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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: TEXAS SERVICE CENTER Date: DEC 13 2013

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 \$630. 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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation that seeks to employ the beneficiary as its marketing 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. The director denied the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and 2) the petitioner failed to establish that it has been doing business in the United States.

On appeal, counsel asserts that the petitioner never stopped doing business, but rather merely experienced a slowdown in its business activity in 2005. He further states that the beneficiary fits the statutory definition for both managerial and executive capacity. Counsel's brief and relevant supporting documentation will be addressed in a full 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 first issue in this proceeding is whether the petitioner would employ the beneficiary 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.

In support of the Form I-140, the petitioner provided its organizational chart showing a hierarchy comprised of multiple managerial tiers, a sales and administrative staff, and bottom tier employees, including a messenger and two drivers. It is noted that of the twenty three positions included in the chart, nineteen positions were shown as being vacant and the only person actually named in the chart was the company's president, [REDACTED]. It is further noted that the beneficiary's proposed position of marketing manager is among the positions that is shown as vacant despite the fact that the petitioner's Form I-140 indicates that the beneficiary is currently present in the United States in the status of an L-1 nonimmigrant.

Additionally, the petitioner provided a description of the beneficiary's proposed employment, stating that the beneficiary oversees all marketing and public relations and is responsible for all financial reporting

requirements, financial planning, budgeting, and directing the daily operations of the marketing division. The petitioner provided the following list of the beneficiary's proposed job duties:

1. In consultation with the [p]resident [and e]xecutive [s]taff, [the beneficiary] will develop and implement goals, policies and priorities relating to the marketing and public relations function of the company.
2. Organizes, supervises, evaluates and provides for training and professional development of the supervisory and other staff of the [m]arketing [d]ivision.
3. Develops and administers processes and procedures for the implementation of division objectives.
4. Reviews, formulates, and supervises the preparation of all financial reports and statements.
5. Performs a variety of marketing and public relations activities including setting the marketing, advertising and public relations budget, meeting with executives regarding the company's advertisement placement.
6. Prepares a variety of complex analysis including legal requirements, accounting techniques, data processing, and statistical studies.
7. Responses [sic] to inquires [sic] from the [p]resident [and e]xecutive [s]taff and other division heads with regards to marketing, advertising and public relations issues.

On May 21, 2009, the director issued a decision denying the petitioner's Form I-140. In discussing the petitioner's supporting evidence, the director observed that the petitioner does not appear to be doing business and appears to have no employees for the beneficiary to oversee. The director concluded that the beneficiary would not be relieved from having to primarily perform daily operational tasks and therefore would not be employed in a managerial or executive capacity.

On appeal, counsel asserts that the beneficiary fits the criteria for managerial and executive capacity. In his brief, counsel asserts that there is no provision under either statutory definition requiring the beneficiary to oversee subordinate employees. While counsel's assertion is theoretically correct in that the beneficiary does not have to directly manage others, the petitioner must establish that the petitioner is adequately staffed with employees who would perform the non-qualifying functional and administrative tasks that are necessary for the petitioner's daily operation. Merely possessing a managerial or executive position title does not establish that the beneficiary would be employed in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003).

In the present matter, the petitioner has provided a supporting organizational chart that indicates the virtual absence of all staff. As previously noted, only the petitioner's president is expressly named in an organizational chart that shows most of the required positions, including the beneficiary's proposed position, as vacant. Counsel fails to clarify the practical application of the statutory criteria within the context of the petitioner's specific organizational hierarchy. In other words, it is unrealistic to put forth the claim that the beneficiary would primarily carry out qualifying managerial- or executive-level tasks when the petitioner has provided no evidence of an in-house staff or contractual workers who would perform the essential non-qualifying tasks. Moreover, counsel fails to take into account the beneficiary's job description, which expressly states that the beneficiary would supervise and train staff in the marketing division.

Additionally, while certain aspects of the proposed job description indicate that the beneficiary would oversee a particular function, such as the preparation of financial reports and statements, the underlying implication is that someone within the petitioner's organization actually prepares those reports and statements. In other words, regardless of whether the beneficiary would directly supervise subordinate employees, the petitioner would be unable to support the beneficiary in a managerial or executive capacity without the required personnel to actually execute the non-qualifying administrative and operational tasks that are necessary for the organization to function on a daily basis. While the AAO acknowledges that the beneficiary is not required to allocate 100% of her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to her proposed position. 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).

In the present matter, counsel contends that an economic downturn resulted in a staff reduction within the petitioner's organization. However, he maintains that because the statutory provisions do not require the beneficiary to manage subordinates, the proposed employment qualifies as a position within a managerial or executive capacity. Counsel's assertion, however, is not persuasive, as it fails to clarify how, in the absence of a support staff, the beneficiary would be relieved from having to primarily perform non-qualifying tasks. Therefore, regardless of the beneficiary's job description, the evidence of record simply does not support the petitioner's claim that the beneficiary would be employed in a qualifying managerial or executive capacity and therefore the petition cannot be approved.

The other issue in this proceeding is whether the petitioner has been doing business, which 8 C.F.R. § 204.5(j)(2) defines as 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 not fully clarified in the director's decision dated May 21, 2009, a complete analysis of whether an entity is doing business includes consideration of 8 C.F.R. § 204.5(j)(3)(i)(D), an initial filing requirement which states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140.

In the present matter, counsel claims that the petitioner's business activity merely slowed down but did not cease entirely. However, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Moreover, counsel's statement is in direct contradiction to the petitioner's own claim and supporting documentation. According to the petitioner's explanation at Exhibit LL, after 2005 the U.S. entity's "business operation ceased due to lack of executive

staff to direct and supervise the marketing, sales and overall functioning of the corporate activities in the United States." The record also includes a Certificate of Filing issued by the State of Texas for the purpose of reinstating the petitioner to active status as of November 26, 2007. Thus, based on the petitioner's explanation and the information provided in the Certificate of Filing, it appears that the petitioner was not in active business status and was not doing business, i.e., manufacturing and selling cosmetics products, from 2005 through November 26, 2007. Regardless of whether the petitioner has resumed business activity, the evidence of record indicates that the petitioner has not met the initial filing requirement discussed at 8 C.F.R. § 204.5(j)(3)(i)(D). Therefore, on the basis of this second ground of ineligibility, the instant petition cannot be approved.

Furthermore, while not previously addressed in the director's decision, the AAO additionally finds that the petitioner failed to meet the initial filing requirements specified at 8 C.F.R. §§ 204.5(j)(3)(i)(B) and (C).

First, with regard to 8 C.F.R. § 204.5(j)(3)(i)(B), which states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to her entry to the United States as a nonimmigrant to work for the same employer, the petitioner failed to specify the beneficiary's dates of employment abroad and it has failed to provide an adequate description of the job duties that were performed during the period of such employment. Without this highly relevant information, the AAO cannot conclude either that the beneficiary was employed by the foreign entity during the qualifying period or that she was employed in a primarily managerial or executive capacity during the period of her overseas employment.

Second, with regard to 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, the key to meeting this requirement is establishing that the petitioner and the claimed foreign employer are similarly owned and controlled. *See Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the present matter, while the petitioner provided a copy of its articles of incorporation, which establishes the number of authorized shares the petitioner may issue, the record is silent as to the number of shares that were actually issued and the identity of the recipient(s) of those shares. 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)). Without the necessary documentation establishing who owns and controls the petitioning entity, the AAO cannot conclude that the petitioner has the requisite qualifying relationship with the beneficiary's foreign employer.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (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.

As a final note, on appeal counsel makes references to the petitioner's current approved L-1 employment of the beneficiary. First, in light of the information provided by the petitioner in this proceeding with regard to its inactive business status since the approval of the beneficiary's L-1 employment, it appears that the

petitioner's Form I-129 was approved in error. 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). Second, it is noted that each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof. Thus, 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. Furthermore, the approval of a nonimmigrant petition, particularly one that was approved in error, 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).

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).

Accordingly, the instant 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.