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U.S. Citizenship and Immigration Services

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JAN 11 2005

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 03 113 54584

IN RE: Petitioner: [redacted]
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:

[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, California 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 California in March 2000. It is engaged in marketing distribution for precious metal reclamation. It seeks to employ the beneficiary as its president and director. 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 determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner asserts that the director incorrectly concluded that the petitioner and the beneficiary's foreign employer are not affiliates.

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 a qualifying relationship 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.
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> *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 petitioner and director both agree that one individual, [redacted] owns 100 percent of the petitioner. The record shows that four individuals own interests in the foreign entity in the following proportions:

[redacted]	35,729 shares
	1,875 shares
	10,000 shares
	2,500 shares

The director observed that the two entities were not each owned and controlled by the same parent or individual and concluded that although some commonality existed between the two entities, implicitly complete common control must exist. The AAO has determined, however, that if one individual owns a majority interest in both the petitioner and the foreign entity, and controls both companies, then the companies will be deemed to be affiliates under the definition even if one entity or both entities have multiple owners.

In this matter, it appears at first glance that the petitioner and the foreign entity may be affiliates.[1] However, the petitioner has filed Internal Revenue Service (IRS) Forms 1120S, U.S. Income Tax Return for an

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[1] On appeal, counsel for the petitioner submits a letter and stock transfer forms transferring all outstanding shares of the foreign entity to the beneficiary. Counsel points out that the transfer was accomplished subsequent to filing the Form I-290B, Notice of Appeal. The AAO observes that a petitioner must establish

S Corporation, in 2000, 2001, and 2002. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any non-resident alien shareholders. *See* Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a foreign corporation or foreign individual owns it in any part. Accordingly, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign individual. In this matter, the petitioner's claimed owner is the beneficiary, a non-resident foreign individual. This conflicting information has not been resolved. 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 conflicting evidence casts doubt on the qualifying relationship between the two entities.

Beyond the decision of the director, the record does not contain an adequate description of the beneficiary's proposed duties for the petitioner. The director requested a more detailed description of the beneficiary's duties and the petitioner's organizational chart on May 15, 2003. The record does not contain a response to the director's request for evidence. The director requested additional evidence on June 24, 2003, including copies of the petitioner's California Forms DE-6, Quarterly Wage Reports. In a response dated July 3, 2003, the petitioner provided its California Form DE-6 for the first quarter of 2003, the quarter in which the petition was filed. The California Form DE-6 shows that the petitioner employed four individuals including the beneficiary. The record does not contain information regarding the duties of each employee.

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). As the record does not contain the beneficiary's job description, other than that the beneficiary oversees daily management of the west coast office, the AAO cannot conclude that the beneficiary's proposed position is managerial or executive. The petitioner may have believed that its reference to the approval of the beneficiary's classification as an L-1A nonimmigrant was sufficient to establish that the beneficiary's position was managerial or executive. However, each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, Citizenship and Immigration Services (CIS) is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

Moreover, 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 Citizenship and Immigration Services 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

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eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Citizenship and Immigration requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

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).

In this matter the record does not establish that the beneficiary's proposed position would be 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).

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.