

Identifying data deleted to
prevent unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B4

FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER
LIN 07 089 50435

Date: **APR 03 2009**

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: SELF-REPRESENTED

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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting 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 a New York corporation seeking to employ the beneficiary as its manager 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.

The director denied the petition based on the determination that the petitioner failed to establish that the beneficiary was employed abroad by a qualifying foreign employer for the requisite one year during the three-year period prior to entering the United States to work for the petitioner or its subsidiary or affiliate.

On appeal, the petitioner disputes the director's conclusion, asserting that the beneficiary was employed by its foreign affiliate from 1997 to 1998. The petitioner's assertions will be fully addressed in the discussion below.

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 beneficiary was employed abroad by a qualifying entity. In support of the Form I-140, the petitioner provided a letter dated January 22, 2007 in which it claimed that its foreign affiliates include El Camerino Maquillaje C.A., Camerino San Ignacio C.A., and Secretos Del Maquillaje C.A., all located in Venezuela. Although the petitioner explained how the beneficiary came to work for the U.S. entity, discussed the beneficiary's qualifications for the proffered position, and briefly addressed the beneficiary's responsibilities within the U.S. entity, the petitioner did not claim that the beneficiary was employed abroad by an entity that has a qualifying relationship with the U.S. employer.¹ Furthermore, the petitioner provided a copy of the beneficiary's résumé, which indicates that the beneficiary's employment abroad included Tolo Construction and Remodeling Company in Venezuela from 1993-1999 and Sambil Parking Lot Corp. in Venezuela from 1999-2003. The petitioner neither claimed nor submitted evidence to indicate that it has a qualifying relationship with either of these employers.

Accordingly, on January 7, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, *inter alia*, evidence of the beneficiary's employment abroad establishing that the petitioner has a qualifying relationship with the beneficiary's foreign employer.

In response, the petitioner provided a letter dated January 14, 2008 asserting that the companies that are part of El Camerino Maquillaje Group, abroad and in the United States, are family-owned businesses. The petitioner further stated that the beneficiary and his wife came to the United States to help the family business establish a presence in the key Latin markets in the United States. Again, the petitioner neither claimed nor provided evidence to indicate that the beneficiary was employed abroad by any of the family-owned companies with which a qualifying relationship is claimed. The petitioner did not address the RFE request specified above.

On April 1, 2008, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed abroad by a qualifying entity.

On appeal, the petitioner provides a letter dated April 10, 2008 claiming that the beneficiary was employed abroad by Camerino from 1997 until 1998 as operations manager during the construction of the two stores. However, 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). In fact, in the present matter, the petitioner does not offer evidence to support the new claim regarding the beneficiary's foreign employment. Rather, the petitioner merely offers the new claim without supporting evidence or even an explanation as to why this claim is inconsistent with claims that were previously made. Going on record without

¹ *See* 8.C.F.R. § 204.5(j)(2) for the definition of *affiliate*.

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)). Moreover, 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). Accordingly, under the circumstances, the AAO need not and does not consider the new claim the petitioner has offered on appeal.

Additionally, the petitioner submitted a second letter dated April 8, 2008, claiming that the requirements set out in 8 C.F.R. § 204.5(j)(3)(i)(B) have been satisfied. The AAO finds that the following subsections of 8 C.F.R. § 204.5(j)(3)(i) are relevant:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity;
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity[.]

In light of the above, even if the AAO were to consider the petitioner's new claim on appeal, i.e., that the beneficiary was employed by El Camerino Maquillaje C.A. from 1997 to 1998, there is no evidence that this was the relevant one-year time period during which the alleged employment must have occurred. To explain further, the provisions of 8 C.F.R. § 204.5(j)(3)(i)(B) apply only to those aliens who are "already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas." In the present matter, the record indicates that the beneficiary entered the United States as an L-2 spouse or dependent of an L-1 nonimmigrant.

While the beneficiary may be currently employed by the U.S. petitioner, there is no evidence that he entered the United States for this purpose. In fact, the beneficiary's 2004 W-2 statement shows that he was employed by Multihulls Unlimited, Inc. in 2004. As such, the provisions at 8 C.F.R. § 204.5(j)(3)(i)(A) would apply and the petitioner would have the burden of establishing that the beneficiary's one year of qualifying employment abroad occurred during the three-year period prior to the filing date of the current Form I-140. The record shows that the Form I-140 was filed on January 29, 2007. Therefore, the relevant three-year time period is from January 2004 through January 2007, a time period during which the petitioner claims the beneficiary was already residing in the United States. As such, even if the petitioner submitted sufficient evidence supporting the claim that the beneficiary was employed abroad by a qualifying employer from 1997 to 1998 and the AAO were to consider the claim and supporting evidence, the petitioner would still fall short of meeting the provisions specified in 8 C.F.R. § 204.5(j)(3)(i)(A).

Regardless, the petitioner was notified of a significant deficiency and was allowed the opportunity to respond to that deficiency. As the petitioner failed to do so, the AAO will not accept the new claim offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764. Consequently, the appeal will be dismissed.

Furthermore, while not specifically addressed by the director, the petitioner also failed to meet the requirements of 8 C.F.R. § 204.5(j)(3)(i)(C), which states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer, or the requirements of 8 C.F.R. § 204.5(j)(5), which requires that the petitioner provide a detailed description of the beneficiary's proposed employment to establish that the beneficiary would primarily perform job duties within 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 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.

ORDER: The appeal is dismissed.