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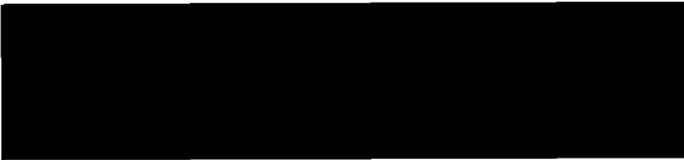
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**U.S. Department of Homeland Security**  
U. S. Citizenship and Immigration Services  
*Office of Administrative Appeals* MS 2090  
Washington, DC 20529-2090



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

B4



FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: **AUG 02 2010**

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:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
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 organized in the State of Delaware. It seeks to employ the beneficiary in the position of managing director. 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 determined that the petitioner did not have a qualifying relationship with the beneficiary's foreign employer at the time of filing and is therefore ineligible for the immigration benefit sought in the present matter.

On appeal, counsel disputes the director's conclusion and submits a brief accompanied by supplemental documents in support of her assertions.

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 had a qualifying relationship with the beneficiary's foreign employer at the time of filing.

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 November 6, 2008 in which the petitioner's relationship with the beneficiary's foreign employer was described as that of parent-subsidiary with the U.S. petitioner as the parent and the beneficiary's foreign employer as the petitioner's subsidiary. It is noted that the foreign entity was referred to as "the former Sydney subsidiary," which the petitioner indicated was closed down in 2007. The petitioner further indicated that it maintains affiliate relationships with the Tokyo and Hong Kong offices that continue to do business abroad.

In a decision dated April 6, 2009, the director denied the petition concluding that since the Australian entity was no longer in existence at the time the Form I-140 was filed, the petitioner does not meet the provisions of 8 C.F.R. § 204.5(j)(3)(i)(C).

In the appellate brief, counsel asserts that the beneficiary's foreign employer in Australia was in existence at the time of filing and supports this assertion by directing the AAO's attention to the foreign entity's annual tax returns. Counsel also asserts that at the time of filing the petitioner's Australian subsidiary continued to have assets and merely downsized in order to operate on a "minimal budget" while continuing to maintain a corporate presence. Counsel asks the AAO to review the Australian entity's financial documents, which she indicates will corroborate her assertions.

In the alternate, counsel asserts that the petitioner is not required to have a qualifying relationship with the beneficiary's foreign employer at the time of filing so long as it continues to have foreign affiliates. In support of her argument, counsel cites to *Matter of Chartier*, 16 I&N Dec. 284 (BIA 1977) and *Matter of Thompson*, 18 I&N Dec. 169 (Comm. 1981),<sup>1</sup> stating that even though both of the cited cases involved nonimmigrant L-1A intracompany transferees, they are nevertheless relevant in the current matter concerning a Form I-140 immigrant petition.

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<sup>1</sup> The Legacy Immigration and Naturalization Service found the decision in *Thompson* to be an inappropriate application of the holding in *Matter of Chartier*, 16 I&N Dec. 284 (BIA 1977) and overturned that decision by regulation. 52 Fed. Reg. 5738, 5741 (Feb. 26, 1987). The final rule defining qualifying organizations is set forth at 8 C.F.R. § 214.2(l)(1)(ii)(G). Therefore, counsel's reliance on *Matter of Thompson* is not persuasive.

In reviewing counsel's arguments, the AAO finds that the director's determination was properly made and need not be withdrawn.

With regard to counsel's assertion that the beneficiary's foreign employer continues to exist, the AAO first notes that going on record without 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)). It is further noted that the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). While counsel contends that the documents submitted on appeal establish that the beneficiary's foreign employer continues to exist, the AAO finds that the submitted documents do not support counsel's assertion. Namely, the petitioner submits the 2008 and 2007 tax returns for its Hong Kong subsidiary Evo Capital Management Asia Limited and the 2007 tax return for its Sydney, Australia subsidiary by the same name, the latter of which previously employed the beneficiary. However, none of these documents establish that the beneficiary's former employer abroad, i.e., the Australian entity, was in existence as of November 10, 2008 when the Form I-140 was filed.

While counsel presumably implies that the submission of the Australian entity's 2007 tax return establishes its corporate existence in 2007, despite the statements made in the petitioner's original support statement, it is possible and quite likely that the Australian entity continued to exist for a portion of the 2007 tax year, thereby explaining why an entity that ceased its corporate existence in 2007 would still have a need to file a 2007 tax return. Regardless, the Australian entity's 2007 tax return does not establish that it continued to exist as a corporate entity in November 2008 when the petition was filed. Similarly, the submission of 2008 tax returns for an entirely separate entity, despite its corporate relationship to the petitioner, does not establish that the beneficiary's foreign employer had a corporate existence in 2008. In summary, the documents submitted on appeal are irrelevant, as they either address a time period that is not in contention or they were filed by a foreign entity that did not employ the beneficiary during the time period in question. Therefore, the petitioner's documents do not support counsel's claim that the beneficiary's foreign employer continued to exist at the time of filing.

With regard to counsel's reliance on *Matter of Chartier* the AAO finds that such reliance in the present 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.

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, an intracompany transferee may be employed by the "same employer" (immigrant context) or by a "branch" of the same employer (nonimmigrant context).

Although counsel did not specifically explain her argument, it is presumed that her goal in relying on *Matter of Chartier* it is to establish that the precedent decision permits the closing of the business entity abroad where the beneficiary was previously employed so long as the U.S. employer maintains foreign operations through

another affiliate abroad. In support of this assertion, counsel also makes a general reference to "the Service's comments to the 1987 L regulations." *Appeal to Administrative Appeals Office/Motion to Reopen/Reconsider*, p. 7.

It appears that counsel has misconstrued both the supplemental information, which is found in 52 Fed. Reg. 5738 (Feb. 26, 1987), and 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. 16 I&N Dec. at 284 – 285. While the employer in *Matter of Chartier* may not continue to employ anyone in Canada, the employer, which was a branch rather than an entity separate from the petitioner, did not cease to exist and, as such, it can be distinguished from the matter currently before the AAO where the adverse decision is premised on the finding that the beneficiary's foreign employer no longer exists. Counsel appears to confuse this issue, i.e., the continued existence of the beneficiary's employer abroad, with the separate issue of whether the "qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States." 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 the term *multinational* under 8 C.F.R. § 204.5(j)(2), but rather 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). The AAO finds that 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 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 ceases to exist at the time of filing due to some change in circumstances. Precedent case law specifically instructs against such an approach by specifically requiring that each petitioner establish its eligibility at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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 longer eligible for the immigration benefit it was seeking by virtue of the ceased legal existence of the beneficiary's foreign employer. It would be factually impossible for the petitioner to establish an ongoing qualifying relationship with a foreign entity that no longer exists. 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.