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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 04 039 50531 Office: NEBRASKA SERVICE CENTER Date: DEC 22 2005

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 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 a limited liability company organized in the state of Michigan and engaged in the business of production, importation, and exportation of fruit beverage and vitamin water. It seeks to employ the beneficiary as its executive director of operations. 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.[1] The director denied the petition based on two separate grounds: 1) the petitioner failed to establish that it has a qualifying relationship with the claimed foreign entity; and 2) the record does not establish that the petitioner has the ability to pay the beneficiary's proffered wage.

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.

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[1] On the first page of counsel's November 18, 2003 letter in support of the petitioner, counsel stated that the petitioner filed a Form I-140 petition to classify the beneficiary as "an L-1B inter-company [sic] [t]ransferee, as a legal permanent resident." While counsel accurately pointed out the petitioner's filing of an I-140 petition to classify the beneficiary as an employment-based immigrant, an L-1B petition to classify a beneficiary as an intra-company transferee is done by filing a Form I-129, which applies to beneficiaries seeking temporarily employment as nonimmigrants. See § 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L).

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;
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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.

In the November 18, 2003 statement appended to the petition, the petitioner stated that the U.S. petitioner is a wholly owned subsidiary of the foreign entity. The petitioner failed to submit any evidence to support this claim. Rather, the petitioner indicated that the foreign entity owns only 30% of the petitioner's shares. The petitioner indicated that its directors own the remaining 70% of its shares.

On June 10, 2004, the petitioner issued a request for additional evidence instructing the petitioner to submit documentary evidence establishing that the beneficiary's foreign employer and the U.S. petitioner share common ownership and control, as these factors are essential for the purpose of establishing a qualifying relationship.

In a response letter dated July 15, 2004, the petitioner stated that its prior statement claiming that it is a wholly owned subsidiary of the beneficiary's foreign employer was made in error. The petitioner reaffirmed the subsequent ownership breakdown indicating that the foreign entity owns 30%. In support of this claim, the petitioner submitted its Memorandum of Understanding and Operational Agreement, which stated that the foreign entity owns 35% of the petitioner's shares, while [redacted], the chairman, owns 65% of the remaining shares.

Accordingly, the director denied the petition stating that the breakdown of ownership suggests that the U.S. and foreign entities do not share common ownership and therefore do not have a qualifying relationship.

On appeal, counsel states that an agreement was reached at the time of the petitioner's establishment—while the petitioner would be majority owned by the petitioner's directors, control would rest with the foreign entity. However, 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). (Emphasis added.) 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 instant matter, the petitioner readily admits and submits evidence showing that majority ownership of the petitioning entity does not lie with the beneficiary's foreign employer. Therefore, the petitioner has failed to support the claim that it is a subsidiary of the foreign entity. As ownership is an element that is essential for establishing the existence of a qualifying relationship, the AAO concludes that the petitioner has failed to meet the requirement discussed in 8 C.F.R. § 204.5(j)(3)(C).

The other issue that served as a basis for the director's denial was the petitioner's failure to establish its ability to remunerate the beneficiary his proffered wage.

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

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In Part 6, item 7 of the petition, the petitioner indicated that the beneficiary would be paid $2,000 per week under an approved petition. This translates to an annual salary of approximately $104,000. On page four of the petitioner's November 18, 2003 letter submitted in support of the petition, the petitioner stated that the beneficiary's gross annual income is approximately $70,000.

In response to the director's request for evidence, the petitioner submitted its Form 1065 partnership tax return for 2003, the year during which the petition was filed. The tax return indicates that the petitioner's total income in 2003 was $73,300, while its ordinary income after deductions was only $19,666, far less than the beneficiary's proffered wage of $2,000 per week. Schedule A, no. 3 of the tax return also indicates that the petitioner paid a total of $46,800 for cost of labor. In a supplemental explanation, counsel stated that the beneficiary's annual salary would be $55,000 in addition to 90% of the total company net profit. Based on a net profit of $19,666 the beneficiary would receive approximately $17,700 in addition to his base salary.

In the denial, the director properly pointed out the petitioner's inconsistent claims regarding the beneficiary's proffered wage and concluded that the petitioner failed to establish its ability to pay the beneficiary, even if the beneficiary's proffered wage were $55,000, the smallest of the three amounts claimed. The director noted the petitioner's failure to submit the beneficiary's W-2 wage and tax statements establishing how much the beneficiary has been paid by the petitioner thus far.

On appeal, the petitioner claims that the director's perceived inconsistencies regarding the beneficiary's salary are part of a misunderstanding. The petitioner claims that some references were made to the beneficiary's salary during his employment with the foreign entity and states that the beneficiary took a cut in pay when he assumed the position in the United States. Specifically, the petitioner claims that $70,000 was shown in the petition as the beneficiary's gross salary and states that this represents the beneficiary's salary during his employment with the foreign entity. However, the answers provided to questions posed in Part 6 of the I-140 petition suggest that counsel was fully aware that the inquiry into the beneficiary's salary clearly pertained to his proposed position, not his position with the entity abroad. While page four of the petitioner's support statement indicates that the beneficiary received a salary of $70,000 in gross earnings during his employment overseas, there is no evidence to suggest that the overseas salary was included anywhere in the petition itself. 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)). 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).

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the instant matter, the petitioner repeatedly claims that it employs the beneficiary. However, no W-2 wage and tax statements have been submitted to show the amount of the beneficiary's salary. As such, the AAO cannot determine that the beneficiary has been remunerated the proffered wage.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

As the petition's priority date falls on December 5, 2003 the AAO must examine the petitioner's tax return for 2003. The petitioner's IRS Form 1065 for calendar year 2003 presents a net income of $73,300. The petitioner could not pay a proffered wage of $104,000 per year out of this income.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage. In the instant matter, the record lacks evidence to warrant the conclusion that the petitioner's assets are sufficiently liquid in order to pay the beneficiary's proffered wage.

Beyond the director's decision, the regulations at 8 C.F.R. § 204.5(j)(3)(B) and (5) require that the petitioner establish that the beneficiary was employed abroad for the requisite time period and would be employed in the United States in a qualifying managerial or executive capacity. 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).

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). In the instant matter, the petitioner's descriptions of the beneficiary's past and proposed duties consist of vague job responsibilities or broadly-cast business objectives. However, this is not sufficient; as previously stated, 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 did the beneficiary primarily do on a daily basis during his employment abroad and what does the beneficiary primarily do on a daily basis in his proposed position with the petitioner? The actual duties themselves will reveal the true nature of the employment. *Id.* As such, the AAO cannot conclude that the beneficiary was employed abroad and that he will be employed in the United States 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 grounds 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 she shows that the AAO abused it discretion with respect to all of the AAO's enumerated grounds. *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).

As a final note, the petitioner includes documentation of the petitioner's current 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, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and CIS normally accords the petitions a less substantial review. *See* 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30 (recognizing that CIS approves some petitions in error).

Moreover, 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 prior nonimmigrant approvals do not preclude CIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that 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 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 and contradictory 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).

Accordingly, 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.