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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:

DEC 13 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:

[REDACTED]

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. The fee for filing a Form I-290B is \$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, Nebraska Service Center, on March 26, 2009. The director reopened his initial decision and denied the petition again in a second decision dated June 24, 2009. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a limited liability company that was organized in the State of Arizona. It seeks to employ the beneficiary as its president and chief executive officer. 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 failed to establish that it had a qualifying relationship with the beneficiary's foreign employer at the time of filing and denied the petition on that basis.

On appeal, counsel disputes the denial in an appellate brief and submits evidence in support of his 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 a qualifying relationship existed between the petitioner and the beneficiary's foreign employer on June 23, 2008, when the petition was filed, and continues to exist.

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 June 9, 2008 in which the beneficiary, on behalf of the petitioner, stated that he is sole owner of the petitioner and that he was majority owner of [REDACTED] until he sold his controlling interest in 2004 and purchased a controlling interest in another restaurant establishment in South Africa. The beneficiary acknowledged that the qualifying relationship with his employer abroad was severed as a result of the sale of his controlling interest in the foreign entity. However, the beneficiary asserted that his purchase of a controlling interest in another foreign entity enabled the petitioner to meet the qualifying relationship requirement. The support letter references 8 C.F.R. § 214.2(l), which pertains to a nonimmigrant visa for an intracompany transferee. The beneficiary asserts that the definition of the term "qualifying organization" does not preclude the sale of the foreign employer so long as the petitioner continues to do business abroad through another foreign affiliate entity.

On February 5, 2009, the director issued a notice of intent to deny (NOID) the petition. The director explained that the basis for the NOID was the petitioner's severed qualifying relationship with the beneficiary's foreign employer. The director quoted the AAO's finding in an unpublished decision where the relevant facts were analogous to those presented in this matter. The director pointed out that the AAO's dismissal of the appeal in the unpublished case was based on the petitioner's severed relationship with the beneficiary's employer abroad.

In response to the NOID, counsel for the petitioner submitted a letter dated March 2, 2009, challenging the basis for the intended denial. Counsel referred to a service memorandum that incorporated a relevant section of U.S. Citizenship and Immigration Services' Standards of Operations (SOP) as well as revised portions of the Adjudicator's Field Manual (AFM) in support of the argument that the continued existence of the beneficiary's foreign employer is not a prerequisite for meeting the qualifying relationship eligibility requirement for the immigrant classification sought herein. Copies of both documents have been appended to counsel's response to the NOID.

On March 26, 2009, the director issued a decision denying the petition. The director questioned counsel's reasoning and rejected the AFM and the SOP as sources of authority in support of such reasoning. Specifically, the director focused on the notices that accompanied both the AFM and the SOP, pointing out

that the notice in the SOP stated that the SOP is merely a guidance tool that is meant to create consistency in the processing of Form I-140 visa petitions. The SOP notice expressly stated that "[t]he SOP is not intended to be, and should not be taken as, an authoritative statement of the rules of decision for Form I-140 visa petition cases." The director pointed that the AFM incorporated a similar notice, which stated that the contents of the manual do not "create any substantive or procedural right or benefit that is legally enforceable" and further clarified that the AFM "is intended solely for the training and guidance of USCIS personnel in performing their duties." The director also referred to a December 7, 2000 memorandum from the then-Acting Associate Commissioner Thomas Cook, who clarified that the statute, regulations, precedent AAO decisions, and policy memoranda are the four official authoritative sources for USCIS policy.

On appeal, counsel questions the director's reluctance to rely on the AFM and SOP as authoritative sources for USCIS policy. Counsel also cites AFM section 3.4, which draws a distinction between USCIS correspondence and USCIS policy material, noting that the latter is binding on all USCIS officers while the former is not. However, the AAO finds that counsel's emphasis on the SOP and AFM is misplaced. Regardless of whether these materials support counsel's interpretation, either the Act or Title 8 of the Code of Federal Regulations would supersede any conflicting instructions contained within the SOP and the AFM.

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). As properly pointed out by the director, 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).

While counsel points out that the petitioner became affiliated with another foreign entity after its affiliation with the beneficiary's foreign employer was severed, this point indicates that counsel has confused the issue of the continued existence of the beneficiary's employer abroad with the separate issue of whether the petitioner meets the definition of multinational, which requires that 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). Counsel's reasoning suggests that merely meeting the definition of multinational is sufficient for the purpose of establishing the existence of the requisite qualifying relationship. While there is a certain degree of overlap between a multinational entity and a qualifying organization, these two concepts are not synonymous.

According to the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G), an entity is deemed as a qualifying organization when it meets the requirements that are specified at section 101(a)(15)(L) of the Act, which requires the petitioner to establish that the beneficiary "seeks to enter the United States in order to continue to render his services to the same employer or a subsidiary or affiliate" of the foreign entity where the beneficiary had been employed within three years prior to seeking admission to the United States. A similar provision is found at

section 203(b)(1)(C) of the Act. This section of the Act also requires the petitioner to establish that the beneficiary who seeks classification as a multinational manager or executive is entering the United States "in order to continue to render services to the same employer or to a subsidiary or affiliate thereof." The use of the word "continue" in both sections of the Act is significant, as it clarifies that merely establishing that the petitioner is a multinational entity is insufficient. Rather, the petitioner must maintain an affiliation with the entity that previously employed the beneficiary.

In the present matter, the affiliate relationship that existed between the petitioner and the beneficiary's employer prior to the date the Form I-140 was filed ceased to exist when the beneficiary sold his controlling interest of that foreign entity. As common ownership and control are both required for the purpose of establishing a qualifying relationship, the changed ownership that resulted from the sales transaction effectively severed the previously existing qualifying relationship between the petitioner and the beneficiary's foreign employer. The fact that the petitioner had a qualifying relationship with the beneficiary's foreign employer some time in the past is entirely irrelevant, as precedent case law specifically finds that eligibility must be established at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Here, by the petitioner's own admission, the petitioner did not have the requisite qualifying relationship with the beneficiary's foreign employer at the time the Form I-140 was filed. Therefore, the petitioner is ineligible for the immigration benefit sought herein and the petition cannot be approved.

Additionally, in the latest decision dated June 24, 2009 the director questioned the terms of the franchise agreement into which the petitioner had previously entered, noting that the beneficiary can be deemed as someone employed in a managerial or executive capacity provided that the beneficiary has ultimate control over his own food service business. The AAO finds that, regardless of the terms of the franchise agreement, the petitioner failed to establish that the primary portion of the beneficiary's time with the U.S. entity would be spent within a qualifying managerial or executive capacity. Simply establishing that the beneficiary has control over the petitioner is insufficient to determine whether the beneficiary's proposed employment would be within a managerial or executive capacity. Rather, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law has established that the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). That being said, the AAO notes that while no beneficiary is required to allocate all of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to his/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, a considerable portion of the beneficiary's time would be consumed with various administrative, operational, and otherwise non-qualifying tasks. Thus, regardless of the beneficiary's degree of control over the petitioning entity, the petitioner has not established that the beneficiary's time would be primarily allocated to tasks within a qualifying managerial or executive capacity.

The AAO further finds the record lacking in sufficient evidence establishing that the petitioner meets the regulatory provisions cited at 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 his entry into the United States as a nonimmigrant to work for the same employer. While the petitioner provided a percentage breakdown in its June 9, 2008 support letter, the information provided is overly vague about the underlying tasks associated with the broad job responsibilities that have been listed. For instance, the petitioner failed to specify the beneficiary's specific role with respect to accounting, budgeting, cost control, and payroll. It is unclear whether the beneficiary was overseeing others who performed these tasks or whether he was the individual carrying out the underlying duties.

Furthermore, the beneficiary appears to have been carrying out sales- and marketing-related tasks, which are deemed operational and therefore non-qualifying. Similarly, engaging in vendor negotiation and meeting with suppliers are also operational tasks. Additionally, while the petitioner indicated that the beneficiary was overseeing the ordering of supplies and equipment and invoicing, no specific information was provided to explain exactly what tasks these supervisory tasks entailed. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In summary, the petitioner's description of the beneficiary's foreign employment does not establish that the beneficiary spent the primary portion of his time performing tasks 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 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.

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.