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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 04 2006

SRC 05 262 50243

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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation involved in the operation of retail stores. It seeks 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 petitioner based on three separate grounds of ineligibility: 1) the petitioner failed to establish its ownership and control and, therefore failed to establish that it has a qualifying relationship with the beneficiary's foreign employer; 2) the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity; and 3) the petitioner failed to provide sufficient evidence to establish that the beneficiary's foreign employer continues to do business.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

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 the beneficiary's foreign employer.

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 provided a letter dated August 15, 2005 claiming to be a wholly owned subsidiary of the beneficiary's foreign employer. In support of this claim, the petitioner provided a number of its corporate tax returns containing Schedules K, which indicate that the petitioner is 100% foreign owned, and supplemental Forms 5472, which identify the beneficiary's foreign employer as a foreign entity that owns at least 25% of the U.S. petitioner.

On October 22, 2005, the director issued a notice of intent to deny (NOID) indicating that the record does not clearly establish the petitioner's ownership. The director also indicated that documentation establishing a qualifying relationship with the foreign entity must include proof of capital contribution by the petitioner's owner(s).

In response, counsel submitted a letter dated November 21, 2005 stating that the petitioner's tax returns, particularly Schedule K, adequately establish the petitioner's ownership.

On December 20, 2005, the director denied the petition basing his decision, in part, on the petitioner's failure to properly document its ownership claim. The director addressed the lack of evidence in the form of negotiable instruments, including stock certificates, and the lack of proof of payment in exchange for the petitioner's stock.

On appeal, counsel asserts that the instant matter warranted the issuance of a request for evidence (RFE) and states that the director's failure to issue an RFE shows noncompliance with 8 C.F.R. § 103.2(b)(8), which specifically discusses instances requiring the issuance of an RFE. However, even if the director had committed a procedural error by failing to solicit further evidence, it 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.

Additionally, the NOID and the RFE are similar in their effect. Namely, both notices inform the petitioner of insufficiencies, which, if left unaddressed, would lead to an adverse finding regarding the petitioner's overall eligibility. Counsel's main contention is that the RFE allows a response period of 12 weeks, or 84 days, while the NOID allows only a 30-day response period. However, there is no indication in the record to suggest that the director did not consider the supplemental evidence provided by the petitioner after submission of its response to the NOID. Furthermore, as previously indicated, the AAO provides a *de novo* review of the entire record once the matter is appealed. Therefore, the AAO cannot offer any better remedy aside from affording the petitioner full consideration of all of its submissions thus far.

Counsel further argues that the director's analysis is erroneous and ignores the fact that the petitioner is a close corporation, which does not issue stock. While counsel's statement explains the reason for the lack of negotiable instruments, the AAO notes that all of the Schedule Ls submitted as part of the petitioner's corporate tax returns indicate some capital contribution by the owner of the U.S. entity, namely the issuance of $1,000 worth of common stock. Thus, despite the claim that the petitioner is a closely held corporation, the director's request for proof of capital contribution was reasonable. The mere fact that the petitioner's corporate tax documents identify the beneficiary's foreign employer as the owner of the petitioner merely shows that the petitioner has maintained a uniform claim regarding its ownership. It does not, however, establish any capital contribution by the claimed owner. 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)).

Furthermore, counsel's reference to state law and the petitioner's compliance therewith does not lead to the conclusion that the petitioner has established eligibility as required by the relevant regulatory provisions that govern matters concerning immigration benefits. Thus, while the petitioner may have met the state law requirements for filing the proper documentation for a closely held corporation, the issue of the petitioner's eligibility for the immigration benefit sought in this matter is governed by the regulations set forth in 8 C.F.R. § 204.5(j). The director has concluded that the petitioner has failed to meet the requirements discussed in the relevant regulatory provisions. Based on the documentation submitted, the AAO supports the director's conclusion, which serves as the first basis for dismissal of this appeal.

The second issue in this proceeding is whether the beneficiary would be employed in the United States 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.

In the August 15, 2005 letter submitted in support of the Form I-140, the petitioner submitted the following description of the beneficiary's proposed employment in the United States:

- Establish and approve policies and objectives of the parent and subsidiary operations in consultation with the parent company and management and in accordance with the charters.
- Approve [the] company budget and investment projects.
- Appoint the other members of the managing team and other officers.
- Approve public relation policies.
- Approve hiring of professional services.
- Confer with the management team and the company officials of the corporations to plan business objectives, to develop organizational policies to coordinate functions and operations between divisions and departments of the corporations, and to establish responsibilities and procedures of attaining objectives.

- Review activity reports and financial statements of all operations to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions.

- Direct and coordinate formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity of both [of] the corporations.

- Plan and develop industrial, labor, and public relations policies designed to improve image of the group and relations with customers, employees, and public.

- Evaluate performance of executives for compliance with established policies and objectives of the group and contributions in attaining objectives.

In the NOID, the director pointed out what she perceived as a discrepancy in the documentation submitted. Namely, the director discussed the fact the beneficiary's proposed position of president is currently filled by his son, who has also been identified as the petitioner's president by the [redacted] as well as his own Form I-140 petition.

In response, counsel provides an adequate explanation for the perceived discrepancy. Namely, counsel stated that the beneficiary's son has assumed the position of the petitioner's president in the absence of the beneficiary, the claimed patriarch of both the U.S. and foreign entities. Counsel further stated that should the instant petition be granted, the beneficiary would then assume the position of president and that the petitioner's current president would then assume the subordinate position of vice-president.

Nevertheless, the director concluded that the petitioner failed to provide sufficient evidence establishing that the beneficiary would be employed in a managerial or executive capacity. While the AAO concurs in the director's overall conclusion, it is noted that the director's underlying reasoning is flawed. Despite the questions that might have arisen regarding the beneficiary's son's eligibility to be classified as a multinational manager or executive, this issue is one that is part of a separate record of proceeding and must, therefore be addressed separately from the matter at hand. 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). Accordingly, a proper determination as to the beneficiary's eligibility for the immigration benefit sought must include an analysis of the position description provided by the petitioner. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In the instant matter, the description of the beneficiary's proposed employment consists primarily of broad job responsibilities, which fail to convey an understanding of what specific duties the beneficiary would perform on a daily basis in an effort to meet his overall responsibilities. More specifically, the petitioner indicated that the beneficiary would establish and approve policies and objectives, direct and coordinate the formulation of financial programs, and plan and develop industrial, labor, and public relations policies. However, the petitioner's use of such general terminology, aside from the apparent intent to illustrate a heightened degree of discretionary authority, precludes the AAO from determining the actual duties the beneficiary would be expected to perform. 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.

Moreover, the AAO is entirely unclear as to how several of the responsibilities fit within the context of the petitioner's retail business. Namely, the petitioner indicates that the beneficiary would be responsible for appointing a management team. However, at the time the petitioner filed the Form I-140, the company's "managing team" consisted of a president, who would assume the position of vice president under the beneficiary's approved petition, and a store manager. Given the petitioner's existing organizational hierarchy, the AAO questions the likelihood that a management team would be in place for the beneficiary to manage or that appointing this team would consume any significant portion of the beneficiary's time. Further, the petitioner claimed that the beneficiary would confer with the alleged management team with regard to developing organizational policies that would govern operations between divisions and departments. However, the petitioner's organizational chart does not identify any divisions or departments. Additionally, the petitioner fails to explain how, in light of its limited support staff, a management team would be assigned to policy development.

Accordingly, the director properly concluded that the record is not persuasive in demonstrating that the beneficiary's duties under his proposed position would be primarily managerial or executive. The petitioner has provided Citizenship and Immigration Services (CIS) with a broad set of job responsibilities, a number of which are inconsistent with its current organizational structure. Most importantly, the petitioner has failed to provide a detailed description of duties to be performed on a daily basis.

The third issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary's foreign employer continues to do business. 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 decision denying the petition, the director concluded that the petitioner failed to provide the requested documentation in its response to the NOID in order to establish that the foreign entity continues to do business. However, the AAO has reviewed the record in its entirety (including the petitioner's submissions dated December 21, 2005) and concludes that the petitioner has submitted sufficient documentation to establish that the foreign entity continues to engage in "the regular, systematic, and continuous" course of business. As such, the third ground for the director's denial is hereby withdrawn.

Nevertheless, the petitioner remains ineligible for the immigration benefit sought based on the two remaining grounds of ineligibility discussed above.

Furthermore, the record supports a finding of ineligibility based on at least one additional ground that was not previously addressed in the director's decision.

More specifically, 8 C.F.R. § 204.5(j)(3)(i)(A) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to filing the Form I-140. In the instant matter, much like the description of the beneficiary's proposed employment, the petitioner's description of the beneficiary's employment abroad consists entirely of a broad list of responsibilities, which convey an overall sense of discretionary authority but fail to identify the actual duties performed. As previously stated, the actual duties themselves will reveal the true nature of the

employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. As the petitioner failed to identify any of the duties performed by the beneficiary during his employment abroad, the AAO cannot conclude that he was employed in a qualifying 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 ground of ineligibility discussed above, this petition cannot be approved.

As a final note, counsel refers to the petitioner's approved Form I-140 of another beneficiary who purportedly fills the current position of president. However, 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 prior nonimmigrant or immigrant petition filed by the same petitioner in no way guarantees that CIS will approve an immigrant petition filed on behalf of another beneficiary. 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).

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.