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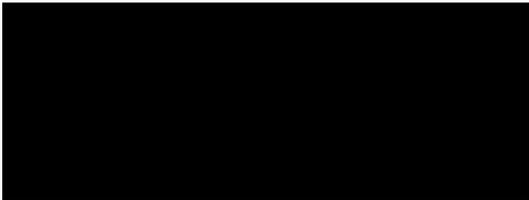
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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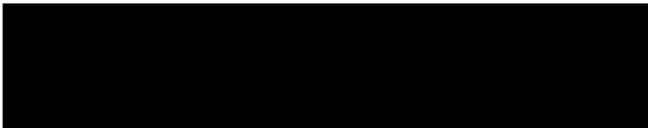
FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER
LIN 08 134 50540

Date: **MAY 11 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 California corporation seeking to employ the beneficiary as its vice president of sales and marketing. 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 no longer has a qualifying relationship with the beneficiary's foreign employer 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 in support of her assertions.¹

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 continues to have a qualifying relationship with the foreign entity that previously employed the beneficiary.

¹ Although counsel requests that U.S. Citizenship and Immigration Services (USCIS) treat the petitioner's Form I-290B as a motion, counsel marked Box A on the form itself, thereby indicating that an appeal was being filed. The director properly acknowledged the Form I-290B and forwarded the supporting documentation to the AAO to be treated as an appeal as indicated in Box A.

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 February 11, 2008, which included a discussion of the common ownership between the beneficiary's foreign and U.S. employers. Specifically, the petitioner stated that the two entities were affiliates by virtue of having been wholly owned by Union Tool Company, located in Japan.

On November 20, 2008, the director issued a request for evidence (RFE) in which he instructed the petitioner to submit, *inter alia*, evidence establishing a qualifying relationship between the beneficiary's foreign and U.S. employers.

In response, the petitioner submitted a letter dated February 6, 2009, which indicated that the beneficiary's foreign employer was dissolved on September 1, 2005 "due to a change in business strategy." The petitioner stated that [REDACTED], the parent entity, continues to do business in multiple countries, including the United States. The petitioner also provided the foreign entity's annual report for 2001 naming the beneficiary's foreign and U.S. employers as two of [REDACTED] affiliates.

After reviewing the petitioner's submissions, the director issued a decision dated March 5, 2009 denying the petition based on the conclusion that the petitioner's prior qualifying relationship with the beneficiary's foreign employer had been severed when the latter entity was dissolved on September 1, 2005. The director determined that in light of the fact that the U.K. entity was no longer in existence at the time the Form I-140 was filed, the petitioner could not have met the provisions of 8 C.F.R. § 204.5(j)(3)(i)(C), which requires that the petitioner *is* the same employer or an affiliate or subsidiary of the beneficiary's foreign employer.

On appeal, counsel focuses on the qualifying relationship that existed between the petitioner and the beneficiary's foreign employer at the time of the beneficiary's employment abroad. Counsel also points out that the petitioner continues to maintain a multinational presence by virtue of being a wholly owned subsidiary of [REDACTED], which also owned the beneficiary's foreign employer. Counsel also makes

numerous references to the regulations that apply to the nonimmigrant L-1A intracompany transferees, indicating that they are relevant in matters concerning Form I-140 immigrant petitions. Counsel asserts that there is no statutory or regulatory requirement that specifies a particular time period during which a qualifying relationship must exist and further stresses that if there was a requirement that the qualifying relationship must exist at the time of filing, then the additional requirement that the petitioner must be a multinational entity would be redundant. Counsel cites an unpublished decision previously issued by the AAO and refers to portions of the USCIS Adjudicator's Field Manual in support of her arguments.

Counsel's assertions, however, are not persuasive in overcoming the director's basis for denial. First, with regard to counsel's reliance on an unpublished AAO decision, it is noted that according to 8 C.F.R. § 103.3(c), only AAO precedent decisions are binding on all USCIS employees in the administration of the Act. Unpublished decisions, including the one cited by counsel, are not similarly binding. Counsel's reliance on the USCIS Adjudicator's Field Manual is similarly not binding, as it merely articulates internal guidelines for service personnel and does not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)).

Second, counsel's 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, with regard to the petitioner's previously approved L-1 employment of the beneficiary, 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. 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). If the initial nonimmigrant petition was approved based on the same 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 a prior approval 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 CIS 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).

Additionally, counsel cites the case of *Matter of Chartier*, 16 I&N Dec. 284 (BIA 1977), arguing that the decision in that case determines that a qualifying relationship between the petitioner and the beneficiary's

foreign employer does not need to exist at the time of filing. However, counsel's reliance on the precedent decision in this matter is misplaced. *Matter of Chartier* is a removal decision regarding an alien beneficiary previously granted L-1A nonimmigrant status, not an alien beneficiary of an immigrant petition. The statute and regulations governing eligibility for the immigrant classification sought in this matter are not the same as the L-1A nonimmigrant statute and regulations in effect in 1977 when *Matter of Chartier* was published.

Additionally, counsel cites the case of *Matter of Thompson*, 18 I&N Dec. 169 (1981)², where the beneficiary's foreign employer seized its operations and left the petitioner with no foreign operations outside of the United States. Counsel focused on the determination that there was no regulatory provision requiring a foreign employer to continue its operations. Although counsel recognizes the regulatory changes that have occurred since 1977, i.e., the requirement that the petitioner be a multinational entity at the time of filing, which overrules the finding in *Matter of Thompson*, she maintains the argument that there is no statutory provision that requires that a qualifying relationship between the petitioner and the beneficiary's foreign employer exist at the time of filing so long as the petitioner has a multinational presence through other foreign operations.

In reviewing counsel's assertions, it appears that counsel has misconstrued 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 did not cease to exist and, as such, it can be distinguished from the matter currently before the AAO. 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 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). 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).

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, 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 time in the past. 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 prior to the time of filing, as is the case in

² *Matter of Thompson* was expressly overturned in the supplementary information to the final rule amending the L-1 regulations in 1987. See 52 Fed. Reg. 5738, 5741 (February 26, 1987).

the present matter. The AAO cannot, however, adopt counsel's interpretation. Precedent case law instructs against such an approach by specifically requiring that each petitioner establish its eligibility at the time of filing the petition. *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 met that burden.

ORDER: The appeal is dismissed.