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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

**PUBLIC COPY**

**U.S. Citizenship and Immigration Services**

[redacted]

B4

DATE: JUL 14 2011 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

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

The petitioner is a branch office of a Chinese-owned enterprise and is authorized to do business in the State of New York. The petitioner seeks to employ the beneficiary as the general manager of its branch office. 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 grounds of ineligibility. First, the director found that the petitioner had failed to establish that it had been doing business in the United States for one year prior to filing this petition as required by 8 C.F.R. § 204.5(j)(3)(i)(D). Second, the director concluded that, because the petitioner was not licensed to operate as a business enterprise until February 18, 2009, it failed to establish that the beneficiary was coming to the United States to continue employment with the same employer, or an affiliate or subsidiary of the foreign employer.

On appeal, counsel disputes the director's findings, asserting that the petitioner is a wholly-owned subsidiary of China Construction Bank in Beijing, China and further contending that the director placed undue emphasis on the significance of a business license in determining whether the petitioner had been doing business during the prescribed one-year period.

With regard to the issue of a qualifying relationship, while counsel erroneously refers to the petitioner as a wholly-owed subsidiary[1] of a foreign entity, the AAO finds that the record contains sufficient documentation to establish that the U.S. petitioner is a branch of a foreign entity. Therefore, the AAO hereby withdraws the second ground as a basis for the denial. Nevertheless, the AAO finds that the petitioner's Form I-140 does not warrant approval on the basis of the director's first finding, i.e., that the petitioner does not meet the filing requirement specified in 8 C.F.R. § 204.5(j)(3)(i)(D).

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.

[1] *See* 8 C.F.R. § 204.5(j)(2) for the definition of "subsidiary."

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 primary issue in this proceeding is whether the petitioner had been doing business as of March 23, 2008, or one year prior to the date the instant Form I-140 was filed.

The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity *and* does not include the mere presence of an agent or office." (Emphasis added).

In the present matter, the petitioner is a U.S. branch office of a foreign banking institution whose purpose is to conduct banking activity in the United States. The record shows that on September 21, 2004 the petitioner was granted authorization by the State of New York Banking Department to "carry on the activities permissible for a representative office." The authorization document expressly distinguishes itself from a license to engage in the banking business, which the petitioner ultimately obtained on February 18, 2009. The record also contains a February 18, 2009 press release, which announced the petitioner's newly obtained license and stated that "[t]he New York branch will engage in wholesale deposit-taking, lending, trade finance, foreign exchange and other banking services." The press release also announced that the New York branch was scheduled to "formally open" sometime in 2009.

On August 12, 2009, the director issued a notice of intent to deny (NOID) stating that the petitioner has failed to establish that it had been doing business in the time and manner specified in 8 C.F.R. § 204.5(j)(3)(i)(D), which states that the petitioner must establish that it had been doing business for at least one year prior to filing the Form I-140. The director allowed the petitioner the opportunity to provide evidence to address the deficiency.

In response, counsel provided a statement dated September 10, 2009 disputing the director's adverse finding. Counsel pointed out that the representative office was open since March 1997 and pointed to the 2004 state authorization document, which permitted the petitioner to maintain a representative office in New York. Counsel also provided a list of the permissible business activities that the representative office was legally authorized to carry out without a business license. Additionally, counsel stated that the representative office's main purpose was to create a U.S. presence for the foreign entity such that would allow the foreign entity to eventually open a branch office.

In a decision dated October 20, 2009, the director denied the petition. The director took note of the petitioner's business license, which was issued on February 18, 2009, and determined that, while the petitioner had a representative/agent office in the United States prior to obtaining its business license, it was not engaged in a systematic and continuous provision of goods and/or services in a capacity other than an agent or office of a foreign entity.

On appeal, counsel asserts that the director misapplied the provisions of 8 C.F.R. § 204.5(j)(3)(i)(D) and contradicted prior U.S. Citizenship and Immigration Services (USCIS) decisions in which other Form I-140s filed by the same petitioner were approved. Counsel again erroneously refers to the petitioner as a wholly-owned subsidiary, despite the lack of documentation to support her claim, and points to New York's banking policy, which allows foreign banking organizations to engage in the solicitation of business and provide marketing services on behalf of the foreign organization.

Counsel's statements, however, are insufficient to overcome the basis for denial as they fail to establish that the petitioner's activities during the one year prior to filing the Form I-140 constitute "doing business" as defined at 8 C.F.R. § 204.5(j)(2).

As a threshold matter, the AAO points out that "doing business" is comprised of two parts. First, the petitioner must establish that it provides goods and/or services on a regular, systematic, and continuous basis. Second, the petitioner must establish that it carries out these business activities in the capacity of a firm, corporation, or other legal entity, rather than in the capacity of a "mere presence of an agent or office." Counsel erroneously places undue emphasis on the first part of the definition without giving equal consideration to the second requirement. *Id.* Counsel repeatedly makes references to the petitioner as a representative office, indicating that, prior to having obtained the license to operate as a branch of the foreign banking institution, the petitioner's primary purpose was to establish a U.S. presence that would enable the foreign entity to commence doing business in the United States at a future date. Contrary to counsel's contentions, merely establishing that some business activity is being carried out is not enough to meet the criteria specified in the regulatory definition.

Furthermore, based on counsel's account of the petitioner's activities, none of the services that the representative office performed were for outside banking clientele, but rather for the foreign entity itself for the specific purpose of securing the foreign entity the opportunity to eventually be able to provide its banking services to clientele in the United States. Additionally, while the AAO finds that securing a business license is an indication of the petitioner's intent to do business in the United States, a license is not evidence that an entity is or has been engaged in doing business.

With regard to the list counsel provides of all business activities that are legally permissible without a business license, the petitioner has provided no evidence that it in fact engaged in all of the permitted activities. Moreover, state law is not the proper source for determining what constitutes "doing business" in the context of an immigrant visa petition. Even if the petitioner's business activity rises to the level of doing business by state law standards, the petition will only merit approval if the petitioner has established that it meets all the relevant statutory and regulatory criteria that pertain to the type of immigrant petition that has been filed. In the present matter, the statutory and regulatory criteria that apply to the instant petitioner is set out at section 203(b)(1)(C) of the Act and at 8 C.F.R. § 204.5(j), respectively. The AAO finds that the petitioner has failed to establish that the business activity that was carried out during the one-year period prior to the date the petition was filed rises to the level of doing business as defined at 8 C.F.R. § 204.5(j)(2). Therefore, on the basis of this conclusion, the instant petition cannot be approved.

Additionally, with regard to counsel's reference to petitioner's previously approved L-1 employment of the beneficiary as well as USCIS's approval of immigrant petitions that were filed by the same petitioner on behalf of other employees, 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 prior nonimmigrant approvals do not preclude USCIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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 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. Moreover, with regard to a previously approved nonimmigrant petition, 8 C.F.R. § 214.2(l)(9)(i) states that approval of a nonimmigrant petition may be revoked at any time, even after the expiration of the petition. The regulation at 8 C.F.R. § 214.2(l)(9)(iii) sets out the list of six possible bases for revocation.

Additionally, the approvals of immigrant petitions filed by this petitioner may also be subject to revocation. Section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary of Homeland Security 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)).

Thus, in light of the above, it is apparent that 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).

Accordingly, regardless of any favorable action taken with regard to previously filed nonimmigrant petitions on behalf of the same beneficiary as well as any immigrant petitions filed by the same petitioner on behalf of other beneficiaries, the instant petition may not be approved due to the petitioner's failure to establish eligibility for the immigration benefit sought.

Lastly, while addressed in the director's decision, the AAO finds that the record lacks sufficient evidence to establish that the petitioner was ready and able, at the time of filing, to employ the beneficiary in a primarily managerial or executive capacity.

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.