

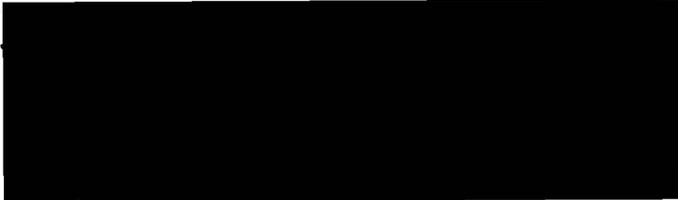
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Services

By

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FILE:

Office: CALIFORNIA SERVICE CENTER

Date: MAR 31 2006

WAC 04.191.51318

IN RE:

Petitioner:

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:



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

The petitioner is a California corporation engaged in the business of manufacturing and distributing shipping labels and clothing tags to commercial clients. It seeks to employ the beneficiary as its information systems 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 denied the petition on the following independent grounds of ineligibility: 1) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer; and 2) the petitioner failed to establish that the beneficiary was employed abroad in a managerial or executive capacity for at least one out of three years prior to his entry to the United States as a nonimmigrant.

On appeal, the petitioner's Chief Executive Officer (CEO), on behalf of the petitioner, 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 a foreign entity.

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 a letter dated June 21, 2004, counsel stated that the U.S. petitioner and the beneficiary's foreign employer are affiliates. In support of this claim, the petitioner submitted the following documentation:

1. A letter dated October 14, 1997, discussing the petitioner's merger with another company and the new distribution of the petitioner's shares as a result of the merger.
2. Stock certificates 7, 8, and 9, reflecting the new distribution of shares as follows: 2450 shares to [REDACTED], 2450 shares to [REDACTED] and [REDACTED] (as trustees of the ADI Trus), and 100 shares to [REDACTED] respectively.
3. A summary translation of an amendment to the foreign entity's corporate chart reflecting the following distribution of its shares: 48 shares to [REDACTED], 48 shares to [REDACTED] and 3 shares to [REDACTED], respectively.

Although the director issued a request for additional evidence (RFE) dated March 24, 2005, the petitioner was not asked to submit additional evidence addressing the issue of the petitioner's claimed affiliate relationship with the foreign entity.

On September 7, 2005, the director denied the petition, basing his decision, in part, on the determination that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

On appeal, the petitioner submits a statement clarifying its ownership breakdown. Specifically, the CEO asserts that his wife surrendered her portion of control over the petitioner's stock as corroborated in a Shareholders Agreement Consent of Spouse signed by the CEO's wife on October 31, 2003. However, he states that the 2,450 shares he controls are actually owned by the ADI Trust.

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.¹ *Matter of Church Scientology International*, 19 I&N Dec. at 595. In the instant matter, the CEO focuses on and submits a written statement as evidence of his wife's relinquishment of control over her portion of the petitioner's stock. However, even assuming that both Nate Rubin and his wife are the sole trustees and even if his wife relinquished control as claimed, she still maintains indirect ownership of the stock.

In applying part B of the definition of affiliate to immigrant petitions, the AAO has historically required that the *same* group of individuals own and control approximately the same share or proportion of each entity. 8 C.F.R. § 204.5(j)(2). As clearly indicated in the regulation, while it is not required that each individual own the exact same percentage of each entity, it is required that the group of individuals who own each entity, albeit directly or indirectly, be the same. *Id.*; see also 8 C.F.R. § 204.5(j)(2) (defining "subsidiary"). It is important the same group of individuals own and control both entities to ensure that both entities are part of the same organization as intended by Congress. Otherwise, CIS faces a situation in which diversely-held business associations would meet the requirements of a qualifying affiliate relationship, through means "such as ownership of a small amount of stock in another company without control, exchange of products or services, and membership of the directors of one company on another company's board of directors." 52 Fed. Reg. 5738, 5742 (Feb. 26, 1987).

When the definition of affiliate was added to the Code of Federal Regulations in 1987 it read, "[a]ffiliate" means one of two subsidiaries both of which are owned and controlled by the same parent or individual or 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." 52 Fed. Reg. at 5752. Absent majority and thus "de jure" control of the U.S. and foreign entities by a single person, ownership of both entities by the same group of individuals without any "de jure" or "de facto" majority control was already considered by CIS to be a lenient standard. See Memorandum, Richard E. Norton, Assoc. Commissioner, Immigration and Naturalization Service (INS), *Implementation of Final L Regulations*, 1 (Aug. 20, 1987) (copy incorporated into record of proceeding). This less stringent standard was permitted, however, in an apparent attempt to balance business realities with ensuring the intent of Congress as well as the integrity of the multinational executive and managerial immigration provisions. See 56 Fed. Reg. 61111, 61114 (Dec. 2, 1991).

In the instant matter, there is no one person with majority control. Therefore, based on the above stated standards, the owning parties must be identical. However, as Mr. [REDACTED] wife does not own any part of the foreign entity, it cannot be concluded that the foreign and U.S. entities are owned by identical parties. As such, the AAO cannot conclude that the two companies have the requisite qualifying relationship.

The second issue in this proceeding is whether the beneficiary was employed abroad in a managerial or executive capacity during the requisite time period specified above.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

¹ It is unclear, based on the evidence and information submitted, whether Nate Rubin has indirect ownership over the shares owned by the ADI Trust.

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 counsel's support letter dated June 21, 2004, counsel referred to the petitioner's three previously filed nonimmigrant petitions, citing each petition's receipt number. However, no information was provided with regard to the beneficiary's position abroad.

Accordingly, on March 24, 2005, the director issued an RFE instructing the petitioner to submit a more detailed description of the beneficiary's job duties abroad as well as the foreign entity's organizational chart describing the company's managerial hierarchy and staffing levels. The director also instructed the petitioner to provide the foreign entity's payroll records pertaining to the beneficiary for the year preceding the filing of the instant petition.

The CEO, on behalf of the petitioner, provided a response dated June 10, 2005. He expressed his confusion with regard to the director's request for the foreign entity's payroll records for the year prior to the filing of the I-140 petition, pointing out that the beneficiary has not been on the foreign entity's payroll since his entry to the United States in 1998 as an L-1A nonimmigrant. The CEO referred to the petitioner's previously filed nonimmigrant petitions, suggesting that Citizenship and Immigration Services (CIS) review the records of proceeding of those nonimmigrant petitions to find the requested information regarding the beneficiary's position abroad. The CEO briefly described the foreign entity's stages of development and the beneficiary's contribution to the company's success, stating that by May of 1997 the beneficiary had hired two degreed professionals to resolve certain hardware and network related issues. Although the CEO indicated that the beneficiary administered and upgraded the foreign entity's network and developed custom applications prior to hiring the second computer technician, he did not provide a detailed description of the beneficiary's duties either before or after the second computer technician was hired. Thus, the AAO has no way of knowing whether the beneficiary performed other nonqualifying duties prior to the hiring of the second computer technician or whether he continued to perform the nonqualifying duty of creating custom applications after hiring the additional technician. Overall, the petitioner failed to provide the requested information regarding the beneficiary's job duties abroad during the relevant time period.

In the denial, the director stated that the petitioner failed to provide the requested payroll records and the foreign entity's organizational chart, noting that he reviewed the record of proceeding related to one of the petitioner's previously filed nonimmigrant petitions and found that it did not contain the requested information. The AAO notes that the director was under no legal obligation to conduct such a review. 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 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. The fact that the director went to the length of conducting an independent review of a separate record of proceeding with the same petitioner and beneficiary merely demonstrates the director's good faith attempt to verify the petitioner's claim, a burden that falls on the petitioner, not on CIS.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In the instant matter, the director instructed the petitioner to provide two types of documentation with regard to the beneficiary's foreign employment. One type of documentation was the foreign entity's payroll records pertaining to the beneficiary for the year preceding the filing of the instant petition. With regard to that portion of the request, the petitioner claimed that the beneficiary was employed in the United States during the one year prior to filing the Form I-140, which precludes his name from appearing on the foreign entity's payroll during that time. Thus, based on the particular facts in the present record of proceeding, the director's specific request for the payroll documentation was invalid. The petitioner's inability to produce evidence of a factual impossibility will not result in an adverse finding in this proceeding.

Notwithstanding the improper request discussed above, the petitioner is required to provide a statement that establishes that the beneficiary was employed abroad in a qualifying capacity during a specific time period. *See* 8 C.F.R. § 204.5(j)(3)(B). In an attempt to elicit sufficient information with regard to the beneficiary's duties with the foreign entity, the director properly requested the foreign entity's organizational chart and a detailed description of the beneficiary's duties abroad. Although the petitioner may have felt that this evidence need not be resubmitted based on the claim that it had been submitted with a previously filed nonimmigrant petition(s), the AAO must reemphasize that 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. As such, even if evidence previously submitted to establish eligibility for one benefit is identical to the evidence required to establish eligibility in a separate matter, the petitioner must resubmit the requested information, which the director deems necessary in order to reach a decision regarding the petitioner's eligibility. Although the AAO acknowledges the fact that the beneficiary has not been employed by the foreign entity for some time, the director's request instructed the petitioner to provide the foreign entity's organizational chart depicting the beneficiary's position within the structural hierarchy. The petitioner's assumption that it was required to provide a current organizational chart showing the beneficiary as currently employed abroad was unfounded.

On appeal, the petitioner asserts that the director reviewed the wrong record of proceeding, which pertained to the petitioner's first nonimmigrant petition. The petitioner further states that the director should have reviewed the record of proceeding regarding the second nonimmigrant petition, which purportedly contains the information cited in the RFE. However, the AAO notes that in making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). If a director requests additional evidence that the petitioner may have submitted in conjunction with a separate nonimmigrant petition filing, the petitioner is, nevertheless, obligated to submit the requested evidence, as the record of the nonimmigrant proceeding is not combined with the record of the immigrant proceeding. Moreover, in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner cannot shift that burden and expect that the information required to establish the petitioner's eligibility will be provided by CIS.

Although the petitioner's appeal includes the previously requested organizational chart, the AAO notes that the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary was employed abroad in a primarily managerial or executive capacity. The petitioner failed to provide a detailed description of the beneficiary's duties abroad during the relevant time period as requested in the RFE. Thus, the AAO cannot determine with any degree of certainty that the beneficiary was primarily performing managerial or executive duties, particularly given the foreign entity's early stage of development during the time period in question.

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 its 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 record shows CIS's prior approval of L-1 employment on behalf 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).

As previously discussed, 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 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 petition was 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).

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.