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U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: SRC 06 071 50536 OFFICE: TEXAS SERVICE CENTER Date: SEP 08 2006

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 summarily dismissed.

The petitioner is a Texas corporation engaged in the business of international and domestic sales of chemical, decorative, and health supplement products. 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.

On June 6, 2006, the director determined that the petitioner failed to establish its ability to pay the beneficiary's proffered wage and denied the petition. More specifically, the director cited the provisions of 8 C.F.R. § 204.5(g)(2), which specifically requires that the prospective United States employer, i.e., the petitioner, establish its own ability to pay the beneficiary's proffered wage. In the instant matter, Part 6, Item 9 of the Form I-140 indicates that the beneficiary's proffered wage is $60,000 per year.

On appeal, counsel disputes the director's conclusion on the basis that the foreign entity, which is the claimed owner of the petitioner, has established its ability to pay. Counsel further admits (and the documentation in the record supports counsel's admission) that the petitioner itself lacks the ability to pay the beneficiary's proffered wage. Numerous financial documents belonging to the foreign entity were submitted in order to establish that entity's ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part:

> An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

Inasmuch as the petitioner has failed to identify specifically an erroneous conclusion of law or a statement of fact in this proceeding and based on counsel's own interpretation of the law, which is entirely contrary to the relevant and unambiguous regulatory provision, this petition cannot be approved.

Furthermore, the record supports a finding of ineligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(B) 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 entry as a nonimmigrant. In the instant matter, the petitioner provided a letter dated November 18, 2005 from the foreign entity describing the beneficiary's position abroad. However, the description is comprised of a brief account of the beneficiary's broad job responsibilities, which was devoid of any the duties actually performed by the beneficiary on a daily basis. 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). As the record lacks a detailed description of the actual duties performed by the beneficiary during his employment abroad, the AAO cannot conclude that the beneficiary's foreign employment was within a qualifying capacity.

Second, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. In the instant matter, the petitioner claims to be a wholly owned subsidiary of the beneficiary's foreign employer. However, the evidence of record does not support this claim. Namely, the petitioner has submitted two of its corporate tax returns—one tax return for 2004 and another for 2005. However, neither tax return includes a completed Schedule L, which accounts for shareholder equity, i.e., shareholder capital contribution in exchange for shares purchased.

Furthermore, while Article Four of the petitioner's Articles of Incorporation states that the par value of the petitioner's stock would be $1 per share, the Minutes of Organizational Meeting that took place on October 12, 2003 indicate that the claimed parent entity bought 310 shares of the petitioner's stock at $100 per share and note that "[t]his price per share shall not be less than the par value stated in the Articles of Incorporation." 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). Although the petitioner provided a "Certified Shareholder List," this document is a mere attestation of the petitioner's vice president, which can only be deemed a third party claim, not the independent objective evidence required to resolve this inconsistency. The petitioner also provided a stock certificate indicating that 310 of its shares were issued to the beneficiary's foreign employer. However, as general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. 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)). As the petitioner failed to provide sufficient, credible evidence documenting its ownership and control, the AAO cannot conclude that it properly established a qualifying relationship with the beneficiary's foreign employer at the time of filing the Form I-140.

Third, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. 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." As the petition was filed on January 3, 2006, the petitioner must establish that it had been doing business as of January 3, 2005 in order to meet the provisions in 8 C.F.R. § 204.5(j)(3)(i)(D). In the instant matter, the petitioner provided numerous shipping documents dated April, May, October, and November of 2005.[1] No additional documentation was provided to establish that the petitioner was doing business on a "regular, systematic, and continuous" manner during the remaining eight months of the relevant 12-month period.

Lastly, 8 C.F.R. § 204.5(j)(5) requires that the petitioner submit an offer of employment with a detailed description of the beneficiary's proposed duties in the United States. In the instant matter, the petitioner did not submit such a letter. Rather, the only letter discussing the beneficiary's proposed position in the United States is dated April 17, 2006 and was written by an official of the beneficiary's foreign employer, not his prospective employer. The only other discussion of the beneficiary's proposed employment can be found in the petitioner's organizational chart. However, neither job description consists of specific duties the beneficiary would actually perform on a daily basis. It is noted that reciting the beneficiary's vague job

[1] The AAO acknowledges the petitioner's submission of other shipping documentation. However, only documentation that directly applies to the relevant 12-month period will be discussed.

responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? 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 record lacks an adequate account of the beneficiary's proposed duties in the United States, the AAO cannot conclude that the beneficiary would primarily perform duties of a qualifying managerial or executive nature.

As a final note, service records show the petitioner's previously approved L-1 employment of the beneficiary. With regard to the beneficiary's L-1 nonimmigrant classification, it should be noted that, 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.

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. 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 at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103.

Furthermore, if the previous nonimmigrant petitions were 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).

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 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. Therefore, the appeal will be summarily dismissed.

ORDER: The appeal is summarily dismissed.