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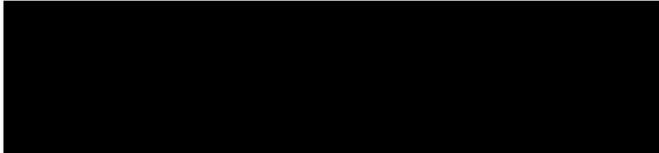
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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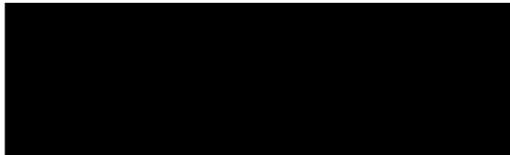
FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date:
LIN 07 099 51461

MAY 27 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 petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was summarily dismissed. The matter is now before the AAO on motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a Delaware corporation that seeks to employ the beneficiary as its 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 denied the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

Upon review of the petitioner's submissions on appeal, the AAO noted that counsel erroneously submitted a brief and supporting documentation to the Nebraska Service Center, not to the AAO. The AAO then cited 8 C.F.R. § 103.3(a)(2)(viii), which requires that any brief or additional supporting evidence not filed together with the Form I-290B shall be submitted directly to the AAO within the time permitted. Accordingly, as the petitioner did not properly submit the additional supporting evidence directly to the AAO, the AAO declined to consider the brief and supporting evidence and deemed the record complete as constituted on the date the appeal was filed. The AAO relied on the provisions of 8 C.F.R. § 103.3(a)(1)(v) and summarily dismissed the appeal.

The petitioner now files a motion to reopen and reconsider seeking full consideration of the brief submitted in support of the appeal. In support of the motion, counsel cites to an unpublished non-precedent decision issued by the AAO on May 17, 2007. Counsel points out that the facts in the instant case with regard to the submission of supporting evidence on appeal are analogous to those of the earlier AAO decision, where the appeals officer granted the motion in order to consider a brief that had been improperly submitted to a service center instead of to the AAO. Counsel urges the AAO to take similar action in the present matter, dismissing the significance of the mailing error and referring to the regulatory requirement as a mere "technicality."

Counsel's assertion, however, is without merit. First, with regard to the prior decision made by an AAO appeals officer, the AAO cannot compound an acknowledged error by following an erroneous course of action as was done in the unpublished decision relied upon by counsel. The appeals officer in the unpublished decision did not have the discretionary authority to go beyond the provisions of the relevant regulation, which clearly instructs both counsel and the petitioner of the proper protocol for submitting additional documents that are not provided simultaneously with the originally filed Form I-290B. *See* 8 C.F.R. § 103.3(a)(2)(viii). Second, counsel's characterization of his admitted error as a mere technicality is equally erroneous. Despite the prior AAO officer's actions, the AAO does not have the discretionary authority to choose which regulatory provisions to enforce. All USCIS regulations are binding on all USCIS employees. All must be equally enforced, even when doing so is perceived as inconvenient to the interests of the petitioning party. The AAO further notes that the officer's action in the earlier unpublished matter was harmless error, as the AAO ultimately affirmed its prior dismissal of the appeal.

Moreover, the AAO notes that counsel's arguments do not meet the requirements of a motion to reconsider or a motion to reopen.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹

In the present matter, counsel has not presented any new evidence or information to warrant the granting of a motion to reopen.

Next, the regulations 8 C.F.R. § 103.5(a)(3) includes the following provisions for a motion to reconsider:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [USCIS] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

As previously stated, counsel's reliance on an unpublished AAO decision does not fit the criteria discussed in 8 C.F.R. § 103.5(a)(3). Moreover, counsel has failed to establish that the AAO's decision was incorrect based on the evidence on record at the time of the initial decision dismissing the appeal. The AAO cannot overlook the regulatory criteria for a motion to reopen or a motion to reconsider and simply grant the motion when sufficient evidence has not been provided to warrant such action.

Therefore, the motion to reopen and reconsider will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4), which states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed.

Lastly, the AAO notes that even if the supplement to the appeal had been properly submitted, the end result, i.e., the AAO's decision to dismiss the appeal, would have been the same, as counsel's statements in the appellate brief did not establish that the petitioner would employ the beneficiary in the United States in a qualifying managerial or executive capacity.

In the petitioner's undated letter, which was submitted in support of the initial Form I-140, the petitioner indicated that the beneficiary would be directly involved in contract negotiation, business development, and client interaction. The petitioner also indicated at Part 5, Item 2 of the Form I-140, that it had two employees, including the beneficiary, at the time of filing. Given the lack of support personnel the petitioner had at the time of filing, it was certainly justified in having the beneficiary directly involved with such operational tasks as negotiating contracts, finding business opportunities, and assisting clients. However, the petitioner's business needs do not override the statutory provisions, which expressly state that in order to qualify for classification as a multinational manager or executive, the beneficiary must allocate the primary portion of his time to tasks within a managerial or executive capacity. 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

¹ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence>" WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

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).

Additionally, while counsel is correct in stating that the number of employees the beneficiary supervises does not determine eligibility, 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 other words, while the single factor of having a small support staff would not inevitably lead to an unfavorable outcome for the petitioning entity, this factor will nevertheless be considered. Where, as in the instant matter, the petitioner has an extremely limited support staff that consists of a single individual, U.S. Citizenship and Immigration Services (USCIS) can and should question who is actually carrying out the daily operational tasks that are required for the petitioner to function on a daily basis. Here, the petitioner listed several key operational tasks that have been assigned to the beneficiary. Given the lack of support personnel, it is reasonable to conclude that the primary portion of the beneficiary's time would be allocated to these and perhaps other non-qualifying tasks.

Furthermore, counsel's assertion that the petitioner's employees will oversee the foreign entity's employees in servicing the petitioner's clientele suggests that the foreign entity's employees would provide essential software development and consulting services. The AAO notes, however, that the U.S. and foreign entities, despite their qualifying relationship, are separate entities, each with its own corporate existence. Thus, the petitioner cannot persuasively establish that the beneficiary will have duties involving work in a managerial capacity by simply stating that the petitioner and the foreign entity share human resources, as claimed here, without sufficient documentation in support of that assertion. 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)). In other words, if the petitioner is using the foreign entity's employees to provide key services, it must provide adequate documentation establishing that the beneficiary would spend time on the management of the foreign employees whose services the petitioner purportedly uses as independent contractors. In the present matter, there is no such documentation; there is only counsel's claim that the foreign entity's consultants and software developers relieve the beneficiary from having to provide key operational tasks. 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).

In summary, even if the AAO had given full consideration to all of the petitioner's supporting evidence when assessing the merits of the appeal, the appeal would nevertheless have been dismissed due to the petitioner's failure to establish that the beneficiary would be employed in a qualifying managerial or executive capacity.

As a final note, the proper filing of a motion to reopen and/or reconsider does not stay the AAO's prior decision to dismiss an appeal or extend the beneficiary's previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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. Here, the petitioner has not sustained that burden.

ORDER: The motion is dismissed.

FURTHER ORDER: Because the finding that eligibility has not been established in this proceeding is not consistent with the director's approval of the petitioner's most recently filed Form I-140 [REDACTED] the AAO recommends that the director review the approval of the petition for possible revocation pursuant to 8 C.F.R. § 205.2.