managerial or executive capacity as required by 8 C.F.R. § 204.5(j)(3)(i)(B). The petitioner's brief description of the beneficiary's job duties with the foreign entity suggest that the beneficiary was responsible for marketing and contract negotiation, neither of which can be deemed as qualifying tasks. The petitioner failed to identify the actual tasks the beneficiary performed in relation to either of those responsibilities, thereby making it impossible for the AAO to conclude that the beneficiary's duties abroad were primarily within a qualifying managerial or executive capacity.

Second, the record contains no evidence to document the petitioner's claimed qualifying relationship with the beneficiary's foreign employer pursuant to 8 C.F.R. § 204.5(j)(3)(i)(C). In fact, the petitioner confuses matters further by referring to itself as a branch *and* a subsidiary of the foreign entity. The AAO notes that these two terms are not interchangeable. The term *subsidiary* is specifically defined in 8 C.F.R. § 204.5(j)(2). Any entity that can be deemed a *subsidiary* cannot by definition be deemed a *branch*. Thus, the terms *subsidiary* and *branch* are mutually exclusive. The petitioner's apparent misunderstanding of the correct terminology aside, the record lacks documentation to substantiate either a parent/subsidiary or a branch relationship with the beneficiary's foreign employer. *See Matter of Soffici*, 22 I&N Dec. at 165.

Third, the record lacks sufficient documentation to establish that the petitioner had been doing business for one year prior to filing the Form I-140 as required by 8 C.F.R. § 204.5(j)(3)(i)(D). 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 Form I-140 was filed on March 31, 2005. However, the only evidence establishing that the petitioner had been doing business during the 12 months preceding the filing of the petition consists of a handful of contract proposals signed by the beneficiary between June and August of 2004. None of the proposals are signed and dated by the other party to show that the contract had been accepted. Moreover, even if the contracts had been accepted, the record lacks any evidence to establish that the petitioner was doing business from March through May of 2004 and from September 2004 through February 2005.

Lastly, 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.

In the instant matter, the petitioner has not submitted sufficient documentation to establish that it has the ability to pay the beneficiary's proffered wage of approximately \$36,400. While the record shows that the petitioner employed the beneficiary and in fact paid him prior to the filing of the petition, there is no indication that the petitioner had the ability to pay the proffered wage at the time the petition was filed as required by regulation.

Service records show the petitioner's previously approved L-1 employment of the beneficiary. With regard to the beneficiary's L-1 nonimmigrant classification, 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, 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 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).

Furthermore, 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).

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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown 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 at 1043.

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. In the instant matter, counsel has failed to identify specifically an erroneous conclusion of law or a statement of fact in this proceeding. Moreover, the AAO has pointed out a number of additional grounds that render the petitioner ineligible for the benefit sought. As such, the petitioner has not sustained that burden. Therefore, the appeal will be summarily dismissed.

ORDER: The appeal is summarily dismissed.