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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B4

FILE: [redacted] OFFICE: NEBRASKA SERVICE CENTER Date: FEB 11 2011

IN RE: Petitioner: [redacted]
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:

[redacted]

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 $630. 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 limited liability company that was organized in the State of Florida. It seeks to employ the beneficiary as its director of business. 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, counsel challenges the denial, asserting that the director denied the petition based on a ground that was not previously addressed in the request for evidence (RFE).

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. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally*

§ 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

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 share certificates for the foreign entity and membership certificates for the U.S. entity, all indicating that the beneficiary owns 75% of the U.S. entity and 75 shares of the foreign entity.

On June 2, 2008, the director issued a request for evidence (RFE) instructing the petitioner to provide a stock ledger establishing the ownership of the foreign entity's outstanding stock.

In response, counsel submitted a letter dated July 11, 2008 on behalf of the petitioner, asserting that the relevant documentation establishing the foreign entity's ownership had been previously submitted in support of the Form I-140. The petitioner resubmitted the documents that had been submitted earlier in the proceeding along with a chart, which illustrating the current ownership structure of the foreign entity, showing the beneficiary as owner of 75% of the foreign entity's outstanding stock.

In a decision dated July 21, 2009 the director denied the petition, concluding that the petitioner failed to comply with the RFE, which expressly instructed the petitioner to provide evidence other than stock certificates to establish the foreign entity's ownership. The director noted that stock certificates, if unaccompanied by additional documentation such as a stock ledger, are not sufficient to establish the foreign entity's ownership, which is a prerequisite to establishing common ownership among the foreign entity and the U.S. petitioner.

On appeal, counsel refers to the previously approved L-1 petitions that were filed on behalf of the same beneficiary, contending that the approvals of the prior petitions confirm the existence of a qualifying relationship between the foreign and U.S. entities.

Counsel's argument is without merit, as it is based entirely on evidence that is not in the current record of proceeding, i.e., evidence submitted in support of the previously filed L-1 petitions. Each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof. As such, 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 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 the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approvals 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).

In summary, 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.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

In the present matter, the petitioner was advised that the stock certificates submitted initially in support of the Form I-140 were insufficient to establish who owns the foreign entity. Despite the RFE, which expressly instructed the petitioner to provide additional evidence addressing this deficiency, the petitioner did not provide the requested evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As the petitioner failed to provide the requested stock ledger, the AAO cannot conclude that a qualifying relationship exists between the beneficiary's foreign and proposed employers and the petition cannot be approved for this reason.

The other issue in this proceeding is whether the petitioner submitted sufficient evidence to establish that 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 support of the Form I-140, the beneficiary, on behalf of the petitioner, submitted a letter dated April 16, 2007 in which the beneficiary stated that his proposed employment would involve planning and directing the purchase, development, and sale of commercial and residential properties. The beneficiary would also direct, fund, and manage day-to-day operations of the company, including supervising contract labor and hiring, training, and firing personnel as needed.

The director determined that the initial job description that was provided in support of the petition did not adequately establish that the beneficiary would be employed in a qualifying managerial or executive capacity. Accordingly, this deficiency was addressed in the RFE, which instructed the petitioner to provide a list of the specific job duties that would comprise the beneficiary's proposed employment. The director also asked the petitioner to indicate what percentage of time the beneficiary would allocate to each of the listed job duties.

In response, counsel provided a supplemental job description in the letter dated July 11, 2008. As the director's denial includes the additional job description, the AAO need not repeat this information in the current decision.

The director determined that the supplemental job description did not establish that the beneficiary would allocate the primary portion of his time to performing managerial- or executive-level tasks. The director determined that the record does not establish that the beneficiary would primarily manage a function in the role of a function manager or that he would otherwise be relieved from having to primarily perform non-qualifying tasks.

On appeal, counsel challenges the director's decision, arguing that the director denied the petition, in part, based on the finding that the beneficiary cannot be deemed a function manager, which is an element that had not been previously addressed in the RFE. Counsel's assertion is based on the notion that all potential grounds for denial must be addressed in an RFE or a notice of intent to deny (NOID) such that the petitioner is allowed the opportunity to overcome any adverse finding prior to the ultimate notice of denial. Counsel's reasoning fails to account for the express regulatory provision found at 8 C.F.R. § 103.2(b)(8)(ii), which states that USCIS has the discretion to deny an application or petition for lack of initial evidence or for ineligibility without issuing an RFE or NOID. In other words, while the director may choose to address deficiencies prior to denying the petition, he does not have a legal obligation to address every foreseeable ground for denial or to provide a full analysis of the elements underlying the intended denial. Thus, the fact that the director provided a more comprehensive analysis that included an element not previously discussed does not mean that the director's decision was erroneous. By virtue of having an appeal process in place, the petitioner is allowed an opportunity to overcome any ground cited as a basis for denial, regardless of whether that ground was previously addressed in an RFE or NOID.

Additionally, the director's choice to incorporate a discussion of the term "function manager" is natural when trying to determine whether the prospective employment fits the definition of managerial capacity, as there are two different types of managers—a personnel manager and a function manager—and either type of manager can fit the statutory definition. Here, the director addressed the term function manager in an effort to give the petitioner the benefit of applying the key elements of a personnel manager and a function manager to the description of the beneficiary's proposed employment. In doing so, the director does not automatically

reach an adverse conclusion when a beneficiary is shown to manage an essential function rather than a staff of subordinate employees. Here, the director found that the beneficiary's proposed employment does not fit either aspect of managerial capacity in that the beneficiary was found not be a manager of an essential function, nor was he found to be the manager of supervisory, professional, or managerial employees. Although counsel disputes the director's discussion of the term function manager on procedural grounds, counsel does not actually address the merits of the director's findings and thus fails to overcome the adverse conclusion.

Furthermore, in examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The fact that the director expressly instructed the petitioner to provide a list of the beneficiary's proposed daily tasks and to assign the percentage of time the beneficiary would allocate to each task indicates that the petitioner was adequately informed of the pivotal role that a detailed job description plays in assisting USCIS to determine whether the beneficiary's proposed employment would be within a qualifying managerial or executive capacity. In the present matter, counsel provided an RFE response that did not follow the requested format in that counsel grouped tasks together, rather than listing them separately, and failed to assign a specific time constraint to each individual task. As the beneficiary appears to allocate his time to a mixture of both qualifying and non-qualifying tasks, assigning time constraints to all tasks is crucial for the purpose of determining precisely how much of his time would be spent in a qualifying managerial or executive capacity. While the AAO acknowledges that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to his/her proposed position. 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. 593, 604 (Comm. 1988). In the instant case, the record lacks sufficient information to enable the AAO to conclude that the beneficiary would primarily perform managerial or executive duties. Therefore, on the basis of this conclusion, the instant petition cannot be approved.

Additionally, while not addressed in the director's decision, the AAO finds that the petitioner has not met the eligibility requirement described at 8 C.F.R. § 204.5(j)(3)(i)(D), which 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 term "doing business" is defined as 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. 8 C.F.R. § 204.5(j)(2). Here, the Form I-140 at part 5, item 2 of the Form I-140 indicates that the petitioner is a food preparation business. While the petitioner provided promotional material for the food preparation business, such documents are not sufficient to establish that the petitioner was doing business in the time and manner prescribed by regulation. Additionally, in a separate statement dated April 16, 2007, the beneficiary stated that the petitioner is also engaged in buying, developing, and selling commercial and residential real estate. Although the petitioner provided three lease agreements that fall within the relevant one-year period prior to the date the petition was filed, the three leasing transactions are insufficient to establish that the petitioner was conducting business on a "regular, systematic, and continuous" basis during that time period. *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 ground 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.