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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**

[Redacted]

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DATE: **JUL 13 2011** OFFICE: TEXAS SERVICE CENTER [Redacted]

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[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 Georgia limited liability company that seeks to employ the beneficiary as its food production 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 the determination that the petitioner failed to provide supporting evidence at the time of filing the Form I-140. The director addressed various eligibility criteria cited at 8 C.F.R. § 204.5(j)(3)(i) and found that the record fails to establish that 1) the U.S. entity has been doing business in the United States; 2) the beneficiary was employed abroad in a qualifying capacity during the requisite time period by a branch, affiliate, or subsidiary of the U.S. entity; and 3) the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, counsel states that the beneficiary will be employed as a manager and indicates that additional evidence and/or information will be submitted within thirty days of the appeal. The petitioner has since supplemented the record with supporting documentation and asks that the AAO approve the petition.

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 to be addressed in this discussion is whether the petitioner has established that it has been doing business.

The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) requires the petitioner to provide evidence 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) defines doing business 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."

As properly noted in the denial, the petitioner did not provide any supporting evidence at the time the Form I-140 was filed and thus failed to establish that the U.S. entity had been doing business.

On appeal, [REDACTED]<sup>1</sup> states that both the foreign entity and the U.S. petitioner continue to do business. [REDACTED] refers to tax documents, bank statements, payroll records, and corporate reports<sup>2</sup> as evidence that both entities are doing business.

The petitioner's supporting documentation, however, is insufficient to establish that the U.S. entity had been doing business during the one-year period prior to filing the instant petition or that it is currently doing business. Despite [REDACTED] belief, none of the documents referenced provide an accurate measure of the regularity or continuity with which the petitioner had been carrying out business transactions. While both tax and payroll documents establish the existence of the petitioner as a business entity, such documents do not establish that the petitioner has sold its goods and services on a regular, systematic, and continuous basis. As such, these documents do not allow the AAO to determine whether the petitioner was doing business in the time and manner prescribed by 8 C.F.R. § 204.5(j)(3)(i)(D).

Next in this proceeding, the AAO will address the regulatory criterion cited at 8 C.F.R. § 204.5(j)(3)(i)(B), which requires the petitioner to establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for a branch, affiliate, or subsidiary of the beneficiary's foreign employer.

As a threshold matter, the AAO notes that the above regulatory requirement is comprised of multiple parts. The first part requires the petitioner to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; the second part requires the petitioner to establish that the qualifying employment took place during a specific time period; and the remaining part of the regulation requires the petitioner to establish that the beneficiary's prospective U.S. employer is a branch, affiliate, or subsidiary of the foreign employer where the beneficiary had been previously employed.

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<sup>1</sup> The AAO notes that, while the petitioner's letterhead indicates that it is doing business under the name [REDACTED] the official document that was issued by the State of Georgia Department of Revenue indicates that the petitioner's official name is [REDACTED] and that this entity is doing business as [REDACTED]. Although it appears that [REDACTED] are one and the same, the inconsistency between the petitioner's letterhead and the official state document was not addressed or explained.

<sup>2</sup> While not germane to the findings issued herein, the record contains no evidence that the petitioner supplemented the record with the U.S. entity's audited financial reports. Additionally, while the foreign entity's financial reports have been submitted on appeal, there is no evidence to establish that these were audited reports as claimed on appeal.

In the present matter, the record does not establish that the petitioner met any of the three criteria that comprise 8 C.F.R. § 204.5(j)(3)(i)(B).

First, with regard to the issue of managerial or executive capacity, the AAO notes that a detailed description of the beneficiary's specific job duties is crucial, as the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. Here, the petitioner has not provided a description of the job duties the beneficiary performed during his employment abroad.

With regard to the second element—the time period of foreign employment—the petitioner has not provided any documentation to establish when the beneficiary's employment abroad took place. As such, even if the petitioner were able to establish that the foreign employment was within a qualifying managerial or executive capacity, there is no evidence to establish that the time period and duration of the foreign employment meets the regulatory requirement.

Lastly, the petitioner has not established that the beneficiary's U.S. employer is the same employer, or an affiliate or subsidiary of the beneficiary's employer abroad.

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, while the petitioner provided a copy of a membership certificate dated January 1, 2008 showing the issuance of 100,000 units to [REDACTED], the beneficiary's claimed foreign employer, the petitioner's 2008 partnership tax return, i.e., IRS Form 1065, identified a total of six shareholders, each owning between 10-25% of the U.S. entity. Thus, based on the information provided in the tax return, the petitioner is not a subsidiary of the [REDACTED] as claimed. In fact, while [REDACTED] is among the shareholders, owing 20% of the petitioner, there is no evidence that this entity is in any way related to the beneficiary's claimed foreign employer such that the foreign employer can be deemed one of the owners of the petitioning entity.

The inconsistency between the petitioner's membership certificate and its 2008 tax return creates two problems. First, the fact that the anomaly exists is in itself an issue of credibility. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, no such objective documentation has been provided to establish the reason for or resolution to the inconsistency. Second, if the petitioner has six distinct owners and is not the foreign entity's subsidiary as claimed via the membership certificate, the burden is on the petitioner to establish that the foreign entity is owned and controlled by the same group of individuals with each individual owning and controlling approximately the same share or proportion of each entity. See the definition of *affiliate* at 8 C.F.R. § 204.5(j)(2). The petitioner has not, however, provided evidence to establish that it is an affiliate of the foreign entity.

Therefore, the AAO finds that the record fails to establish that the petitioner meets any of the three criteria that comprise 8 C.F.R. § 204.5(j)(3)(i)(B) and on the basis of this second adverse conclusion the instant petition cannot be approved.

The third issue to be addressed in this proceeding deals with the beneficiary's proposed employment with the U.S. petitioner and whether such employment falls within the statutory definition of 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 petitioner appended the following list of the beneficiary's proposed duties and responsibilities:

- Responsible for the production of food which meets the quality standards for food service and procurement of food products including purchasing, order, receiving, storing and unit inventory quantities of food and supplies necessary for menus;
- Responsible for training, supervising, direction, motivation and disciplining of staff;
- Responsible for development and execution of fundamental strategies required to deliver financial targets while creating sustainable competitive advantages;
- Develop and apply strategic insights to guide business in addressing needs across the entire food service value chain;
- Coordinate activities of and direct indoctrination and training of chefs, cooks and other kitchen workers engaged in preparing and cooking various foods . . . ;
- Plan and regularly update menus, serving arrangements and utilization of food surpluses . . . .
- Specify food portions and courses, production and time sequences, and work station and equipment arrangements;
- Inspect supplies, equipment and work areas to ensure efficient service and conformance to standards;
- Analyze operational problems such as theft and wastage and establishes [sic] controls;
- Schedule corporate parties and reservations;
- Develop plans to operate the new locations, supervise and direct personnel program and training, will negotiate contracts; coordinate production and product quality in accordance with policies, principles and procedures established by the business owner.

On appeal, the petitioner provided a similar job description paraphrasing and repeating most of the items included in the initial list of duties and responsibilities. The petitioner also provided an additional job description with percentage breakdowns allocating the beneficiary's time as follows:

- Strategic planning including planning production schedule within budgetary limitations and time constraints analyzing personnel and other resources to select the best way of meeting production quota and determine the equipment to be used, the work shifts that are necessary, and the sequence of production; develop [a] position control system to contain labor cost; coordinate the resources and activities required to meet demands of customers; decide on the maintenance and or replacement of equipment; work out the most efficient methods of producing a wide and varied range of gourmet boutique products prepared to customers' specifications and timely delivered, supervise/perform business functions[.] 60%
- Working with the purchasing department and suppliers to improve the quality of the products' components; oversee ordering of stock and coordinate export orders[.] 30%
- Financial matters including evaluating costs and revenues[.] 10%

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). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. The petitioner must establish what the beneficiary will primarily do on a daily basis, as the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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. at 604.

In the present matter, while the petitioner has provided enough information to establish that the beneficiary has discretionary authority over the petitioner's employees and business operations, the above job descriptions fail to establish that the primary portion of the beneficiary's time would be allocated to tasks within a qualifying managerial or executive capacity. Despite the likelihood that a considerable portion of the beneficiary's time would be spent managing subordinate personnel, the petitioner failed to establish precisely how much of his time would be allocated to personnel-related matters nor is there any indication that the beneficiary would primarily oversee the work of managerial or professional employees. The record also indicates that the beneficiary would be involved in contract negotiation and various customer service tasks, neither of which can be categorized as being within a managerial or executive capacity.

In summary, the petitioner did not provide a sufficiently detailed delineation of the beneficiary's tasks and failed to establish that the primary portion of the beneficiary's time would be spent performing tasks within a qualifying managerial or executive capacity. Therefore, on the basis of this third adverse finding, the instant petition cannot be approved.

Finally, with regard to the petitioner's previously approved L-1 employment of the beneficiary, the AAO notes that 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. 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 petition was approved based on the same unsupported assertions that are contained in the current record, the approval 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).

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.