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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 06 2007

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

The petitioner is an Ohio corporation seeking to employ the beneficiary as its chairman/sales manager. 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 failed to establish that it has a qualifying relationship with the beneficiary's foreign employer and denied the petition.

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 primary issue in this proceeding is whether the petitioner has a qualifying relationship with the beneficiary's foreign employer as claimed.

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 submitted a letter dated January 8, 2004 in which the general manager stated that the petitioning entity and the beneficiary's foreign employer are affiliates. However, no explanation was provided to establish common ownership and control. Rather, the petitioner provided its audited financial statement showing that all of its authorized Class A voting shares were issued and outstanding in 2001 and 2002, and that out of its 19,999,500 Class B non-voting shares, 12,329, 053 were left outstanding. The petitioner provided no supplemental information identifying the shareholders with ownership of its Class A or Class B stock. Nor did the petitioner provide any documentation establishing the ownership of the beneficiary's foreign employer.

Accordingly, on April 6, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide documentation to corroborate the claim that it and the beneficiary's foreign employer are affiliates by virtue of common ownership and control.

In response, the petitioner provided stock certificates and a shareholders list, which lists [redacted] as majority owner of the petitioner's Class B non-voting shares and all of the petitioner's Class A voting shares, which, if properly documented, would give it both ownership and control of the petitioning entity. The petitioner also submitted its own 2003 tax return containing Form 5472, which indicates in Part II, item 3a that [redacted], the beneficiary's foreign employer is an indirect owner of the petitioning entity. Part I, item 1a of the same document identifies [redacted]. as the petitioner's direct owner. However, the petitioner did not provide a list of stockholders or a stock ledger specifically establishing the owners of Class A stock. In light of the petitioner's submission of only one stock certificate, i.e., stock certificate no. 6, the recipients of stock certificates 1-5 remain in question as well as the class of stock issued in those stock certificates. The petitioner did not submit documentation establishing the ownership of the foreign entity.

Accordingly, in a decision dated August 10, 2005, the director denied the petition, concluding that the petitioner failed to establish shared ownership and control with the beneficiary's foreign employer. The director listed the documentation submitted by the petitioner and noted that the petitioner's ownership was insufficiently documented. While the AAO supports the director's ultimate basis for denying the petition, the record does not support his finding with regard to the evidence establishing the petitioner's ownership. Contrary to the director's determination, the AAO finds that the record sufficiently establishes that the ownership and control of the petitioning entity belongs to [redacted]. Regardless, the director

properly pointed out that establishing the petitioner's ownership and control is not sufficient for the purpose of establishing the existence of a qualifying relationship, which requires common ownership and control shared between the petitioner and the beneficiary's foreign employer. The director properly found the record to be devoid of evidence establishing the ownership and control of the latter entity and denied the petition.

On appeal, the petitioner provides foreign language documents in an apparent attempt to establish the foreign entity's ownership. However, as the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

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.

In the present matter, the petitioner claims to have an affiliate relationship with the beneficiary's foreign employer. This claim requires documentation to establish the ownership of each company claimed to be part of the affiliate relationship. In the present matter, the petitioner has not provided sufficient documentation establishing its own ownership and has also failed to establish the ownership of the beneficiary's foreign employer. 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)). Accordingly, based on the evidence furnished, the AAO cannot conclude that the petitioner has established the existence of a qualifying relationship as claimed.

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 coming to the United States as a nonimmigrant. In the instant matter, the petitioner stated in its initial support letter dated January 8, 2004 that the beneficiary managed the foreign entity's sales effort, including the sales force's annual increase in sales revenue. This general statement of the beneficiary's overall responsibility fails to account for any duties the beneficiary actually performed on a daily basis. This information is crucial, as 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). The petitioner's failure to submit a more definitive statement describing the beneficiary's daily tasks abroad precludes a determination that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Second, 8 C.F.R. § 204.5(j)(5) requires that the petitioner provide a job offer specifically describing the duties that comprise the beneficiary's proposed employment. In the initial support letter, the petitioner provided a general job description stating that the beneficiary's responsibilities would include playing a key role in

defining solutions, establishing appropriate partnerships and alliances, bringing products to market, and ensuring client satisfaction, which includes developing and managing client relationships. The petitioner's job description, while lacking a detailed account of the beneficiary's proposed daily job duties, clearly states that the beneficiary would be directly involved in providing customer service, a task that cannot be deemed as qualifying. The director subsequently asked for a percentage breakdown in an attempt to determine how much of the beneficiary's time would be devoted to the specific duties that would comprise his work day. While the petitioner's response includes some specific tasks, a majority of the list provided in response to the RFE consisted of general areas of responsibility, not specific tasks that convey an understanding of what exactly the beneficiary would be doing on a daily basis. Thus, based on the lack of detail the petitioner provided in describing the beneficiary's daily activities, the AAO cannot conclude that the primary portion of his time would be devoted to duties of a qualifying managerial or executive nature.

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." Although the petitioner provided tax returns and audited financial statements, such documentation is not an accurate indicator of whether an entity is conducting business on a "regular, systematic, and continuous" basis. *See id.* Therefore, the record lacks sufficient documentation to show that the beneficiary complied with the requirements discussed in 8 C.F.R. § 204.5(j)(3)(i)(D).

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 as 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.

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. The approval of a nonimmigrant petition in no way guarantees that Citizenship and Immigration Services (CIS) will approve an immigrant petition filed on behalf of the same beneficiary. 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 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approvals 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).

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.