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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

[REDACTED]

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FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: **AUG 13 2009**  
LIN 07 221 53628

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:

[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.

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 petitioner's motion to reopen the proceeding was subsequently granted resulting in the director issuing a new adverse decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporate entity engaged in the manufacture and distribution of gas-powered garden equipment. It seeks to employ the beneficiary as its senior purchasing agent. 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 initially denied the petition based on three independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and 3) the petitioner failed to establish that it had a qualifying relationship with the beneficiary's foreign employer at the time the Form I-140 was filed. With regard to the first two issues, the director specifically noted that the petitioner failed to respond to the prior notice requesting additional evidence. The director cited 8 C.F.R. § 103.2(b)(14), which states that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition.

On motion, counsel referred to the petitioner's response to the notice of intent to deny, arguing that the director's concerns were duly addressed in the petitioner's timely filed submissions.

In response to the petitioner's motion, the director issued a new decision issuing the following two findings regarding the petitioner's ineligibility: 1) the petitioner failed to establish that it had a qualifying relationship with the beneficiary's foreign employer at the time the Form I-140 was filed; and 2) the petitioner failed to establish that the beneficiary would be employed as a functional manager in his proposed position with the U.S. entity.

On appeal, counsel submits an appellate brief disputing each ground as a basis for denial.

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 had a qualifying relationship with the beneficiary's foreign employer at the time the Form I-140 was filed.

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 July 23, 2007 in which the beneficiary's foreign employer was identified as Electrolux Kelvinator Limited, located in India. The petitioner claimed that the beneficiary was employed by the foreign entity from June 2004 until July 7, 2005 at which time the foreign entity was sold to another entity.

On May 30, 2008, the director issued a notice of intent to deny the Form I-140 asking the petitioner to provide evidence to establish that a qualifying relationship existed between Electrolux Kelvinator Limited and the beneficiary's U.S. employer at the time the Form I-140 was filed in July 2007.

In response, the petitioner provided a letter from counsel, dated June 26, 2008, asserting that the director's intent notice erroneously cites 8 C.F.R. § 204.5(j)(3)(i)(C), rather than 8 C.F.R. § 204.5(j)(3)(i)(B) as controlling authority in the present matter. In response, the AAO notes that 8 C.F.R. § 204.5(j)(3)(i)(B) and 8 C.F.R. § 204.5(j)(3)(i)(C) are similarly controlling in every filing of a Form I-140 petition in that each regulation specifies a different regulatory requirement the petitioner must meet in order to merit approval of a petition. The former requirement addresses the relevant time period during which the beneficiary's employment abroad must have taken place, while the latter requirement addresses the issue of the qualifying relationship the petitioner must have with the beneficiary's foreign employer at the time the Form I-140 is filed. In the present matter, there is no dispute as to whether the beneficiary was employed abroad during the requisite three-year time period. Therefore, the provisions described in 8 C.F.R. § 204.5(j)(3)(i)(B) are not at issue.

Counsel also focuses on the petitioner's continued presence abroad, indicating that the petitioner's ongoing foreign operations are sufficient to establish the necessary qualifying relationship that is required by regulation.

On July 9, 2008, the director denied the petition, concluding that the necessary qualifying relationship between the beneficiary's foreign and prospective employers was not present at the time the Form I-140 was filed. The director also concluded, in error, that the petitioner failed to respond to the previously issued notice of intent.

Accordingly, the director reopened the proceeding and issued a new decision on September 4, 2008, again concluding that the petitioner failed to establish that it had a qualifying relationship with the beneficiary's foreign employer at the time the Form I-140 was filed. The director specifically addressed counsel's citing to 8 C.F.R. § 204.5(j)(3)(i)(B), explaining that this section of the regulations is not to be construed as creating an exception that allows petitioners of Form I-140s to qualify for the immigration benefit sought herein without first establishing that eligibility existed at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

On appeal, counsel does not dispute the director's factual conclusion, but asserts that the director's finding does not render the petitioner ineligible, as the key issue is not whether the qualifying relationship between the beneficiary's foreign and proposed U.S. employers existed at the time of filing, but rather, whether such relationship existed at the time of the beneficiary's employment abroad. The AAO finds counsel's arguments unpersuasive and contrary to the current regulatory requirements.

The current regulations expressly state that the petitioner must establish that the beneficiary's "prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity" which employed the beneficiary abroad. 8 C.F.R. § 204.5(j)(3)(i)(C). The regulation's use of the word "is" prescribes that the relationship between the petitioner and the beneficiary's foreign employer must exist in the present, i.e., at the time of filing, and continue to exist until such time as the beneficiary is granted an immigrant visa or adjusts status

to that of a permanent resident of the United States. The petitioner's burden of establishing eligibility for the benefit sought is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

In direct contradiction to the express language in the relevant regulatory provision, counsel's faulty reasoning focuses on the petitioner's circumstances prior to the filing of the Form I-140, thereby suggesting that eligibility need not be present at the time of filing so long as the petitioner established that it met the relevant regulatory provisions at some other time. This line of reasoning suggests that once a qualifying relationship is established as having existed, the petitioner can continue relying on that old qualifying relationship for a petition filed in the future, even if the relationship has ceased to exist at the time of filing, as is the case in the present matter. The AAO cannot, however, adopt counsel's interpretation. Precedent case law specifically instructs against such unsound logic by specifically requiring that each petitioner establish its eligibility at the time of filing. *Matter of Katigbak*, 14 I&N Dec. at 49.

The facts presented by the petitioner in this matter indicate that the circumstances that would have rendered the petitioner eligible for the immigration benefit sought did not occur contemporaneously with the filing of the Form I-140. Rather, by the time the petitioner filed the Form I-140, it was no longer eligible for the immigration benefit it was seeking by virtue of the sale of the beneficiary's foreign employer by the entity that previously owned it and the beneficiary's current U.S. employer. It would be factually impossible for the petitioner to establish an ongoing qualifying relationship with a foreign entity that is no longer owned and controlled by the same entity as the current U.S. employer.

Counsel also cites *Matter of Chartier*, 16 I&N Dec. 284 (BIA 1977), arguing that this case supports counsel's assertion that a nonimmigrant petitioner is not required to establish that it has an active office abroad. However, counsel's reliance on this precedent decision in this matter is misplaced. First, *Matter of Chartier* is a removal decision regarding an alien beneficiary previously granted L-1A nonimmigrant status, not an alien beneficiary of an immigrant preference petition. There are significant differences between the requirements for the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and the requirements for 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.

Second, the BIA's principal concern in *Matter of Chartier* was the imposition of a requirement that the U.S. employer have "a subsidiary or affiliate in Canada." 16 I&N Dec. at 286. The AAO agrees that neither the statute nor the current regulations require that a U.S. petitioner have a subsidiary or an affiliate abroad in either the L-1 or multinational immigrant petition context. As the current regulations at 8 C.F.R. §§ 204.5(j)(3)(C), 214.2(l)(1)(i), 214.2(l)(1)(ii)(G), and 214.2(l)(3)(i) clearly indicate, a beneficiary may be employed by the "same employer" (immigrant context) or by a "branch" of the same employer (nonimmigrant context).

It appears that counsel has misconstrued the holding in *Matter of Chartier*. In *Matter of Chartier*, the alien beneficiary's employer in Canada is the same employer in the United States by virtue of being a branch of the same office. 16 I&N Dec. at 284 – 285. That being said, all that would be

necessary in such a scenario is for the petitioner to also be a multinational entity that conducts business through an affiliate or subsidiary in two or more countries, one of which is the United States. *See* 8 C.F.R. § 204.5(j)(2) (definition of "Multinational").

In this matter, it is recognized that the petitioner continues to conduct business in two or more countries, one of which is the United States. However, the issue here is not whether the petitioner meets the definition of multinational under 8 C.F.R. § 204.5(j)(2), but whether it maintained (at the time the petition was filed) and continues to maintain a qualifying relationship with the separate legal entity that employed the beneficiary abroad. The current regulations expressly state that the petitioner must establish the beneficiary's "prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity" which employed the beneficiary abroad. 8 C.F.R. § 204.5(j)(3)(i)(C). Both counsel and the petitioner readily admit that the petitioner did not have the requisite qualifying relationship at the time of filing. Therefore, based on this initial ground of ineligibility, this petition cannot be approved.

The second issue in this proceeding is whether the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

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

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.

The petitioner's July 23, 2007 letter, which was previously referenced, included the following list of the beneficiary's proposed duties and responsibilities:

1. Handle long-term purchasing;
2. Identify, validate and finalize suppliers;
3. Identify commodities feasible for Low Cost Country sourcing;
4. Develop strategic plans, objectives and goals;
5. Establish procurement budget based on model year production plan;
6. Develop operating policies, guidelines and procedures;
7. Review and sign Engineering Change Orders (ECOs);
8. Serve as liaison between suppliers and [the q]uality [c]ontrol department;
9. Authorize payment and [a]ccounts [p]ayable within their limits;
10. Conduct supplier audits as needed;
11. Implement supplier changes, monitor their success or failure, and make adjustments as needed;
12. Become familiar with new technology that would be of use in a production manufacturing facility;
13. Perform all price negotiations and meet [c]orporate [t]argets;
14. Work with [m]aterial [m]anagement to improve sourcing and supplier base;

15. Work with [the c]orporate [c]ommodity [m]anager on certain products and enforce [c]orporate [c]ontracts with [the s]upply [c]hain;
16. Communicate with [p]roduction [c]ontrol, [s]ales and [d]esign [e]ngineering to ensure new and exiting products have continuous flow, and reduce [the] company's overall risk exposure;
17. Responsible for supplier consolidation within the specified commodity;
18. Provide quarterly status reports on reductions, supplier delivery, and inventory; and
19. Work with [q]uality [a]ssurance on quality problems with subcontractors.

In the notice of intent, the director instructed the petitioner to provide a more detailed description of the beneficiary's foreign employment, disclosing specific daily job duties as well as the percentage of time dedicated to each job duty. The petitioner was also asked to provide a detailed organizational chart illustrating the hierarchy of the foreign entity at the time of the beneficiary's employment accompanied by job descriptions for the beneficiary's supervisor and any subordinate employees he may have had.

In the June 26, 2008 response letter, counsel claimed that the beneficiary was employed as a function manager in his position abroad. Counsel argued that U.S. Citizenship and Immigration Services (USCIS) accepted this claim on prior occasions, relying on the prior approvals of the petitioner's nonimmigrant petitions as evidence that the beneficiary's position abroad was within a qualifying capacity. Counsel further argued that the petitioner has relied on USCIS's prior determinations and that such determinations should therefore be given deference in issuing the current decision.

Additionally, the petitioner provided supporting evidence, including a breakdown of the job duties the beneficiary performed during his employment abroad. The petitioner claimed that 50% of the beneficiary's time involved long-term purchasing duties, including non-qualifying duties such as conducting analysis to identify potential business opportunities from low cost countries, generating requests for quotes, identifying suppliers for specific requests for quotes and matching the right supplier with the plant purchasing manager based on specific qualifying parameters, preparing and signing agreements, and develop payment, quality, pricing, and delivery issues, all of which cumulatively consumed approximately three hours and sixteen minutes. The petitioner claimed that another two hours, or 25% of the beneficiary's time, was spent identifying, validating, and finalizing low cost country commodities suppliers, which involved similar job duties as those associated with long-term purchasing. Another 12.5% of the beneficiary's time was allotted to forming company policies and business strategies, which were determined by reviewing Asia Pacific marketing conditions, supplier updates, available technology and skill level, employment rate, raw materials rates and availability, local trade shows and other information needed to enable senior management to make long-term sourcing strategies. The remaining 12.5% of the beneficiary's time was spent on duties related to e-auctioning, including collecting requests for quotes, narrowing down the lists of suppliers, setting up and executing e-auctions, and summarizing the auction results for senior management.

The petitioner also provided a copy of the organizational chart pertaining to the purchasing department where the beneficiary was employed. The chart shows that the purchasing director was at the top of the hierarchical chain with respect to the purchasing function; the director's subordinates include an administrative assistant and two senior purchasing agents, one of whom was occupied by the beneficiary. Neither the broader organizational chart showing all of the main departments, nor the organizational chart pertaining specifically to the beneficiary's function shows any other employees performing key operating tasks within the purchasing department.

In the latest adverse decision, dated September 4, 2008, the director found that the petitioner failed to provide evidence establishing that he managed an essential function.

On appeal, counsel asserts that the beneficiary exercised wide discretion over vendor management and commodities acquisition. However, the petitioner must establish that the primary portion of the beneficiary's time was spent managing an essential function rather than performing the underlying duties associated with that function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). While counsel places great emphasis on the beneficiary's discretionary authority, the AAO cannot overlook the remainder of the statutory requirements, including the requirement that a function manager must function at a senior level with respect to the function managed. Section 101(a)(44)(A)(iii). In the present matter, the organizational hierarchy illustrated in the chart that was submitted in response to the notice of intent indicates that the beneficiary was not operating at a senior level with respect to the purchasing function. Rather, the chart clearly indicates that the director of the purchasing department was at the senior level with respect to the function and, according to the description of the beneficiary's job duties, the beneficiary spent the majority of his time carrying out the underlying tasks associated with that function. Regardless of the beneficiary's wide use of discretionary authority, the beneficiary's job duties and his actual placement within the foreign entity's organizational hierarchy indicate that the beneficiary was not employed in a managerial or executive capacity. For this additional reason, this petition cannot be approved.

Lastly, as stated by the director in his prior decision, counsel's reliance on the beneficiary's previously approved nonimmigrant status was erroneous, as the lack of a qualifying relationship between the beneficiary's foreign and U.S. employers indicates that approval of the prior nonimmigrant petitions was not warranted. 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). Furthermore, 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).

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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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.