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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **JUL 05 2007**
SRC 06 206 51060

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

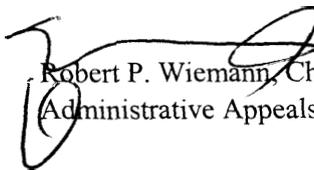
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the petition will be remanded to the director for further review and entry of a new decision.

The petitioner filed the immigrant visa petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner, a Texas corporation, is engaged in the operation of restaurants. The petitioner states that it is an affiliate of Comida Rapida Tecnologica S.A. de C.V., located in Mexico. It seeks to employ the beneficiary as its operational manager.

The director denied the petition, concluding that the petitioner had failed to establish that there is a qualifying relationship between the U.S. petitioner and the beneficiary's previous foreign employer. The director determined that because the two companies have only three common shareholders, the petitioner had not established the claimed affiliate relationship.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director's interpretation of the regulatory definition of "affiliate" is erroneous as a matter of law. Counsel submits a brief 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 or 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, 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 issue in this proceeding is whether the petitioner established that a qualifying relationship exists between the U.S. company and the beneficiary's previous foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." See generally § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C).

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.

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 petitioner claims to have an affiliate relationship with the beneficiary's previous foreign employer, Comida Rapida Tecnologica, S.A. de C.V. The ownership of the two companies was well documented in the record through the submission of the foreign entity's public registry and stock certificates, and the U.S. company's articles of incorporation, amended articles, and stock certificates. The ownership of the two companies is therefore not at issue. The ownership structure of the petitioning company is as follows:

<u>Name</u>	<u>Shares</u>	<u>Percentage interest</u>
[REDACTED]	12,900	64.5%
[REDACTED]	3,400	17.0%
[REDACTED]	1,700	8.5%
[REDACTED]	2,000	10.0%

The ownership structure of the foreign entity is as follows:

<u>Name</u>	<u>Shares</u>	<u>Percentage interest</u>
[REDACTED]	4,875	65%
[REDACTED]	1,500	20%
[REDACTED]	375	5%
[REDACTED]	375	5%
[REDACTED]	375	5%

The director denied the petition on October 27, 2006, concluding that the petitioner had failed to establish the claimed affiliate relationship between the two companies. Specifically, the director provided the following reasoning in support of the decision to deny the petition:

In this case, the United States corporation is owned and controlled by a group of four individuals with a 64.5%, 17%, 8.5% and 10% proportion of stock ownership while the foreign company is owned and controlled by group of five individuals with a 65%, 20%, 5%, 5%, and 5% proportion of capital ownership, out of the five individuals, only three are the same owners of the US Corporation. The same group of individuals does not therefore own and control the United States corporation and the qualifying foreign company with approximately the same proportion of ownership and control. While federal regulations at 8 CFR 204.5(j)(2) do provide for majority control among subsidiaries to qualify for classification of a multinational executive or manager under section 203(b)(1)(C), federal regulations do not extend this same provision for majority control of an affiliate. The petitioner and foreign company are subsequently not affiliates within the meaning of 8 CFR 204.5(j)(2).

On appeal, counsel for the petitioner asserts that "the Director's interpretation of affiliate under 8 C.F.R. § 204.5(j)(2) is clearly erroneous as a matter of law." Counsel reviews the legislative history of the current regulations and states:

[T]he Attorney General proposed but subsequently rejected a definition requiring that the two affiliates be "entirely owned and controlled by the exact same individuals. See 56 Fed Reg. 30703. In fact, when promulgated the final version of § 204.5(j)(2), the Attorney General made doubly clear that

This definition [of "affiliate"] is broader and more attuned to the commenters' concerns [that] the definition in the proposed rule [was too restrictive and did not reflect business reality]. This part of the final rule does not require that a group of individuals entirely own and control two legal entities in order for the entities to be considered affiliated. Nor does this part require each individual in the group directly to own and control the same proportion of each entity.

56 Fed. Reg. 60897

Counsel emphasizes that the petitioner's and foreign entity's three common shareholders possess "approximately the same share or proportion of each entity," both individually and collectively, such that they own and control the two companies. Counsel notes that collectively, [REDACTED], and two of his sons own 75 percent of the foreign entity and 83 percent of the U.S. entity. Counsel concludes: "This breakdown of stock ownership plainly shows ownership and control by [the petitioner's] and [the foreign entity's] three common shareholders (all members of the same family) in approximately the same proportions. Counsel also cites *Sun Moon Star Advanced Power, Inc. v. Chappell*, 773 F. Supp. 1373, 1378 (N.D. Cal. 1990) in support of her assertion that the two companies qualify as affiliates for the purpose of this immigrant visa classification.

Upon review, the decision of the director will be withdrawn. The AAO concurs with counsel that the director's decision was in error, but disagrees with counsel's reasoning.

As noted by the director, 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 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 context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

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). Furthermore, in *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Comm. 1981) the Commissioner determined that a majority stock ownership in both companies is sufficient for the purposes of establishing a qualifying relationship. In the *Tessel* decision, the beneficiary solely owned 93% of the foreign corporation and 60% of the petitioning organization, thereby establishing a "high percentage of common ownership and common management . . ." It was further determined that "[w]here there is a high percentage of ownership and common management between two companies, either directly or indirectly or through a third entity, those companies are 'affiliated' within the meaning of that term as used in section 101(a)(15)(L) of the Act." *Id.* at 633. If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners.

In this matter, the record demonstrates that one individual, [REDACTED], owns a 64.5% interest in the U.S. company and a 65% interest in the foreign entity, and therefore must be deemed to have "de jure" control of both entities. Further, the two companies must be deemed to have a high percentage of common ownership and common management. As the two entities are owned and controlled by the same individual, it is not necessary to consider whether they are also owned and controlled by the same group of individuals, with each individual owning and controlling approximately the same share or proportion of each entity.

The director offers no support for his statement that the regulatory definition of affiliate at 8 C.F.R. § 204.5(j)(2) provides for majority control of subsidiaries, but does not extend this provision to allow majority control of affiliates, particularly in light of the fact that affiliate is defined as "one of two subsidiaries, both of which are owned and controlled by the same parent or individual." The definition does not require that an individual wholly own both entities to establish the requisite ownership and control, although the director's statement appears to imply that such a requirement exists.

The AAO notes that if neither the petitioner nor the foreign entity had a majority shareholder, the fact that the two companies have only three common shareholders would be relevant, and the claimed qualifying relationship would not exist absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest among the common shareholders. Contrary to counsel's assertions, the ownership interests of a father and his sons will not be assumed to be combined to establish a majority interest. Familial relationships do not constitute a qualifying relationship under the regulations. Nevertheless, the majority ownership of both companies by [REDACTED] is sufficient to

establish the affiliate relationship, and it is not necessary to consider the interests of the other shareholders of either corporation.

Based on the foregoing discussion, the petitioner has established that the petitioner and the beneficiary's foreign employer are affiliates. Accordingly, the director's decision dated October 27, 2006 will be withdrawn.

Although the director's decision will be withdrawn, the AAO finds that the record as presently constituted does not contain sufficient evidence to establish: (1) that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity prior to his entry to the United States as a nonimmigrant; or (2) that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. Accordingly, the petition will be remanded to the director for further action and entry of a new decision, consistent with the discussion below.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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.

The petitioner indicated that the beneficiary was employed by the foreign entity as an operational manager from August 2001 until his transfer to the U.S. company in June 2005. The petitioner did not provide a description of the beneficiary's duties with the foreign entity, although it indicated that the beneficiary performs "the same type of duties" as an operational manager with the U.S. company. The beneficiary's U.S. position is described as follows:

He is responsible for supervising operational procedures, including the chicken process, weight and size specs, selection, marinating process, grilling process, food preparation, and the line of food production among other things. He is also responsible for quality control, inventory and goods reports, cost and price analysis, warehouse maintenance, cash management, personnel reports, and supervision of employees who are responsible for discrete areas of the food preparation and presentation. As Operational Manager, [the beneficiary] has the authority to hire and fire any of the employees.

The petitioner submitted an organizational chart for the U.S. company, but the beneficiary is not identified on the chart. The chart does depict two operational managers working within the petitioner's restaurant, and shows that each employee supervises five "chicken prep" workers, five grillers-cookers, five assembly line workers, and two busboys. Both operational managers report to the store manager. The petitioner also submitted an organizational chart for the foreign entity, which indicates that the beneficiary was responsible for the evening shift of the foreign entity's restaurant, which included a total of fifteen employees, including chicken processors, grillers, assembly line workers, cooks, cashiers and maintenance employees.

Based on the limited evidence submitted, it cannot be concluded that the beneficiary has been or would be employed in a qualifying managerial or executive capacity. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(ii)(B)(2). The record as presently constituted does not establish that the beneficiary's authority over the day-to-day operations of the foreign entity or the U.S. entity is beyond the level normally vested in a first-line supervisor, nor does it establish that the beneficiary's subordinates, who provide the products and services of fast food restaurants, are professionals. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, as noted above, the petitioner provided no description of the beneficiary's duties while employed by the foreign entity and for this reason alone, it cannot be concluded that he was employed in a qualifying capacity. 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's brief description of the beneficiary's U.S. position suggests that he performs a combination of non-qualifying first-line supervisory duties and operational tasks. The petitioner does not explain what specific managerial duties are involved in supervising "operational procedures" related to marinating and grilling chicken, nor does it clarify how the beneficiary's role in "quality control, inventory and goods reports, cost and price analysis, warehouse maintenance, etc.," is managerial in nature. 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 actual duties themselves reveal the true nature of the employment. *Id.* Furthermore, as noted above, the organizational chart for the U.S. entity does not include the beneficiary, and is thus not probative of his claimed supervisory authority.

The petition will be remanded and the director is instructed to request additional evidence related to the beneficiary's claimed managerial or executive capacity with both the foreign entity and the U.S. entity. The director is instructed to request a comprehensive, specific description of the duties performed by the beneficiary, including a breakdown of the percentage of time he will devote to those duties on a weekly basis, and a description of the duties he performs on a "typical day." The definitions of executive and managerial capacity have two specific requirements. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The provided job descriptions do not allow the AAO to determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature, nor does it adequately indicate what proportion of the beneficiary's time will be devoted to qualifying duties.

The petitioner shall also be requested to provide organizational charts for both entities, clearly indicating the beneficiary's positions and those of his subordinate employees. In addition, the petitioner should provide brief position descriptions for the beneficiary's subordinates, as well as their work schedules. Finally, if the petitioner claims that the beneficiary formerly or currently supervises professionals, the petitioner should provide evidence of the employees' educational qualifications.

It is emphasized that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, June 22, 2006.

The AAO recognizes that CIS previously approved an L-1A nonimmigrant visa petition filed by the petitioner on behalf of the beneficiary for employment as its operational manager. 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. Because CIS spends less time reviewing L-1 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 25 (D.D.C. 2003).

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. It is worth emphasizing that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d); 8 C.F.R. § 103.2(b)(16)(ii). 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 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 petition was 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). Due to the lack of required evidence in the present record, the AAO finds that the remand of this petition is warranted.

In this matter, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the petitioner meets the requirements for the requested immigrant visa classification as of the date of filing the petition. The director's decision will be withdrawn and the matter remanded for further consideration and a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence she deems necessary.

ORDER: The decision of the director dated October 27, 2006 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.