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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

PUBLIC COPY

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[REDACTED]

DATE: JUL 06 2011

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

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:

[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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation that seeks to employ the beneficiary as its president. 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, finding that the petitioner failed to establish eligibility for the immigration benefit sought. The director concluded that the petitioner failed to establish that 1) the beneficiary would be employed in the United States in a managerial or executive capacity; 2) a qualifying relationship exists between the petitioner and the beneficiary's foreign employer; and 3) the petitioner has the ability to pay the beneficiary's proffered wage.

On appeal, counsel disputes the denial, pointing to the director's reference to an incorrect position title when discussing the beneficiary's proposed employment and asserting that the director's findings were erroneous.

Although the AAO acknowledges the director's erroneous reference to a food marketing manager when addressing the beneficiary's proposed position with the U.S. entity, the inadvertent error was insignificant and had no bearing on issues concerning the petitioner's eligibility. Moreover, the fact that the director made specific references to documents and information that are in the record of proceeding is a clear indicator that the adverse decision was based on the director's analysis of relevant factors that directly concern the petitioner's eligibility.

Additionally, while the AAO concurs with the director's findings regarding the first two grounds cited as alternate bases for ineligibility, the record does not support the director's finding with regard to the third ground dealing with the petitioner's ability to pay. As observed by the director, the IRS Form W-2 for 2008 that was issued to the beneficiary shows that the petitioner was paid the proffered wage during the year the Form I-140 was filed. The Form W-2 therefore serves as *prima facie* evidence of the petitioner's ability to pay the proffered wage as required by 8 C.F.R. § 204.5(g)(2). While the wages paid to other employees may assist the director in making adverse findings regarding other eligibility factors, only those wages paid to the beneficiary himself will contribute to a finding regarding the petitioner's ability to pay the beneficiary's proffered wage. Accordingly, the AAO hereby withdraws the third ground as a basis for denial and will focus on the first two grounds for the remainder of this discussion.

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 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 a letter dated October 20, 2008, which was submitted in support of the Form I-140, the beneficiary, in his capacity as president of the petitioning entity, provided the following description of the proposed position:

As [p]resident of [the petitioner], I provide corporate leadership in the overall direction, operation, and expansion of the computer sales and repair businesses I also establish and maintain all corporate relationships with wholesale distributors of computer equipment and accessories. I negotiate all business transactions and liaise with [the] CPA to overseeing [sic] the company's financial matters. . . . I maintain consistent employment of two full-time [s]tore [g]eneral [m]anagers, one part-time [c]omputer [t]echnician, and several other outside contractors, like the CPA consultant Thus, through the technical store managers, I direct and control the activities related to technical services. I make all important policy decisions affecting the organization, and have the authority to hire and fire employees. Accordingly, I function in an executive/managerial capacity with [the petitioning entity].

The beneficiary added that in addition to his duties with the existing computer business, he was also in the process of "developing" a steel import business.

The petitioner also provided numerous sales and purchase invoices, advertising contracts, and a copy of its organizational chart showing the beneficiary at the top of an organization that is comprised of two store managers, a computer technician, and a CPA consultant.

On June 2, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a supplemental description of the beneficiary's proposed employment listing the beneficiary's job duties, percentage of time that would be assigned to each duty, the number of subordinates who would report to the beneficiary, and the subordinates' job duties and educational levels. The petitioner was also asked to provide its payroll summary, IRS Form W-2s, IRS Form 1099, and/or any other compensation paid in 2007 and 2008. The petitioner was asked to provide as much detail as possible in the response.

The petitioner responded with a letter, dated July 1, 2009, from counsel, who claimed that the petitioner's lower-level personnel will relieve the beneficiary from having to primarily perform non-qualifying tasks. Counsel also referred to a letter from an expert who claimed to have evaluated the beneficiary's position and deemed the position as that of an executive. Counsel claimed that the expert opinion establishes that the beneficiary's position fits the legal definition of executive capacity. Counsel also cited unpublished AAO decisions in support of his assertions.

The petitioner's supplemental documentation in response to the RFE included another copy of the organizational chart that was previously submitted in support of the petition as well as a percentage breakdown of the proposed employment.

In the response to the RFE, the petitioner indicated that the beneficiary's time would be allocated as follows: 20% to overseeing the store managers, who would carry out customer service functions and oversee the work of the computer technician, reviewing reports and financial status updates from the store managers, identifying and prioritizing problems to be resolved, and reviewing the store managers' performances; another 20% to making decisions such as the hiring and firing of employees, implementing policy changes based on performance reports and company goals, and expanding business operations; 15% to providing corporate leadership regarding the direction, operation, and expansion of the computer sales and repair business, including evaluating managers' presentations of project feasibility and building a team environment among personnel; 10% to maintaining business relationships with product distributors; 5% to negotiating business transactions such as real estate leases and vendor contracts; 10% to communicating with the CPA regarding the company finances by reviewing federal and state tax reporting; 10% to developing expansion goals to engage in additional business activity; and the remaining 10% would be allocated to delegating technical service activities to store managers and optimizing IT services.

Regarding the remaining employees, the petitioner indicated that both store managers and the computer technician require bachelor degrees and indicated that the store managers would sell computers, software, and accessories and that all three employees would perform computer repair services. The petitioner also provided the IRS Form W-2s for 2008 issued to the beneficiary, its two store managers, and the computer technician, as well as numerous service and repair invoices showing orders that were taken in by each of the store managers.

On August 6, 2009, the director issued a decision denying the petition. The decision was based, in part, on the conclusion that the petitioner failed to establish that the beneficiary's proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity. The director observed that the wages paid to the beneficiary's subordinates indicate that the subordinates were not employed on a full-time basis. The director found that, given the petitioner's operation of two store locations and the limited staff available to support the operation of those locations, the beneficiary's employment would not primarily consist of tasks within a qualifying managerial or executive capacity.

On appeal, counsel challenges the director's decision urging the AAO to defer to USCIS's prior approvals of the petitioner's L-1 employment of the beneficiary. Counsel asserts that the prior approvals serve as "indisputable fact" that the petitioner is eligible for the immigration benefit sought herein. Counsel's contention, however, is incorrect and will not lead to a reversal of the director's decision.

Although the AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity, 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. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). 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. Despite counsel's argument to the contrary, 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).

Additionally, the AAO notes that counsel's reliance on internally generated service memoranda and unpublished AAO decisions is misplaced. With regard to the former, the AAO notes that USCIS memoranda merely articulate internal guidelines for service personnel; they do 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)). 8 C.F.R. § 103.3(c) provides that only AAO precedent decisions are binding on all USCIS employees in the administration of the Act. There are no regulatory provisions that make unpublished decisions similarly binding. As such, neither the cited service memorandum nor the unpublished AAO decisions will serve to overcome the director's decision.

That being said, the AAO finds that counsel was equally misguided in his reliance on the expert opinion of a third party whose expertise in the arena of immigration law was neither claimed nor established. It is noted that, while the AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Here, the petitioner offers expert testimony from an individual whose opinion is based primarily on the statements provided to him by the beneficiary. There is no evidence that the expert has any personal knowledge of the beneficiary's specific tasks within the organizational hierarchy that existed at the time of filing the petition; nor is there any evidence that the individual whose expert testimony has been offered is an expert in immigration law such that his assessment of the beneficiary's proposed job duties was issued in light of the relevant statutory and regulatory provisions. Thus, the expert opinion that is offered here is little more than an extension of the petitioner's own claim, which must be corroborated with adequate supporting documentary evidence in order to enable the petitioner to meet its 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)).

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The AAO will then consider this information in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks. In the present matter, the record lacks a comprehensive description of the beneficiary's specific day-to-day tasks and does not adequately establish that the organizational structure that was in place at the time of filing the petition was sufficient either to support or require the services of an individual whose time would be primarily allocated to the performance of tasks within a qualifying managerial or executive capacity.

While the beneficiary's job description is generally lacking in the specific information that is required to determine whether the position is one within a qualifying capacity, sufficient information was provided to lead the AAO to question the validity of the job description. Namely, the AAO notes that the job description offered in response to the RFE indicated that 20% of the beneficiary's time would be allocated to making personnel-related decisions including hiring and firing of employees. However, the record indicates that the petitioner was comprised of the same four employees during 2008 and that only one personnel change took place in 2009 after the petition was filed. The AAO therefore questions whether one fifth of the beneficiary's time would actually be allocated to making personnel-related decisions.

The AAO further notes that Schedule E of the petitioner's IRS Form 1120, where the beneficiary and his wife are each identified as the petitioner's corporate officers, indicates that the beneficiary's wife was said to only allocate 25% of her time to the business. The AAO therefore questions how effective the beneficiary's wife would be in managing one of the petitioner's two store locations and how, give the relatively small amount of time that she would dedicate to the business, the beneficiary's wife would be able to relieve the beneficiary from having to carry out the operational tasks required to manage the store location to which she has been assigned. Similarly, the AAO questions how the beneficiary could spend 10% of his time dealing with the CPA when federal and state tax reporting is done no more frequently than on a quarterly basis.

Most importantly, the numerous invoices that were submitted in support of the Form I-140 as part of Exhibit 14 list the beneficiary as the primary contact person. The beneficiary's name also appears on the tag line of numerous emails that show the petitioner's online sale of computer equipment. Although the record also contains invoices showing other company employees taking orders and issuing invoices, the AAO cannot discount the beneficiary's role in providing customer service to the petitioner's clientele, particularly given the limited personnel and their limited work schedules. Although the AAO finds that the overly broad job description offered by the petitioner is one major downfall in establishing the beneficiary's managerial or executive capacity, it must be noted that, even in instances where the job description is satisfactory, the description alone is meaningless if the organization that seeks to hire the beneficiary does not have the human resources to relieve him from having to primarily perform non-qualifying operational job duties.

Additionally, 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). Here, in light of the deficient job description provided and the petitioner's lack of organizational complexity, the evidence on record does not lead to the conclusion

that the beneficiary would more likely than not perform primarily managerial or executive job duties under an approved petition. Therefore, the instant petition cannot be approved.

The other 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.

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; *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, the director concluded that the petitioner failed to provide evidence establishing the ownership of the foreign entity, thus precluding USCIS from conducting a comprehensive analysis of the key elements that determine whether the necessary degree of common ownership exists between the foreign entity that employed the beneficiary abroad and the entity that seeks to employ the beneficiary in the United States.

After reviewing the elements of the petitioner's claim, the AAO finds that the director overlooked a fundamental factor which, when considered, renders the director's ownership analysis unnecessary. Namely,

the AAO focuses on the documentation in Exhibit 28, which the petitioner initially submitted in support of the Form I-140. The exhibit includes a letter dated September 13, 2008, signed by the deputy secretary of the Lahore Chamber of Commerce and Industry, which states that Akhtar Brothers, the foreign business where the beneficiary was employed prior to entering the United States to work for the U.S. petitioner, is a sole proprietorship belonging to the beneficiary. A sole proprietorship is a form of business in which one person owns all the assets of the business in contrast to a partnership, trust or corporation. *Black's Law Dictionary* 968 (Abridged 6th Ed. 1991). Therefore, to the extent that the foreign business has been identified as a sole proprietorship and cannot be deemed a legal entity,¹ it does not fit either the definition of affiliate or subsidiary and cannot be deemed as having a qualifying relationship with the U.S. petitioner, regardless of the claimed common ownership and control.

Accordingly, while the AAO does not concur with the director's approach in arriving at the adverse conclusion with regard to the second ground that served as a basis for the denial, the AAO also finds that the petitioner failed to meet the filing requirement specified at 8 C.F.R. § 204.5(j)(3)(i)(C). Therefore the petition must be denied on this basis as well.

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.

¹ A legal entity is 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. *Id.* at 620.