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U.S. Citizenship
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Services

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FILE: [REDACTED]
SRC 05 143 51631

OFFICE: TEXAS SERVICE CENTER

Date: DEC 01 2008

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


for
John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner filed a motion in response to the adverse decision. Upon review of the motion, the director agreed to reopen the proceeding and having done so, issued a request for additional evidence (RFE). After reviewing the response to the RFE, the director issued a final decision affirming the denial. The petitioner has appealed that decision, and the appeal is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a limited liability company organized in the State of Florida. The petitioner is engaged in the construction of residential real estate and seeks to employ the beneficiary as its president and general 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. In her latest decision, the director determined that the ownership breakdown of the U.S. and foreign does not amount to a qualifying relationship. This finding was the basis of the director's most recent denial.

On appeal, counsel disputes the director's conclusions and submits a brief in support of her 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 foreign entity that employed the beneficiary abroad.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). 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 April 4, 2005, which included the ownership breakdown of the U.S. and foreign entities. The petitioner stated that the foreign entity's ownership is distributed among seven individuals: the beneficiary and his wife, each of whom owns 30%; their three sons, each of whom owns 10%; and the beneficiary's parents, each of whom owns 5%. With regard to the U.S. entity, the petitioner stated that the beneficiary and his wife each retains a 35% ownership interest while the beneficiary's three sons each retains a 10% ownership interest. The ownership breakdown of the petitioner is reiterated in membership certificates 1-5.

The director subsequently issued two RFEs, one on May 16, 2005 and another on August 25, 2005. It is noted that neither RFE addressed the issue of a qualifying relationship. Accordingly, the director's follow-up decision dated January 13, 2006, was based on findings from evidence and information that was submitted in response to previously issued RFEs.

In response to the director's adverse decision, the petitioner filed a motion to reopen and reconsider. The director reviewed the petitioner's submissions and reopened the proceeding, which prompted the issuance of a

third RFE, dated March 22, 2007, in which the petitioner was instructed to provide evidence of the foreign entity's ownership.

The petitioner provided a response letter, dated May 18, 2007, in which counsel reiterated the ownership breakdown of the foreign entity, as well as the documents and their certified translations that support the ownership breakdown provided earlier by the petitioner and more recently by counsel.

On June 19, 2007, the director issued a decision in which she found that the ownership breakdowns described and documented by the petitioner do not amount to a qualifying relationship between the beneficiary's U.S. and foreign employers. In light of this finding, the director found the petitioner to be ineligible for the immigration benefit sought and determined that denial of the petition should be affirmed.

On appeal, counsel for the petitioner asserts that the director's conclusion is erroneous. She argues that both entities are similarly controlled and provides a letter dated July 10, 2007 from the beneficiary's parents, who stated that they have no role in the operation of the foreign entity despite their respective ownership interests in the company. In effect, the underlying argument is that "de facto" control of the shares held by the beneficiary's parents is distributed among the five remaining owners of the foreign entity's stock. However, counsel's argument is not persuasive.

First, it must be noted that the argument of "de facto" control is only relevant in determining whether an entity is a subsidiary of a parent corporation. More specifically, only the definition of "subsidiary" considers less than half ownership of an entity combined with "in fact" or de facto control of the organization to be a qualifying entity for purposes of an employment-based immigrant petition for a multinational executive or manager. See 8 C.F.R. § 204.5(j)(2). Moreover, the definition of "subsidiary" only pertains to "a firm, corporation, or other legal entity of which a *parent* owns, directly or indirectly, . . . less than half of the entity, but in fact controls the entity." 8 C.F.R. § 204.5(j)(2) (emphasis added). While a parent or parent corporation is considered under the law to be an individual and a person, an individual human being or group of human beings are not considered to be a parent corporation. See generally, *Black's Law Dictionary* 344, 777, 1137, 1162 (7th Ed. 1999) (defining the terms "parent corporation," "individual," "person," and "parent"). As such, only a parent corporation, and not a human being or group of human beings, is permitted to own less than half of an entity, in fact control the entity, and qualify as a "subsidiary" under the regulations. In this matter, as the petitioner and the foreign entity claim to be owned by a group of human beings and not by a common parent corporation, the definition of subsidiary is not applicable, and the claim of "de facto" control is irrelevant.

Second, as the definition of subsidiary is inapplicable to the instant matter, the only remaining means apparently available to the petitioner under which a qualifying relationship could be claimed is that of an affiliate.¹ 8 C.F.R. § 204.5(j)(2). Furthermore, only part B of the definition of affiliate provides for a

¹ It is noted that the petitioner fails to demonstrate that there is majority ownership and control, directly or indirectly, of both companies by any one person as required under part A of the definition of affiliate. See 8 C.F.R. § 204.5(j)(2) (defining the term affiliate). In addition, as the United States entity is not a partnership organized in the United States to provide accounting services, it is also concluded that the petitioner does not qualify under part C of the definition of affiliate. *Id.*

situation in which a group of individuals collectively owns and controls two legal entities. 8 C.F.R. § 204.5(j)(2) (defining the term "Affiliate"). In applying part B of the definition of affiliate to immigrant petitions, the AAO has historically found that the *same* group of individuals must own and control approximately the same share or proportion of each entity. *Id.* 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.* 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, U.S. Citizenship and Immigration Services (USCIS) 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" majority control was already considered by USCIS 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). 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).

The record in the present matter clearly indicates that two shareholders of the foreign entity do not own, directly or indirectly, any part of the United States entity. As such, even assuming the same group of individuals in fact controls both entities, it cannot be found that the *same* group of individuals own both corporations as required under part B of the definition of affiliate. *See* 8 C.F.R. § 204.5(j)(2). Consequently, the petitioner has failed to meet its burden of proof to establish that a qualifying relationship exists between the U.S. and foreign entities.

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Specifically, in order to classify the beneficiary as a multinational manager or executive, the petitioner must establish that it is a multinational entity. The regulation at 8 C.F.R. § 204.5(j)(2) states that a multinational entity is one that "conducts business in two or more countries, one of which is the United States." The regulation at 8 C.F.R. § 204.5(j)(2) also 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 ample documentation, per the director's request, to establish that it has been doing business in the United States, the documentation submitted to establish that the foreign entity is doing business is not sufficient, as it consists primarily of untranslated foreign documents and excerpts of foreign document translations. The regulation at 8 C.F.R. § 103.2(b)(3) states that any foreign documents the petitioner submits must be accompanied by certified translations. As the petitioner has not provided adequate

documentation, the AAO cannot conclude that the foreign entity continues to do business such that the U.S. petitioner can be deemed to be multinational.

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.

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.

Lastly, counsel makes a brief reference to the petitioner's current approved L-1 employment of the beneficiary. The AAO notes, however, 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. USCIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. The approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. USCIS 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 USCIS 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.