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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **JUL 28 2009**
LIN 08 054 51085

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

The petitioner is a limited liability company engaged in the business of providing financing, leasing, insurance concepts, and fleet management services. The petitioner seeks to employ the beneficiary as its vice president. 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 conclusion that the petitioner did not have a qualifying relationship with the beneficiary's foreign employer at the time of filing.

On appeal, counsel disputes the director's conclusion, arguing that the reasoning that served as the basis for the denial was flawed.

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 matter is whether the petitioner continues to have a qualifying relationship with the foreign entity that previously employed the beneficiary.

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 October 29, 2007 stating that the beneficiary's employer abroad "served" as the parent company of the beneficiary's current employer.

On May 5, 2008, the director issued a request for additional evidence (RFE) indicating that the restructuring of the beneficiary's former employer had given rise to questions regarding the continued existence of a qualifying relationship between the beneficiary's former and petitioning employers. The director instructed the petitioner to clarify how the restructuring of the beneficiary's former employer affected its affiliate relationship with the petitioning entity. The petitioner was asked to provide evidence establishing that a qualifying relationship continues to exist between the beneficiary's former and proposed employers.

In response, counsel provided a letter dated June 13, 2008, explaining that the beneficiary's current U.S. employer was an affiliate of the foreign entity that previously employed him. Counsel also claimed that the beneficiary's current employer should be considered a successor in interest to the corporation with which the beneficiary's employer abroad was previously affiliated. Among the supporting documents, the petitioner provided the Chrysler Financial corporate history, expressly stating that in 2007 the beneficiary's current U.S. employer became a "standalone company."

In a decision dated July 18, 2008, the director denied the petition, concluding that the petitioner's qualifying relationship with a qualifying foreign entity ceased to exist when the beneficiary's former employer abroad sold its interest in the beneficiary's current U.S. employer to another company. The director explained that in the context of an employment-based immigrant petition, the petitioner must provide evidence to establish that a qualifying relationship with the beneficiary's foreign

employer existed at the time the petition was filed. The director expressly rejected counsel's reliance on an unpublished decision as binding on the outcome in the present matter. The director also rejected counsel's reference to regulatory provisions concerning nonimmigrant petitions in adjudicating a matter concerning an immigrant petition.

On appeal, counsel disputes the director's decision, asserting that the director placed undue emphasis on the fact that the petitioner did not have a qualifying relationship with the beneficiary's employer abroad at the time of filing. Counsel also points out that the restructuring of the petitioning entity had no impact on the beneficiary's position with the petitioning entity and further asserts that the beneficiary's current and former employers should be considered to be the "same employer" as statutorily required. *See* section 203(b)(1)(C) of the Act. Counsel's reasoning, however, is not consistent with relevant regulatory requirements and, therefore, is not persuasive.

First, it is important to note that despite the fact that the petitioner continues to conduct business in two or more countries, one of which is the United States, the key issue in the present matter 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. As properly pointed out by the director, the regulations pertaining to the immigrant petition filed by the current petitioner are sufficiently clear in requiring 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 it must 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 the former 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 expressly requiring that each petitioner establish its eligibility at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Second, while the AAO agrees with the director's prior rejection of the petitioner's reliance on unpublished decisions, it is important to further clarify the inherent and significant distinction between the current situation, where a previously existing qualifying relationship was severed prior to the filing of the petition, and the sample situation described in counsel's brief, where two companies that did not have a qualifying relationship at the time of the beneficiary's employment abroad eventually formed such a relationship by the time the petition was filed. The AAO's prior

finding that the employer in the latter situation is eligible is consistent with the finding that the current petitioner, which is most like the employer described in the first scenario, is not eligible for the same benefit. The consistency lays primarily in the AAO's application of the express language of the relevant regulatory provision, which requires the petitioner to 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). In other words, so long as the requisite qualifying relationship exists at the time of filing the Form I-140, the petitioner may be able to establish eligibility, even if it may have been ineligible for the same benefit at the time of the beneficiary's actual employment abroad.

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 foreign entity's sale of the beneficiary's U.S. employer to another company, thus severing the qualifying relationship that previously existed.

Third, counsel's repeated references to regulations pertaining to L-1A nonimmigrant petitions are irrelevant in the present matter, where the petitioner seeks to employ the beneficiary permanently in an immigrant classification. While the AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity, the regulations that apply to each type of classification are distinct and are not interchangeable as counsel's arguments suggest. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). For example, the multinational immigrant regulations at 8 C.F.R. § 204.5 require that a petitioner be a "United States employer" and that this employer establish its ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2) and 204.5(j)(1). In addition, L-1B specialized knowledge employees are not eligible for an immigrant visa under section 203(b)(1)(C) of the Act.

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. U.S. Citizenship and Immigration Services (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). The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of a prior approval of a nonimmigrant petition. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). This is particularly relevant in the present matter where the ownership of the U.S. petitioner changed over the course of time, leaving a previously eligible petitioner ineligible as a result of such change.

Lastly, counsel asserts that the entity that bought the beneficiary's current U.S. employer should be considered a successor in interest to the corporation with which the beneficiary's employer abroad was previously affiliated. Counsel's assertion, however, is entirely irrelevant to the matter at hand.

In fact, counsel's discussion of a successor in interest implies that there is some question as to the existence of the beneficiary's foreign and/or U.S. employer. However, neither the director nor the AAO has expressed doubt as to either entity's continued existence. That being said, the mere fact that both the petitioning U.S. employer and the former foreign employer continue to exist does not mean that they continue to have the requisite qualifying relationship. Nor does the "Master Private Label Financing Agreement," which shows that the beneficiary's petitioning and former employers continue to do business with one another, establish the existence of a qualifying relationship. More specifically, the regulations 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 Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988). In the context of this 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 at 595. Here, the U.S. petitioner was purchased by a company that does not share common ownership and control with the beneficiary's foreign employer. Accordingly, as the petitioner did not have a qualifying relationship with the beneficiary's foreign employer at the time the Form I-140 was filed, this petition cannot be approved.

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.