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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

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FILE: [REDACTED] OFFICE: TEXAS SERVICE CENTER

Date:

NOV 16 2010

IN RE: Petitioner:
Beneficiary:



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:

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 a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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 claims to be a corporation that seeks to employ the beneficiary as its 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 the beneficiary was employed abroad in a qualifying managerial or executive capacity for the requisite time period; and 2) the petitioner failed to establish that it is a multinational entity that has a qualifying affiliate or subsidiary relationship with the beneficiary's foreign employer.

On appeal, the petitioner disputes the director's conclusions and asserts that the director's decision was arbitrary and capricious.

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 beneficiary was employed abroad in a qualifying managerial or executive capacity for at least one year during the three years prior to her nonimmigrant entry into the United States.

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 submitted a letter dated May 13, 2008 which mentioned the beneficiary's prior managerial experience in the field of interior design. The letter further stated that the employment abroad involved operational policy and management, including supervising lower-level employees and performing sales tasks. The petitioner did not specify the identity of the beneficiary's foreign employer or the time period during which she was employed abroad.

In a decision dated April 2, 2009, the director denied the petition noting that the petitioner failed to include the name of the beneficiary's foreign employer, the dates of the employment, or the duties performed during such employment.

On appeal, the petitioner asserts that the director abused his discretion and denied the petitioner due process by failing to issue a request for additional evidence (RFE) or a notice of intent to deny (NOID) prior to issuing the final decision denying the petition.

The petitioner's assertion, however, is incorrect. Contrary to the petitioner's apparent misconception, the regulation at 8 C.F.R. § 103.2(b)(8), which addresses the issuance of an RFE or a NOID, allows the director full discretion to decide whether or not to issue either notice prior to making a determination as to the petitioner's eligibility or ineligibility for the immigration benefit sought. Thus, the director acted well within his authority in deciding to deny the petition without issuing either an RFE or a NOID. Furthermore, the petitioner has failed to establish that it has been denied a right that is subject to constitutional due process protection. Additionally, the contention that failure to issue an RFE or NOID was equivalent to denying the petitioner "an opportunity to remedy perceived deficiencies" is simply inaccurate in light of the availability of the appeal process itself, which offers the petitioner the chance to supplement the record and provide further statements and legal arguments to overcome deficiencies and meet eligibility requirements.

With regard to the beneficiary's employment abroad, the petitioner states that the beneficiary worked for [REDACTED], the petitioner's claimed affiliate, from August 2003 until August 2004. The petitioner also states that the beneficiary was employed by [REDACTED] from January 2000 until April 2001. Although the petitioner provides a general job description of managerial duties, it is unclear whether the description applies to the beneficiary's employment with the claimed affiliate entity, her employment with [REDACTED], or both. Regardless, the job description provided is devoid of necessary information regarding the beneficiary's actual daily tasks and primarily consists of paraphrased portions of the statutory definition used to describe managerial capacity. Specifically, the petitioner states that the beneficiary managed the organization or components thereof, supervised and controlled the work of supervisory staff, had authority to hire and fire subordinates and make decisions concerning the company's daily operations, set goals and policies, and received only general supervision. 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). As such, a detailed delineation of the actual duties themselves is necessary to reveal the true nature of the employment. *Id.* at 1108. Here, the petitioner has done nothing more than restate the statutory definition of managerial capacity. The petitioner provides no information describing the specific tasks the beneficiary carried out to manage the foreign organization and its staff.

Additionally, the petitioner has provided no documentation to establish that the beneficiary was employed by a qualifying foreign organization for one year during the requisite three-year period. The regulation at 8 C.F.R. § 204.5(j)(3)(i) requires, in part, that:

- A) If the alien is outside the United States, in the three years preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant,

the alien was employed by the entity abroad for at least one year in a managerial or executive capacity[.]

In light of the above, the petitioner must establish that the beneficiary entered the United States in order to work for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas in order to fall under the provisions of 8 C.F.R. § 204.5(j)(3)(i)(B), which allow the relevant three-year period of foreign employment to be based on the date of the beneficiary's nonimmigrant entry into the United States. Otherwise, a nonimmigrant entry that occurred for any purpose other than to work for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas would require the AAO to apply the provisions of 8 C.F.R. § 204.5(j)(3)(i)(A), which require the petitioner to establish that the beneficiary's one year of foreign employment occurred during the three-year period prior to the filing of the petition. As the petition in the present matter was filed on May 27, 2008 and the beneficiary's employment abroad took place from August 2003 to August 2004, such employment would fall outside the three-year period as determined by 8 C.F.R. § 204.5(j)(3)(i)(A). The petitioner has not established that the beneficiary's nonimmigrant entry into the United States was such that the petitioner falls under the provisions of 8 C.F.R. § 204.5(j)(3)(i)(B). As the petitioner has not provided evidence of the date of the beneficiary's nonimmigrant entry into the United States or the purpose of that entry, the AAO is unable to determine whether the provisions of 8 C.F.R. § 204.5(j)(3)(i)(A) or (B) apply.

In summary, not only has the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity, but it has also failed to establish that the beneficiary's requisite one year of employment abroad occurred during the relevant three-year time period. Therefore, on the basis of this initial conclusion, this petition cannot be approved.

The other issue addressed by the director in this proceeding is whether the petitioner has a qualifying relationship with a foreign entity.

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 the present matter, the petitioner claims that it is an affiliate of the beneficiary's foreign employer. Among the initial supporting documents, the petitioner provided its corporate tax returns for 2006 and 2007 both of which identified [REDACTED] as owner of 100% of the petitioner's stock. No further documentation was submitted with regard to the petitioner's ownership and no documentation at all was submitted to establish the ownership and control of the foreign entity where the beneficiary was allegedly employed.

Accordingly, the director concluded that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

On appeal, the petitioner provides translated incorporation documents pertaining to [REDACTED] the beneficiary's claimed foreign employer. Clause four of the document indicates that the foreign entity issued a total of 3,000 shares, which were evenly split three ways among [REDACTED]

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.

In the present matter, based on the information presented in the petitioner's tax returns and the foreign entity's incorporation documents, the AAO cannot conclude that the two entities fall under the definition of *affiliate* as this term is defined at 8 C.F.R. § 204.5(j)(2). While the two entities in question do share a degree of common ownership in that [REDACTED] has an ownership interest in each entity, it cannot be determined that the two entities are similarly owned *and* controlled. [REDACTED] 100% ownership of the U.S. entity entitles her to complete control of that company. However, [REDACTED] shares ownership of the foreign entity with two other individuals, each of whom owns an equal portion of that entity. As such, all three owners have the same degree of control of the foreign entity with no one individual owning a majority or controlling interest. If one individual owns a majority interest in the U.S. and foreign entities, that person is said to have "de jure" control by reason of ownership of 51 percent of outstanding stocks of each. Control may also be "de facto" by reason of having control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289. In the present matter, while [REDACTED] has de jure control of the U.S. entity, she does not have de jure control over the foreign entity and no evidence has been provided to indicate that she has de facto control over that entity. In light of the facts presented herein, the AAO cannot conclude that the U.S. petitioner and the foreign entity share common ownership and control such as to constitute a qualifying relationship pursuant to 8 C.F.R. § 204.5(j)(2). Therefore, on the basis of this conclusion, the AAO cannot approve the instant petition.

Furthermore, while not addressed in the director's decision, the AAO finds that the petitioner has failed to establish eligibility on at least two additional grounds.

First, the petitioner has failed to establish that it would employ the beneficiary within a qualifying managerial or executive capacity. It is noted that 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. at 604. Here, the petitioner failed to provide a detailed job description to establish that the primary portion of the beneficiary's time would be allocated to managerial or executive tasks.

Second, the petitioner has failed to establish that it meets the criteria set forth in 8 C.F.R. § 204.5(j)(3)(i)(D), which requires the petitioner to 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." While the petitioner has submitted several of its bank statements and two corporate tax returns, these documents do not establish the petitioner's participation in ongoing business transactions. As such, they cannot be relied upon to determine whether an entity is conducting business on a "regular, systematic, and continuous" basis. See *id.*

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.