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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER

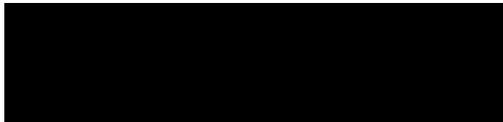
Date: OCT 05 2010

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:



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 initially approved by the Director, Nebraska Service Center. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice of his intention to revoke the approval of the preference visa petition, and his reasons therefore. The director ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

At the time the Form I-140 was filed, the petitioner was operating as a sole proprietorship in the State of Missouri. The petitioner seeks to employ the beneficiary as its general 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 revoked approval of the visa petition based on four independent grounds of ineligibility: 1) the petitioner failed to establish that, at the time the Form I-140 was filed, it was a qualifying entity that was authorized to file an employment-based petition on behalf of the beneficiary; 2) the petitioner failed to establish that it had the ability to pay the beneficiary's proffered wage commencing on the priority date; 3) the petitioner failed to establish that the beneficiary was employed abroad within a qualifying managerial or executive capacity; and 4) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and challenges the director's right to revoke the petition on grounds that were not previously included in the notice of intent to revoke (NOIR).

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 was a qualifying entity that was authorized to file a Form I-140 on the beneficiary's behalf on May 2, 2003 when the petition was filed.

In the present matter, the petitioner submitted a letter dated May 1, 2003 in support of the Form I-140. The letter states that the entity seeking to employ the beneficiary in the United States is a sole proprietorship. Although the petition was approved on July 24, 2003, the record shows that on October 7, 2008, the director determined that such approval was erroneous, as the petitioner was not eligible to file a petition on behalf of the beneficiary. Among the deficiencies noted in the NOIR was the fact that the petitioner, in its capacity as a sole proprietorship, could not be deemed as a separate legal entity that would qualify as a subsidiary or an affiliate of the beneficiary's foreign employer. The petitioner was allowed thirty days in which to respond to the director's adverse findings.

In response, counsel submitted a letter dated November 4, 2008, stating that the beneficiary, who owned and managed the petitioning entity, has "'ported' his I-140 from Missouri to a successor corporation, [REDACTED]. Counsel asserted that U.S. Citizenship and Immigration Services (USCIS) should be estopped from revoking approval on the basis of a fact that was known when the approval was initially issued. Counsel further stated that the time to raise the petitioner's sole proprietorship status was in a request for additional evidence (RFE) that was issued in 2004.

The director determined that counsel's arguments were not persuasive in overcoming the noted ground of ineligibility and revoked the petition in a decision dated December 22, 2008. The director acknowledged counsel's arguments and concluded that USCIS is not precluded from revoking approval of a petition on the basis of facts that were in existence at the time of the approval. The director points out that counsel did not provide any statutory or regulatory authority for claiming that USCIS is precluded from issuing an adverse decision due to the time delay between the date of approval and the issuance of a NOIR. The director also cites portions of the USCIS Adjudicator's Field Manual (AFM), which confirms the director's conclusion that a sole proprietorship cannot petition for an employment-based immigrant visa on behalf of its owner.

On appeal, counsel reasserts the arguments he previously raised in response to the NOIR and argues that the director erred in retroactively applying the AFM. Counsel also asserts that the petitioner falls within the definition of *affiliate* as defined at 8 C.F.R. § 204.5(j)(2).

The AAO has thoroughly reviewed the record of proceeding and finds that counsel's arguments are not persuasive in overcoming the director's adverse findings, which indicate that the petitioner was ineligible at the time the Form I-140 was filed.

Section 205 of the Act, 8 U.S.C. § 1155, which states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

According to the precedent case law cited above, the fact that the petitioner was ineligible at the time of filing serves as a sufficient cause to revoke a previously issued approval, regardless of whether the petitioner's ineligibility was apparent at the time of filing. That being said, counsel disputes the director's conclusion that the petitioner's status as a sole proprietorship renders the petitioner ineligible for the immigration benefit sought. In support of his argument, counsel refers to subsection (A) of the definition for *affiliate*, which states that the term can apply to two subsidiaries that are owned and controlled by the same parent or individual. Counsel emphasizes the term "individual," implying that the beneficiary is the individual who owns and controls the U.S. entity and the beneficiary's foreign employer. Counsel's reasoning, however, overlooks the first requirement of the same subsection, i.e., that the two entities must be subsidiaries. In order to fit the definition of "subsidiary" as defined at 8 C.F.R. § 204.5(j)(2), the petitioner must meet the initial criterion of establishing that it is a firm, corporation, or other legal entity.¹ Unlike a firm, corporation, or other legal entity, a sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). As such, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984).

First-preference immigrant status under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), requires a permanent employment offer from the petitioner to the beneficiary. The fact that the petitioning sole proprietorship was operated by the beneficiary in his own personal capacity at the time of filing is synonymous with the beneficiary extending an offer of employment to himself. However, a petitioner who is a nonimmigrant temporary worker is not competent to offer permanent employment to an alien beneficiary for the purpose of obtaining an immigrant visa for the beneficiary under section 203(b)(1)(C) of the Act. *Matter of Thornhill*, 18 I&N Dec. 34 (Comm. 1981).

With regard to counsel's assertion that the director retroactively applied the AFM, which effectively changed adjudicators' guidelines and resulted in the instant revocation, the AAO notes that counsel relied on faulty reasoning and therefore reached an incorrect conclusion. Contrary to counsel's assertion, the statutes and regulations that were in effect at the time of filing determined the petitioner's ineligibility. The AFM merely corroborates what the statutory and regulatory provisions dictated at the time the petition was initially filed. Counsel's use of the term "retroactive" suggests that the petitioner would have been eligible at the time of filing, but for the guidelines set out in the AFM. A review of the relevant legal provisions clearly shows that this was not the case. Regardless of any guidelines or standards set forth in the AFM, the petitioner was a

¹ An entity, other than a natural person, who has sufficient existence in legal contemplation that it can function legally, be sued or sue and make decisions through agents as in the case of corporations. *Black's Law Dictionary* 620 (6th Ed. 1991).

sole proprietorship at the time the petition was filed and as such was, by the very definition of sole proprietorship, ineligible to petition for permanent employment of the beneficiary.

The fact that USCIS initially approved the instant petition and several previously filed L-1A nonimmigrant petitions, despite the fact that the petitioner was ineligible to file such petitions, clearly shows an error on the part of the service center. There is no indication that any of the service's prior approvals "were supported by substantial evidence," as counsel claims on appeal. 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).

Additionally, the AAO notes that the approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Although the record shows that the petitioner was incorporated and ultimately became a corporate entity, the incorporation took place in 2005, long after the Form I-140 was filed. Precedent case law firmly establishes that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the present matter, the petitioner failed to establish that it was eligible to file a Form I-140 on behalf of the beneficiary at the time of filing. Therefore, on the basis of this initial finding, the instant petition cannot be approved.

The second issue in this proceeding is whether the petitioner had the ability to pay the beneficiary's proffered wage at the time of filing. The regulation at 8 C.F.R. § 204.5(g)(2) states the following, in pertinent part:

Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the October 7, 2009 NOIR, the director advised the petitioner that the record did not contain sufficient evidence establishing the petitioner's ability to pay. The director noted that, other than indicating that the beneficiary would be paid from the company's profits, the petitioner failed to expressly state what the beneficiary's proffered wage would be and further stated that, despite the fact that the Form I-140 was filed in 2003, the only financial documents that were submitted pertained to the sole proprietorship's income from the years 2000 and 2001. The director reminded the petitioner of the types of documents that would be acceptable for the purpose of establishing the ability to pay.

In the December 22, 2008 notice of revocation, the director reviewed the documents submitted by the petitioner thus far and acknowledged that provisions of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) do not require a new employer to which an alien has ported under AC21 to establish its ability to pay. However, the director pointed out that AC21, even if applicable in the present matter, does not relieve the original petitioner from having to establish its ability to pay the beneficiary's

proffered wage. The director determined that the petitioner failed to establish that it earned profits in 2003 when the petition was filed and therefore failed to establish the ability to pay the beneficiary's proffered wage.

On appeal, counsel asserts that the latest income tax return the petitioner had at the time of filing was the beneficiary's 2001 Form 1040, which showed a profit of \$26,000 and therefore established the ability to pay. Counsel's argument, however, is based on the faulty reasoning that the petitioner would be allowed to rely on outdated documents, such as a 2001 tax return, if the tax documents that pertained to the date of the Form I-140's filing were not available. Contrary to such reasoning, the petitioner bears an evidentiary burden that requires the submission of documents to establish that the petitioner, at the time the Form I-140 is filed, met all applicable filing requirements. *See Matter of Katigbak*, 14 I&N Dec. at 49. Whether or not the petitioner met those requirements prior to the filing of a Form I-140 is irrelevant. The regulations do not relieve a petitioner from certain filing requirements or allow a petitioner to meet those requirements by using outdated documents.

The regulation at 8 C.F.R. § 204.5(g)(2) clearly requires the petitioner to establish that it had the ability to pay the beneficiary's proffered wage as of the priority date, i.e., the date the Form I-140 was filed. Here, not only has the petitioner failed to expressly state what the beneficiary's proffered wage would be, but it has submitted outdated documentation to meet a critical filing requirement. As such, the AAO finds that the petitioner has failed to submit sufficient evidence establishing that it met the provisions of 8 C.F.R. § 204.5(g)(2) and for this additional reason the instant petition did not warrant approval.

The two remaining issues addressed in the director's decision concern the beneficiary's employment capacity both abroad and in his proposed position with the U.S. entity. Specifically, the director determined that the petitioner failed to establish that the beneficiary was employed abroad or that he would be employed in the United States within a qualifying managerial or executive capacity.

On appeal, counsel challenges the propriety of introducing two new grounds for revocation in the final decision when these grounds were not initially introduced in the NOIR. After reviewing the provisions of 8 C.F.R. § 205.2(b), the AAO finds that counsel's argument is valid and hereby withdraws the two additional grounds as alternate bases for revocation. The AAO notes that the decision to withdraw these two additional bases for denial in no way indicates that the petitioner has successfully established that the beneficiary was employed abroad or that he would be employed in the United States within a qualifying managerial or executive capacity. In fact, the record as presently constituted indicates that both grounds would have served as valid bases for revocation if they had been properly introduced in the NOIR. However, as the director did not cite either issue as a basis for the intended revocation, withdrawal of these two grounds is necessary for the strict purpose of ensuring compliance with the provisions of 8 C.F.R. § 205.2(b).

Notwithstanding the withdrawal of the two final grounds that were cited in the director's decision, the record clearly shows that the petitioner was not eligible to seek permanent employment of the beneficiary in the immigrant classification of multinational manager or executive. Therefore, the director's decision to revoke the prior erroneous approval of the petitioner's Form I-140 will not be disturbed.

Finally, with regard to counsel's attempt to invoke AC21 protections as a result of the time delay between the date the Form I-140 was approved and the date of the approval's revocation, the AAO notes that AC21 provisions do not apply to the petitioner in the present matter. As properly noted in the director's decision, in order to benefit from the provisions of AC21, the petition must have been valid at the time of approval such that it can remain

valid for the purpose of porting. In the present matter, the AAO has provided a full discussion explaining why the petition was erroneously approved. Therefore, the petition was not valid and therefore cannot be deemed as remaining valid.

Accordingly, the revocation of the approval of the petition will be affirmed based on the above findings, 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.