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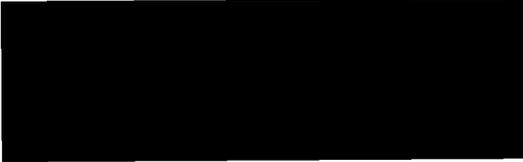
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER
WAC 07 261 50826

Date: **MAR 12 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: SELF-REPRESENTED

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

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 an Indiana corporation that seeks to employ the beneficiary as its 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 two independent grounds of ineligibility: 1) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, the petitioner disputes the second ground for the director's denial, claiming that the beneficiary does not produce goods or provide services, but rather that he carries out managerial duties.

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 has a qualifying relationship with the beneficiary's foreign employer.

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.

The record in the present matter contains copies of documents submitted by the petitioner in support of a Form I-129 nonimmigrant petition seeking to classify the beneficiary as an L-1A intracompany transferee. The supporting documents included the petitioner's articles of incorporation, indicating that the petitioner was authorized to issue 1,000 shares; the petitioner's certificate of incorporation, showing that the petitioner incorporated in the State of Indiana on September 16, 2004; and stock certificates 1 and 2, issuing ██████████ ██████████ of Canada and ██████████ ██████████ of Canada, respectively, 500 shares each. The record also indicates that in response to a request for additional evidence (RFE), which was issued on October 30, 2008, the petitioner submitted a 2007 tax return, including Schedule E, where the beneficiary was identified as 100% owner of the petitioning entity.

Accordingly, in a decision dated January 20, 2009, the director denied the petitioner's Form I-140. The director's decision was based, in part, on the finding that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer. The director specifically noted that the 2007 tax return, which named the beneficiary as sole owner of the petitioning entity, was inconsistent with the above described stock certificates, which indicated that the petitioner is jointly owned by two Canadian entities, neither of which is majority owned by the beneficiary. As pointed out by the director, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, while the petitioner submits a statement disputing the second issue that served as a basis for the director's denial, the petitioner did not dispute or otherwise address the inconsistency described above.

The regulation 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 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 context of this visa 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 Dec. at 595.

Given the petitioner's failure to resolve a considerable inconsistency with regard to its ownership, the AAO cannot conclude that the petitioner has established that it and the beneficiary's foreign employer are similarly owned and controlled such as to create a qualifying relationship in accordance with the criteria described at 8 C.F.R. § 204.5(j)(2). Therefore, on the basis of this initial finding, the instant 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.

In the present matter, the record does not indicate that the petitioner provided a letter in support of the petition detailing the beneficiary's proposed job duties. Rather, the petitioner included the following brief job description at Part 6, Item 3 of the Form I-140:

[The beneficiary's] position will be one involving executive and managerial duties exercising wide latitude in discretionary decision-making, supervising supervisory personnel of the existing 4 retail and service centers. He will direct the growth & expansion of our organization ensuring [that] company policies [and] procedures are implemented to meet planned objectives.

Accordingly, in the October 30, 2008 RFE, the director instructed the petitioner to provide a more detailed description of the beneficiary's proposed employment, including a list of actual daily tasks and an estimate of the percentage of time that would be attributed to each task. The director further asked the petitioner to provide its organizational chart accompanied by job descriptions for the beneficiary's supervisor and subordinate employees.

In response, the beneficiary, on behalf of the petitioner, provided a letter dated November 23, 2008, restating the earlier claim that the proposed employment would be comprised of managerial and executive duties that would involve discretionary decision-making, supervising personnel of two retail locations and two rental properties, planning business objectives, coordinating functions and operations, directing the company's growth and expansion, and ensuring that company policies and procedures are implemented. The beneficiary also added the following information about his daily activities:

Daily responsibilities include staffing, training and performance reviews for management and crew, daily[,] weekly and monthly reports; budget management, equipment calibration and repair, and quality of service and product. I look after sales and customer service, manage inventory, submit financial reporting, ensure facility maintenance, encourage employee relations, increase merchandising and promotions, and budget merchandizing. I create a synergistic work environment while maximizing productivity of personnel and equipment, administering safety and security programs and risk assessment, and managing budgets and records.

Basically, my responsibilities include all day-to-day convenience store operations. I handle all human resource functions including management recruitment, training, performance evaluations, payroll administration and unemployment claims and administration. I prepare sales forecasts and annual operating budgets. I interface daily with primary wholesalers, store-door vendors and food vendors. I manage and coordinate all in-store product merchandising. I manage store maintenance functions including building repair and upkeep, landscaping, etc. Achievements with the company include developing and coordinating training programs on employee orientation, security, safety, cash register operations, and bakery and deli food service operations; assisting with the development of company wide policy and procedure manual; designing and programming new cashier register system for all stores.

Although the beneficiary also provided a list of 90 daily tasks he currently performs, he did not allocate a percentage of time to any of these tasks. Rather, he generally allocated 75% of his time to managing, 20% to supervising, and 5% to miscellaneous duties. There was no indication as to which specific tasks were deemed managerial, which were deemed supervisory, and which were miscellaneous. The list of tasks included numerous daily operational tasks in the areas of personnel management, administration and bookkeeping, property management and repair, and sales and marketing. The AAO notes that an organizational chart of the U.S. entity was not among the documents provided in response to the RFE.¹

After reviewing the petitioner's submissions, the director concluded that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director found that the percentage breakdown, which purported to allocate the beneficiary's time to general responsibilities, was overly broad. While the director also commented on the three organizational charts that had been submitted in support of a nonimmigrant petition filed in March of 2005 on behalf of the same beneficiary, it is noted that any personnel changes that may have taken place between the time of filing of the Form I-129 and the more recent filing of the Form I-140 would not be reflected in the organizational charts that were submitted in support of the earlier petition. It is further noted that eligibility must be established at the time the petition is filed. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Since the petition in the present matter was filed on July 6, 2007, over two years after the filing of the Form I-129, it is unclear whether the representations made in the organizational charts that were submitted in support of an earlier petition accurately depict the petitioner's organizational hierarchy at the time the instant petition was filed. Therefore, the evidentiary weight of the three charts that were submitted in support of an earlier petition is limited at best.

The director also reviewed the 2007 IRS Form W-2s the petitioner submitted in response to the RFE. The director determined that of the fourteen paid employees to whom W-2s were issued, most received very limited compensation, which the director interpreted to mean that such employees worked few hours.

On appeal, the beneficiary, on behalf of the petitioner, submits a statement dated February 17, 2009, claiming that he does not perform any tasks related to the gas station or car wash. The beneficiary further states that he does not "produce goods and services," but rather makes executive decisions and carries out managerial tasks. The beneficiary indicates that he cannot make any further investments in the U.S. business until he is able to adjust his status in the United States to that of a permanent resident.

The AAO finds that the beneficiary's statement on appeal is not persuasive in demonstrating that the petitioner has satisfied the relevant eligibility requirements or that it has overcome the grounds for denial. With regard to the beneficiary's proposed position with the U.S. entity, while there is no indication that the beneficiary has or would perform any of the services offered at the gas station or car wash, the list of daily job duties, which was submitted in response to the RFE, is almost entirely comprised of daily operational tasks that are necessary to provide the services of the petitioner's retail businesses. *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. at 604. Although the list of tasks indicates that the beneficiary would be the petitioner's primary decision maker with regard to personnel and business matters,

¹ Although the director's decision referenced three of the petitioner's organizational charts, it appears that all three charts were originally provided as supporting documents in connection with a nonimmigrant L-1A petition that had been filed in March of 2005 on behalf of the same beneficiary.

the AAO cannot overlook the nature of the tasks that would consume the primary portion of the beneficiary's time, including negotiating with vendors and suppliers, assisting with the maintenance and repair of the business premises, training a staff of non-professional workers, carrying out numerous bookkeeping and administrative tasks, and handling all marketing and advertising.

Additionally, the AAO notes that the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

Furthermore, the beneficiary is not entitled to classification as a multinational manager or executive merely by virtue of not having to engage in retail or perform services that are directly related to the gas station and car wash. As pointed out in the above discussion, the beneficiary's job description contains numerous levels of non-qualifying tasks that render him ineligible for the immigrant classification sought herein. Given that the petitioner has failed to establish that the beneficiary's proposed employment would primarily consist of tasks within a qualifying managerial or executive capacity, the AAO cannot approve the instant petition.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(B) 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 to the United States as a nonimmigrant to work for the same employer. In the instant matter, the response to the RFE included a brief description of the beneficiary's job duties during his employment for Taj Supermarket in Canada. The description indicated that the beneficiary was responsible for financial reporting, employee and client relations, payroll, balancing finances, dealing with vendors and importers, selecting new inventory and selecting inventory for sales promotions, placing advertisements, paying taxes and buying insurance, hiring and evaluating employees, meeting with the accountant, and managing the rental property. As with the beneficiary's proposed employment with the U.S. entity, the description of the beneficiary's foreign employment indicates that the beneficiary spent the primary portion of his time performing non-qualifying, daily operational tasks. Therefore, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Second, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "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." In the present matter, while the petitioner provided a copy of its tax return for the year the petition was filed, the record contains no evidence documenting any specific business transactions from July 6, 2006 until July 6, 2007, the one-year period prior to the filing of the instant Form I-140. Therefore, the AAO cannot conclude that the petitioner has met the requirements specified in 8 C.F.R. § 204.5(j)(3)(i)(D).

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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(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, service records show the petitioner's previously approved L-1 employment of the beneficiary. However, it should be noted that 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 prior nonimmigrant approvals do not preclude USCIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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).

Furthermore, if a previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. 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).

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 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.