



U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 01 115 52175 Office: VERMONT SERVICE CENTER Date: JUL 02 2007

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: SELF-REPRESENTED

### 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, 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 dismissed.

The petitioner is a New York sole proprietorship seeking to employ the beneficiary as its 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 based on the following four independent grounds of ineligibility: 1) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer; 2) the petitioner failed to establish that it was doing business for one year prior to filing the Form I-140; 3) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 4) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, the petitioner disputes the director's conclusions and asserts that a response to the director's request for additional evidence (RFE) was submitted.

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 has a qualifying relationship with a 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.

In support of the Form I-140, the petitioner submitted a letter dated February 12, 2001 in which it claimed that it is a subsidiary of the beneficiary's foreign employer. The only documentation provided in support of this claim is stock certificate no. 1 issuing 102 shares to the beneficiary's claimed foreign employer.

Accordingly, the director issued an RFE dated October 15, 2001 instructing the petitioner to supplement the record with a stock ledger and its articles of incorporation.

In response, the petitioner provided a letter dated January 31, 2002 explaining that it is not a corporation and therefore did not file articles of incorporation. The petitioner further explained that it is a sole proprietorship owned and operated by the beneficiary and provided a Certificate of Business to support its claim.

The director denied the petition on August 2, 2002 concluding that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's claimed foreign employer. The director noted the petitioner's initial response letter dated January 25, 2002 in which the petitioner requested additional time to supplement the record. While the director did not comment on the petitioner's second letter, which was submitted on January 30, 2002, he properly concluded that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's claimed foreign employer. First, the regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

In the present matter, the only documentary evidence addressing the issue of common ownership between the U.S. and foreign entities is a single stock certificate, which is unaccompanied by other corroborating evidence, such as a stock ledger. That being said, the petitioner explained in the second response to the RFE that it cannot submit a stock ledger or other corporate documents because it is not a corporation, but rather is a sole proprietorship. 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). The petitioner's explanation contradicts the information conveyed in the corporate stock certificate and further undermines the overall claim that a qualifying relationship exists between the U.S. petitioner and the beneficiary's purported overseas employer.

Second, first-preference immigrant status under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), requires that the beneficiary have a permanent employment offer from the petitioner. In this matter, it appears more likely than not that the petitioner is in fact a sole proprietorship that is owned and operated by the beneficiary, a nonimmigrant alien. A petitioner who is a nonimmigrant temporary worker is not competent to offer permanent employment to an alien beneficiary for the purpose of obtaining an immigrant visa for the beneficiary under section 203(b)(1)(C) of the Act. *Matter of Thornhill*, 18 I&N Dec. 34 (Comm. 1981). Therefore, by virtue of being a sole proprietorship rather than a business entity separate from its owner, the petitioner cannot have the requisite qualifying relationship and is ineligible to file an immigrant petition..

The second issue in this proceeding is whether the petitioner was doing business for one year prior to filing the Form I-140 pursuant to 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 present matter, the only evidence that indicates that the petitioner was doing business prior to filing the Form I-140 is a single shipping document dated July 20, 2000 in which the petitioner is named as the consignee of products shipped from Pakistan. In the RFE, the director properly stated that the other documents name Aqsa Garments, Inc. but do not name the petitioner as a party to the sales and shipping transactions. Therefore, the director's RFE instructed the petitioner to explain its relationship with Aqsa Garments, Inc., if any, and to submit additional evidence to establish that it was doing business for the requisite 12-month period.

In response, the petitioner explained [REDACTED] role as one of receiver of goods exported by the foreign entity and collaborator in the sales transactions. However, the petitioner provided no additional documentation to establish that it was doing business according to the provisions cited in 8 C.F.R. § 204.5(j)(3)(i)(D). It is noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, the petitioner again attempted to explain [REDACTED] role in its sales process and explained that its own role is limited to that of manager and settler of disputes and problems. The petitioner further stated that the sale and shipment of merchandise takes place directly between the foreign seller and the U.S. purchasers. The petitioner's explanation is confusing and fails to specify exactly which services it provides and which party is the recipient of those services. Furthermore, the record contains no evidence to establish that the petitioner generates income from providing liaison services. 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)). In the present matter, the petitioner has failed to provide sufficient evidence to establish that it has provided goods and/or services on a "regular, systematic, and continuous" basis. See 8 C.F.R. § 204.5(j)(2).

The third and fourth issues in this proceeding call for an analysis of the beneficiary's employment capacity. The first of these issues is whether the beneficiary was employed abroad in a primarily managerial or executive capacity, and the second issue is whether the petitioner established, at the time it filed the Form I-140, that the petitioner would employ the beneficiary in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

With regard to the beneficiary's foreign employer, the petitioner's support letter dated February 12, 2001 merely provided the name of the entity and the beneficiary's position title. Although the petitioner claimed

that the beneficiary was employed abroad in a qualifying managerial capacity, it did not elaborate on the beneficiary's actual duties.

With regard to the beneficiary's position with the U.S. petitioner, the following statements were provided:

[The beneficiary] is managing the organization as its [g]eneral [m]anager[.] He has the authority to hire or fire the staff under his control. He has the discretion over day[-]to[-]day operations of the activity and functions for which he has the authority.

He plans, organize[s], direct[s] and controls the branch. He is looking after the imports from Pakistan of the [l]eather [g]loves, [s]occer [sic] balls, [w]eightlifting belts, Judo [k]arate [b]elts, [c]ycle [g]loves & jogging suits, meets the customers, books the orders, advise[s] the head office about all details and terms and conditions settled for the shipments. He can enter into contracts with the customers of any amount. He also takes care of the quality control of the imported goods and make[s] spot decisions on behalf of the parent firm too [sic].

The petitioner also provided all four of its quarterly tax returns for the year 2000 as well as a state wage and withholding report, which shows that it paid a total of \$12,210 in wages to two employees.

In the RFE issued on October 15, 2001, the petitioner was instructed to provide evidence of the foreign entity's management and personnel structure as well as the number of employees at the foreign entity. The director clearly stated that this information was needed in order to assist Citizenship and Immigration Services (CIS) in determining whether the beneficiary was employed abroad in a qualifying managerial or executive capacity. With regard to the beneficiary's proposed employment with the U.S. petitioner, the petitioner was asked to provide a list of its employees identifying each individual by name and position title. The petitioner was also asked to provide an hourly breakdown of the duties performed by each of its employees, including the beneficiary. The director also requested tax documentation in the form of W-2s for each employee for the year 2000 and two of the petitioner's most recent quarterly tax returns.

In response, the petitioner provided the foreign entity's organizational chart with the requested information. The beneficiary and one other individual were illustrated as the senior-most employees within the foreign entity's organizational hierarchy. The beneficiary's position description was not provided.

With regard to the beneficiary's proposed U.S. employment, the petitioner provided tax documentation for the year 2000, but failed to provide two of its most recent quarterly tax returns as requested in the RFE. Therefore, while the petitioner claimed in the January 31, 2002 response letter that it employs four individuals including the beneficiary, this claim was not corroborated with documentary evidence. Furthermore, while the petitioner named the four individuals it claimed to employ and provided their position titles and number of hours worked on a weekly basis, it failed to comply with the director's request for each employee's hourly breakdown of specific duties. As previously stated, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Accordingly, the director properly concluded that the petitioner failed to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, the petitioner asserts that the director failed to consider the response to the RFE in its entirety. While the director's statements in the decision suggest that the petitioner's response dated January 31, 2002 may not have been considered, is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence. Moreover, even if the director had considered the statement that was submitted by the petitioner beyond the allowed 12-week period, as noted above, the petitioner failed to provide much of the requested evidence with regard to the beneficiary's proposed employment. As such, regardless of the director's inadvertent oversight in not considering some of the petitioner's submissions, an adverse decision was warranted based on the petitioner's failure to establish its eligibility for the benefit sought.

The petitioner argues that CIS's prior approval of the petitioner's nonimmigrant petition effectively established the petitioner's eligibility for the immigrant benefits sought in the present matter. This argument is entirely without merit. 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. See §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). 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 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 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 new office petition was 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).

The petitioner's assertion that the director never requested information regarding the nature of the beneficiary's proposed employment in the United States is also baseless, as the second page of the RFE

clearly instructs the petitioner to provide a definitive list of duties and the number of hours attributed to each duty. Thus, the petitioner's assertion is contradicted by the plain language of the RFE.

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the present matter, the petitioner has provided no information regarding the duties performed by the beneficiary abroad nor has the petitioner provided evidence that the beneficiary was employed by the foreign entity as claimed. With regard to the beneficiary's proposed employment, the only specific duties attributed to the beneficiary are operational tasks and are of a non-qualifying nature. As the petitioner has failed to specifically state which duties consume the primary portion of the beneficiary's time, the AAO cannot conclude that the beneficiary would refrain and/or be relieved from primarily performing non-qualifying tasks. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The remainder of the petitioner's description is comprised of vague statements, which primarily paraphrase portions of the definition of managerial capacity. Furthermore, based on the petitioner's staffing composition at the time the Form I-140 was filed, it is highly unlikely that the petitioner was able to relieve the beneficiary from having to primarily perform duties of a non-qualifying nature.

Accordingly, the record as presently constituted is not persuasive in demonstrating that the beneficiary was employed abroad and would be employed in the United States in a primarily managerial or executive capacity.

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 of ineligibility as 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 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, *aff'd*, 345 F.3d 683.

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.