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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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DATE: **MAR 14 2012**

OFFICE: TEXAS SERVICE CENTER

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. 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 Florida corporation that seeks to employ the beneficiary as its vice president of sales and marketing/chief executive officer. 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 Form I-140 was filed on February 10, 2009. The petitioner did not provide supporting evidence establishing eligibility for the immigration benefit sought. The director therefore issued a request for additional evidence (RFE) on April 13, 2009. The record contains no evidence showing that supporting evidence was submitted in response to the RFE.

The director issued a notice of intent to deny (NOID) dated July 18, 2009 informing the petitioner once again of various evidentiary deficiencies. The NOID included a request for definitive statements describing the beneficiary's specific job duties in his respective positions with the foreign and U.S. entities. The director instructed the petitioner to list the beneficiary's job duties and to assign a time allocation to each item on the list. The petitioner was also asked to discuss the beneficiary's subordinates in terms of their respective job duties and educational levels and to provide each entity's organizational chart.

The petitioner provided a response addressing the director's areas of concern. The petitioner also included its tax, payroll, and bank documents for 2008, the beneficiary's income documents for 2009, and the foreign entity's tax return for 2008.

After reviewing the record, the director concluded that the petitioner failed to establish that the petitioner was employed abroad and that he would be employed by the U.S. entity in a qualifying managerial or executive capacity. The director also determined that the petitioner failed to establish that the foreign entity continues to exist and do business. Accordingly, the director issued a decision dated January 26, 2010 denying the petition based on the three deficiencies outlined herein.

On appeal, counsel submits a brief in which he disputes the denial, contending that the petitioner had previously submitted evidence of its eligibility when the prior nonimmigrant L-1 petition was submitted on behalf of the same beneficiary. Counsel asserts that the director's denial is factually and legally erroneous.

The AAO finds that counsel's arguments are not persuasive and fail to overcome the grounds for denial. It is noted that all of the petitioner's submissions have been reviewed. All relevant documentation that pertains directly to the key issues in this matter will be fully addressed in the discussion below.

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 two issues to be addressed in this proceeding call for an analysis of the beneficiary's job duties with each employer and each employer's organizational hierarchy. Specifically, the AAO will examine the record to determine whether the record supports the petitioner's claim that the beneficiary was employed abroad and 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.

Each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof. As such, each petition must stand on its own individual merits. Given this information, counsel cannot expect that evidence submitted earlier in support of a previously filed L-1 nonimmigrant petition, should have been reviewed by the director in order to determine the petitioner's eligibility in the present matter. Although the AAO will review the documentation pertaining to a prior petition when such documentation is incorporated into the record of proceeding either by U.S. Citizenship and Immigration Services (USCIS) or by the petitioner, as has been done by counsel in the present matter, as a general rule, USCIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions in order to determine the approvability of the petition at hand.

Furthermore, 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 assertion that the director's current denial "is patently unfair, unreasonable, and contradictory" in light of the prior approval of the petitioner's nonimmigrant Form I-129 is not persuasive as there is no statute, regulation, or precedent decision that precludes the director from denying a petition where the petitioner has failed to meet its burden of proof. In fact, if the petitioner's previously filed nonimmigrant petition was approved based on the same deficient documentation that is contained in the current record, the approval would constitute material and gross error on the part of the director and may be reviewed for possible revocation. 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).

In general, when looking to determine whether the beneficiary was employed abroad or would be employed in the United States in an executive or managerial capacity, the AAO will look first to the description of the beneficiary's job duties in the positions being addressed. *See* 8 C.F.R. § 204.5(j)(5). The AAO will then consider this information in light of each entity's organizational hierarchy, the beneficiary's position therein,

and the entity's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks of the business.

The job descriptions that the petitioner submitted in two separate August 17, 2009 statements in response to the RFE failed to state what actual daily tasks the beneficiary performed abroad and which tasks he would be expected to perform in his proposed position with the U.S. entity. Instead, the petitioner provided generalizations that were overly vague and addressed the beneficiary's discretionary authority instead of specifying what the beneficiary did and would be doing on a daily basis. For instance, in describing the beneficiary's employment abroad, the petitioner stated that the beneficiary allocated 20% of his time to hiring and firing personnel, furnishing offices, and obtaining supplies. While hiring and firing personnel may fit the criteria of what is deemed as being in a qualifying managerial capacity, the AAO is unclear as to how, within an organization whose staff was comprised of six positions that were subordinate to the beneficiary, the act of hiring and firing employees was something that the beneficiary did on a regular daily or even a weekly basis. The submitted evidence simply does not corroborate such an assertion. Furthermore, as properly determined by the director, furnishing the offices and obtaining supplies are both non-qualifying operational tasks that do not fit within the definition of managerial or executive capacity. Similarly, managing key client accounts and seeking out business partnerships are also operational tasks that cannot be classified as being within a qualifying managerial or executive capacity.

Although the AAO has considered the supplemental L-1 documents that have been submitted in support of the appeal, the job description of the proposed employment that the petitioner previously offered appears to have been intended for the purpose of filing a new office petition that is subject to the L-1 regulations at 8 C.F.R. § 214.2(l)(3)(v). The AAO notes that the new office regulations are significantly different from those that pertain to the immigrant petition filed in the present matter in that the new office regulations requires only that "[t]he intended United States operation, within one year of the approval of the petition, will support an executive or managerial position . . ." 8 C.F.R. § 214.2(l)(3)(v)(C). To the contrary, the statute and regulations that pertain to the immigrant petition filed herein requires that the petitioner, at the time of filing, be able to employ the beneficiary in a qualifying managerial or executive capacity. *See* section 203(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(5).

While it is acceptable for a beneficiary under an L-1 new office petition to hire senior management personnel, furnish the petitioner's offices, and obtain supplies as part of its start-up phase of the operation, those same job duties within the context of an immigrant visa petition would be deemed as non-qualifying and would contradict the claim that the beneficiary would be hired by the U.S. entity to be immediately employed in a qualifying managerial or executive capacity. Similarly, the petitioner's explanation of what duties will comprise "setting sales and marketing goals and strategies" indicates that the beneficiary's time would be allocated to non-qualifying tasks, such as developing sales channels and researching the market to assess competitors and the petitioner's best use of product lines.

While the AAO acknowledges that no beneficiary is required to allocate 100% of his or her 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 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. The job description that the petitioner initially offered in support of a new

office petition is essentially being offered again with the underlying assertion that the petitioner is still a small company in the beginning phases of development. As noted above, the regulations that pertain to the type of petition filed in this matter do not allow for a new office petitioner. See 8 C.F.R. § 214.2(l)(ii)(F) (for definition of the term *new office*). The petitioner must establish its ability to employ the beneficiary in a qualifying managerial or executive capacity at the time the petition is filed. A petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

While the remaining components of the job description—making final decisions regarding marketing and investments and managing the company's capital—signify that the beneficiary would have a considerable degree of discretionary authority over the petitioner's business operation, these statements lack the detail that is necessary to convey a meaningful understanding of the specific daily tasks that would be involved in these broad job responsibilities. As the petitioner used identical statements to describe the beneficiary's foreign and proposed employment, the same adverse findings apply.

A review of the organizational charts that pertain to the beneficiary's foreign and U.S. employers shows that the U.S. entity's organizational chart names only three employees—the beneficiary as CEO, his wife as the sales and marketing director, and [REDACTED] as the corporate secretary. Although the chart includes a sales administrator position and further shows outworkers and packers as part of the organizational hierarchy, no employees were specifically identified under any of these positions. It is therefore unclear whether the petitioner employed a sales administrator or outworkers and packers at the time the petition was filed. 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)).

Furthermore, referring back to the beneficiary's job descriptions, it is unclear how the petitioner could have offered identical job descriptions for the foreign and proposed positions when the two entities' staffing compositions were so different with the petitioning entity having a much smaller staff than the staff that was in place at the foreign entity during the beneficiary's employment abroad. It is not credible to assert that the beneficiary's job duties and responsibilities would be essentially unaffected by the significant decline in support personnel, i.e., the four fewer employees at the U.S. entity than the number of employees that were in place at the foreign entity during the beneficiary's employment abroad. Although the petitioner claimed a total of six employees at Part 5, Item 2 of the Form I-140, the record does not contain evidence to corroborate the petitioner's claim. See *id.*

While it is true that the AAO will not solely rely on the petitioner's organizational composition as a means of determining eligibility, this factor can and should be considered for the purpose of determining whether the petitioner employs an adequate staff to perform the daily non-qualifying functions. Merely asserting that the beneficiary's position would primarily involve tasks within a qualifying capacity is insufficient if the petitioner does not have the proper staffing in place to relieve the beneficiary from having to primarily engage in the performance of the daily non-qualifying tasks. Moreover, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d at 42; *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29).

While there are greater deficiencies pertaining to the beneficiary's proposed position, the record shows that the petitioner failed to provide sufficient evidence to establish that the beneficiary's employment abroad and his proposed employment with the U.S. entity involved and would involve primarily managerial- or executive-level tasks. On the basis of these findings, the instant petition cannot be approved.

The other issue addressed in the director's decision is whether the petitioner submitted sufficient evidence to establish that the foreign entity continues to do business abroad.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Doing business means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other legal entity and does not include the mere presence of an agent or office.

* * *

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.

Despite the petitioner's submission of the foreign entity's 2008 tax return, the director determined that the petitioner failed to establish that the foreign entity meets the above definition of doing business and denied the petition on this basis in addition to the two grounds that were previously addressed above. The director noted that the petitioner failed to submit documentation to establish the continued ongoing business operations of the foreign entity.

In an effort to overcome the director's finding on appeal, the petitioner provides evidence of promotional material pertaining to the foreign entity from 2007, the foreign entity's tax return and financial statement covering a 12-month period that ended on March 31, 2005, the foreign entity's tax calculation for the year ending on April 5, 2006, and another copy of the foreign entity's tax return for the 12-month period that ended on March 31, 2008.

The AAO finds that none of the documentation that has been submitted in support of this petition thus far establishes that the foreign entity has engaged in the provision of goods and/or services on a regular, systematic, and continuous basis. Although these documents show that the foreign entity continued to exist at least through the latest tax filing, which accounted for the time period ending on March 31, 2008, there is no evidence that this entity either continues to exist presently or that it conducts business that is consistent with the regulatory definition provided above. Additionally, the AAO observes that the three individuals who occupied the top three positions with the foreign entity are now claimed as part of the petitioning entity's organizational chart. It is therefore unclear who is running the foreign entity if it continues to function as claimed.

Given the above adverse findings, the AAO concludes that the petitioner has failed to establish that the foreign entity continues to do business and, while not expressly stated by the director, that the petitioner is a multinational entity as defined above. In light of this adverse conclusion, the AAO finds that the petition cannot be approved on this additional ground.

Beyond the decision of the director, the AAO concludes that the petitioner has failed to provide evidence to show that it meets the criteria described at 8 C.F.R. § 204.5(j)(3)(i)(C), which states that the petitioner must establish that it 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 they 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 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 (Assoc. Comm. 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, while the petitioner provided evidence to show who owns the foreign entity, it did not provide the required evidence establishing its own ownership. The AAO notes that providing evidence of incorporation is not the same as establishing who owns and controls the U.S. entity.

As the petitioner has failed to provide evidence to show its ownership and control, the AAO concludes that the petitioner has failed to establish the existence of the requisite qualifying relationship between the petitioner and the beneficiary's foreign employer.

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.