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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

DATE: **AUG 09 2012**

OFFICE: NEBRASKA SERVICE CENTER

FILE: 

IN RE: Petitioner:
 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:



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 in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** 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 Washington corporation that seeks to employ the beneficiary as its advertising 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.

In support of the Form I-140 the petitioner submitted a brief supporting statement dated June 14, 2010 in which it was claimed that the beneficiary's U.S. employment would entail oversight of sales, graphic design, and distribution of the petitioner's publications to the Spanish-speaking community. The petitioner also provided supporting documents in the form of tax returns, a 2008 and 2009 Form W-2 for the beneficiary, and a state issued document listing the petitioner's registered trade names.

The director reviewed the petitioner's submissions and determined that they were not sufficient to establish eligibility. The director therefore issued a request for additional evidence (RFE) dated July 22, 2010 informing the petitioner of numerous evidentiary deficiencies and allowing the petitioner the opportunity to supplement the record with evidence of its eligibility. The director requested evidence and information pertaining to the beneficiary's employment abroad, his proposed employment with the U.S. entity, and the petitioner's qualifying relationship with the beneficiary's foreign employer.

The petitioner addressed the director's concerns in a statement from counsel, dated August 31, 2010. The petitioner also provided supporting evidence in the form of U.S. tax documents, pay statements, various corporate documents pertaining to both entities, organizational charts, and statements that were previously submitted in support of other, nonimmigrant, visa petitions.

After reviewing the record, the director concluded that the petitioner failed to establish eligibility. The director therefore issued a decision dated November 18, 2010 denying the petition based on the petitioner's failure to submit evidence of (1) the beneficiary's U.S. employment in a qualifying capacity; and (2) the petitioner's qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel submits a statement disputing the director's findings accompanied by a sworn statement from [REDACTED] and the petitioner's sample publication.

The AAO finds that neither counsel's statements nor the petitioner's supporting documents are sufficient to overcome the director's denial. The discussion below will provide an analysis of the relevant requirements and the shortcomings in the record.

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 proceeding pertains to the beneficiary's employment with the U.S. entity and whether such employment can be deemed as being in a 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 denying the petition, the director focused in part on the petitioner's tax documents, which indicate that the beneficiary is the petitioner's only employee. The director determined that the beneficiary's efforts may be geared primarily toward marketing of the petitioner's yellow pages publication rather than carrying out primarily managerial- or executive-level job duties.

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). Published case law supports the pivotal role of a clearly defined job description, 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). The AAO finds that it is appropriate and often necessary to also consider the beneficiary's job description 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 request for evidence, the director instructed the petitioner to provide a detailed description of the beneficiary's proposed day-to-day tasks and to supplement the description with the percentage of time the beneficiary would allocate to each of his assigned tasks. The petitioner did not, however, provide a response in accordance with the requested format. Instead, the petitioner provided a response statement from counsel, dated August 31, 2010, which included general information about the proposed position. Counsel stated that the beneficiary will be responsible for ensuring that the petitioner's publications get prepared, printed, and distributed and that the advertising revenue that is derived from the distribution of the publications be used to pay all necessary expenses and costs. Counsel further stated that the beneficiary will coordinate the advertising sales, graphics layout, and preparation of the publication, and he will supervise the printing and distribution. Counsel also asked the director to review a January 24, 2008 statement, which the petitioner submitted in support of a nonimmigrant petition, where the beneficiary's proposed employment was said to include analysis in order to determine advertising rates, targeting advertisers, and directing and managing the commissioned sales people who will sell advertising.

On appeal, in an attempt to establish that the beneficiary does not primarily perform the petitioner's non-qualifying tasks, counsel contends that the petitioner employs independent contractors to provide graphic design printing and sales services and explains that much of the work in the publishing industry is done via communications over the internet.

The job descriptions that both counsel and the petitioner have offered are deficient in their lack of details about the tasks the beneficiary would carry out on a daily basis. While it has been repeatedly stated that the beneficiary would oversee the work of commissioned employees who would be responsible for the design, printing, and sales components of the petitioner's business, the petitioner does not specify what actual tasks the beneficiary would perform that are indicative of coordinating components of publishing and managing individuals who carry out the underlying operational tasks. Moreover, merely establishing that the beneficiary will be relieved from having to carry out certain non-qualifying tasks is not sufficient to establish that the beneficiary would allocate the primary portion of his time to carrying out tasks within a qualifying managerial or executive capacity. Although the beneficiary may be tasked with overseeing certain commissioned workers to perform graphics design, printing, and sales tasks, there is no evidence that these individuals, who would be subordinate to the beneficiary, are supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act.

The petitioner has provided no supporting evidence to establish that it has commissioned contract workers to carry out the necessary graphics design, printing, and sales services as claimed. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the 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)). None of the petitioner's tax returns show that the petitioner paid additional funds for the cost of labor.

In order to conclude that the beneficiary merits the immigrant classification of multinational manager or executive, the petitioner must first provide a detailed account of the actual tasks the beneficiary would perform in his proposed position. 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 the position in question. 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). As the petitioner has failed to establish what actual tasks would comprise the beneficiary's proposed position, the AAO cannot conclude that the petitioner has submitted sufficient evidence to establish that the beneficiary would be employed in a qualifying managerial or executive capacity.

Another 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 that the two entities are 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.

Precedent case law adheres to the above regulatory provisions in its focus on ownership and control as the two key factors that must be examined in determining whether a qualifying relationship exists between the 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.

The only evidence on record that addresses the petitioner's ownership is Schedule E of the petitioner's tax returns from 2005-2008, all of which name [REDACTED] as the owner of 100% of the petitioner's common stock. However, the petitioner's tax returns only serve as mere reflections of the petitioner's own claims and thus require documentary evidence to establish the truth of the matter. Corroborating evidence may be submitted in the form of a corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings establishing 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.

As the petitioner in the present matter failed to submit relevant corroborating evidence to establish its ownership and control, the AAO cannot conclude that the petitioner has a qualifying relationship with the beneficiary's foreign employer as claimed.

While not previously addressed in the director's decision, the AAO finds that the petitioner failed to establish eligibility on two additional grounds. First, with regard to the beneficiary's employment abroad, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must 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 the same employer. The director specifically addressed this

issue in the RFE by instructing the petitioner to provide a detailed analysis of the beneficiary's daily activities during his employment abroad. However, the information the petitioner provided in response lacked the requested account of the beneficiary's specific daily job duties and the percentage of time the beneficiary allocated to each task. The petitioner therefore failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Second, the AAO will address the provisions of 8 C.F.R. § 204.5(j)(3)(i)(D), which require the petitioner 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) 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." The petitioner claimed that its business purpose is to publish and distribute Spanish-language media. Neither payroll documents nor the petitioner's tax returns establish that the petitioner engaged in such publishing and distribution activities on a regular, systematic, and continuous basis. As the record lacks evidence to establish that the petitioner was doing business in the time and manner prescribed, the AAO finds that the petitioner has failed to meet the criteria specified at 8 C.F.R. § 204.5(j)(3)(i)(D).

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 grounds of ineligibility discussed above, this petition cannot be approved.

Finally, in response to counsel's repeated references to the petitioner's 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 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).

Counsel's reliance on the petitioner's previously approved L-1 employment of the beneficiary as evidence of the petitioner's current eligibility is misplaced. If previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, such 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. at 597. 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).

Lastly, 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.