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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

[redacted]

B4

DATE: MAY 17 2011 OFFICE: NEBRASKA 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, Nebraska Service Center. The petitioner subsequently filed a motion to reconsider, which the director dismissed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a United States corporation that seeks to employ the beneficiary as its vice president of membership and marketing. 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 did not have a qualifying relationship with the beneficiary's foreign employer at the time the Form I-140 was filed and that it is therefore ineligible for the immigration benefit sought in the present matter.

On motion, counsel argued that the director abused his discretion by making a decision that is not in accord with statutory or regulatory mandates. Counsel further contended that there is no legal requirement for a qualifying relationship to exist at the time of filing the petition.

In a decision dated July 21, 2009, the director dismissed the motion, concluding that the petitioner failed to cite to precedent decisions that establish that the prior decision was incorrect based upon the evidence of record at the time of the initial decision.

On appeal, counsel reasserts the arguments previously made on motion, focusing on the petitioner's continued multinational presence through its various foreign subsidiaries. Counsel also refers to a service memorandum that discusses the Adjudicators Field Manual, which specifically requires that the petitioner be doing business through at least one qualifying organization abroad. Counsel persists in her original argument, contending that the petitioner is not required to maintain a qualifying relationship with the beneficiary's foreign employer at the time the Form I-140 is filed.

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.

Here, the petitioner filed a motion to reconsider. Based on the content of counsel's brief, the director determined that the petitioner's submissions were insufficient to meet the requirements of 8 C.F.R. § 103.5(a)(3), which states the following, in pertinent part:

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In reviewing the regulatory provisions concerning the filing of a motion to reconsider, the AAO finds that the director did not err in dismissing the motion. In her brief, counsel cited to case law that set a legal standard for determining what is deemed to be an abuse of discretion and referred to a memorandum in an attempt to contradict the propriety of the director's decision. However, neither citation met the requirements of a motion to reconsider. Merely asserting that the director's decision amounted to an abuse of discretion is not persuasive in light of a decision that was firmly based on the director's interpretation of relevant statutory provisions. Furthermore, with regard to counsel's reference to a memorandum, 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)).

Lastly, the AAO notes that even if the petitioner's motion to reconsider had been granted, the petition would nevertheless have been denied based on the fact that counsel's brief did not overcome the petitioner's ineligibility in that counsel failed to establish that the petitioner had a qualifying relationship with the beneficiary's foreign employer at the time the Form I-140 was filed. 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 primary basis for counsel's dispute is the assertion that there is no statutory or regulatory provision that requires the petitioner to establish the existence of a qualifying relationship between the petitioner and the beneficiary's foreign employer at the time of filing the petition. Counsel is incorrect. The regulations pertaining to the filing of an I-140 petition under section 203(b)(1)(C) of the Act expressly state that the petitioner must establish the beneficiary's "prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity" which employed the beneficiary abroad. 8 C.F.R. § 204.5(j)(3)(i)(C). Thus, if the petitioner does not operate abroad through an affiliate or subsidiary, the record must show that the petitioner and the beneficiary's foreign employer are the "same employer" in the immigrant context. *See* 8 C.F.R. § 204.5(j)(3)(C). The regulation's use of the word "is" prescribes that the relationship between the petitioner and the beneficiary's foreign employer must exist in the present, i.e., at the time of filing the petition, and it must continue to exist until such time as the beneficiary is

granted an immigrant visa or adjusts status to that of a permanent resident of the United States. The petitioner's burden of establishing eligibility for the benefit sought is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

In direct contradiction to the express language in the relevant regulatory provision, counsel's reasoning focuses on the petitioner's circumstances prior to the filing of the Form I-140, thereby suggesting that eligibility need not be present at the time of filing the petition so long as the petitioner established that it met the relevant regulatory provisions at some time in the past. This line of reasoning suggests that once a qualifying relationship is established as having existed, the petitioner can continue relying on that old qualifying relationship for a petition filed in the future, even if the relationship ceases to exist prior to the time of filing, as is the case in the present matter. The AAO cannot agree with counsel's interpretation. Precedent case law specifically requires that each petitioner establish its eligibility at the time of filing the petition. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The facts presented by the petitioner in this matter indicate that the circumstances that would have rendered the petitioner eligible for the immigration benefit sought did not occur contemporaneously with the filing of the Form I-140. Rather, by the time the petitioner filed the Form I-140, it was longer eligible for the immigration benefit it was seeking because of the termination of the petitioner's ownership interest in the beneficiary's foreign employer. It would be factually impossible for the petitioner to establish an ongoing qualifying relationship with a foreign entity with which the petitioner does not share common ownership and control.

In this matter, it is recognized that the petitioner continues to conduct business in two or more countries, one of which is the United States. However, the issue here is not whether the petitioner meets the definition of multinational under 8 C.F.R. § 204.5(j)(2), but whether it maintained (at the time the petition was filed) and continues to maintain a qualifying relationship with the separate legal entity that employed the beneficiary abroad. As the petitioner did not have a qualifying relationship with the beneficiary's foreign employer at the time the Form I-140 was filed, the director could not have approved this petition.

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.