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U.S. Citizenship and Immigration Services

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AUG 11 2006

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 11 2006

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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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was ultimately dismissed. The matter is now before the AAO on motion to reopen and reconsider. The petitioner's motions to reopen and reconsider will be granted and the additional evidence and information provided by counsel will be considered in a full discussion below. However, the underlying decision dismissing the appeal will be affirmed.

The petitioner is an Oregon corporation engaged in exporting commodity items to the Russian Far East. It seeks to employ the beneficiary as its vice 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 grounds: 1) the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer; and 2) the beneficiary's proposed employment is not within a managerial or executive capacity.

The petitioner appealed the denial disputing the director's findings. However, the AAO upheld the director's overall decision on the grounds listed above.

On motion, counsel submits a brief addressing each of the two grounds that served as the basis for denial and subsequent dismissal 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 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.

With regard to the issue of the petitioner's qualifying relationship, the AAO acknowledged that the beneficiary's foreign employer owns 50% of the petitioner's issued shares. However, despite this concession, the AAO concluded that the record does not establish which of the joint venture entities actually controls the petitioner. Since both ownership *and* control must be determined to establish whether a qualifying relationship exists, the AAO concluded that a qualifying relationship cannot be said to exist where the issue of the petitioner's control has not been resolved.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *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.

Based on the above regulatory definition and the corroborating documentary evidence presented on motion, the AAO has cause to revisit and reevaluate its prior decision with regard to the issue of the petitioner's qualifying relationship with a foreign entity. Contrary to the decision reached in the prior proceeding, the petitioner has provided sufficient evidence to establish that it has met the requirements of a subsidiary as specified above. As such, the first ground of the director's denial and the AAO's subsequent dismissal is hereby withdrawn.

Notwithstanding the AAO's favorable determination with regard to one of the previously determined grounds for ineligibility, the AAO concludes that the petitioner has failed to overcome the second ground for ineligibility in this proceeding.

In the dismissal of the appeal, the AAO issued the following findings with regard to the beneficiary's proposed duties with the U.S. petitioner: 1) the beneficiary primarily negotiates shipping contracts and provides customer services in an effort to move commodities from location to location; 2) the petitioner does not employ sufficient personnel to relieve the beneficiary from having to primarily perform non-qualifying tasks on a daily basis; 3) the petitioner failed to establish that the beneficiary's claimed subordinates were professional, managerial, or supervisory employees; and 4) the petitioner failed to quantify the amount of time the beneficiary spends on his various duties.

On motion, counsel explains that the petitioner's fiscal year runs from June through May of the following year. Counsel also states that $11,471 represent the wages paid by the petitioner to one of its employees to compensate that individual for the first five months of 2003, which accounts for only a portion of the petitioner's 2002/2003 fiscal year. However, counsel's explanation is not accompanied by any corroborating documentary evidence such as the petitioner's relevant quarterly wage reports. As noted in the AAO's prior discussion, 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 unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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). The petitioner has not provided any documentation to overcome the observations in the AAO's prior

decision regarding the salaries paid and the part-time status of the petitioner's employees at the time the Form I-140 was filed.

While the petitioner now provides a 2004 quarterly wage report and 2004 W-2 wage and tax statements for three of its employees, such documentation has no probative value in the present matter where the AAO's objective is to determine whether the petitioner was eligible for the benefit sought as of March 27, 2003, the date the petitioner filed its Form I-140. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

With regard to the petitioner's submission of the expert opinion of Dr. Thomas R. Gillpatrick, there is no evidence that Dr. Gillpatrick's expertise concerns the statute, regulation, or case law that address the petitioner's eligibility for the immigration benefit sought in the instant matter. Moreover, Dr. Gillpatrick's statements cannot be viewed as anything more than mere extensions of the petitioner's own claim and must be accompanied by corroborating documentary evidence. *See Matter of Soffici*, 22 I&N Dec. at 165. The fact that a third party deems the beneficiary's prospective duties to be within a managerial capacity is not in itself corroborating evidence, particularly when those very duties have already been deemed as non-qualifying.

Additionally, counsel vehemently asserts that the beneficiary's functions are of a professional nature, implying that this assertion has been disputed by the AAO. However, the AAO neither concedes nor denies the professional nature of the beneficiary's prospective duties, as this factor is irrelevant to the matter at hand. Any number of duties may be considered professional, yet not be deemed qualifying within the statutory definitions of managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act, respectively. As stated in the AAO's prior decision, 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 id.* (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). While the AAO does not dispute that the beneficiary must manage various aspects of shipping, the record also suggests that the beneficiary is directly engaged in, and is in fact a necessary participant in contract negotiation as it regards the shipment of various commodities. This task, despite its significance within the scheme of the petitioner's organization, is a necessary operational task and cannot be deemed as qualifying. Thus, the AAO cannot conclude that the petitioner was able to employ the beneficiary in a primarily managerial or executive capacity at the time the Form I-140 was filed.

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 dismissal of the appeal is upheld.