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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**



By

DATE: MAR 15 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. 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 matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California limited liability company that seeks to employ the beneficiary as its vice president. 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 counsel for the petitioner submitted a statement dated February 7, 2008, which included relevant information pertaining to the eligibility criteria required by regulation. The petitioner also provided supporting evidence in the form of ownership documents pertaining to the petitioner and the beneficiary's foreign employer, the petitioner's corporate and financial documents, and the petitioner's organizational chart identifying eight in-house employees and six independent sales agents.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for additional evidence (RFE) dated May 19, 2009 informing the petitioner of various evidentiary deficiencies. The director asked the petitioner to submit a definitive statement describing the specific job duties the beneficiary performed during his employment abroad and those he would perform in his proposed position with the U.S. entity. The director also asked follow-up questions regarding documents that pertained to the petitioner's corporate documents and instructed the petitioner to provide certain missing tax documents.

The petitioner's response included a statement from counsel dated June 26, 2009 in which counsel provided a list of the beneficiary's proposed job duties and responsibilities. Although counsel generally indicated that the beneficiary was employed abroad by the "parent company" as its marketing manager, counsel's statement did not include the requested description of the beneficiary's employment abroad. The petitioner did, however, supplement the record with the requested tax documents as well as a membership purchase agreement showing the sale of ownership interests of one of the petitioner's four members.

After reviewing the record, the director determined that the petitioner failed to meet certain eligibility requirements and therefore issued a decision dated January 25, 2010 denying the petition. The director concluded that the petitioner failed to provide persuasive evidence establishing that it has a qualifying relationship with the beneficiary's foreign employer or that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

On appeal, counsel submits a brief in which he disputes the director's findings and attempts to provide explanations to clarify what the director perceived to be inconsistencies in the documents pertaining to the petitioner's ownership and control. Counsel also seeks consideration of a newly submitted statement describing the beneficiary's employment with the foreign entity.

The AAO finds that counsel's arguments are not persuasive and fail to overcome the director's denial. It is noted that all of the petitioner's submissions have been reviewed. All relevant documentation that pertains directly to the key issue 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.

First, with regard to the petitioner's earlier failure to comply with the RFE request for the beneficiary's foreign job description, the AAO notes that the regulation requires the petitioner to submit additional evidence as the director, in his or her discretion, deems necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner was put on notice of a deficiency in the evidence and was given an opportunity to respond to that deficiency prior to the issuance of the denial, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the job description that the petitioner now submits on appeal. Consequently, the appeal will be dismissed based on the petitioner's failure to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

The remaining issue in this proceeding is whether the documentation submitted by the petitioner is sufficient to establish that 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 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 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;

\* \* \*

*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.

In the supporting statement dated February 7, 2008, counsel referred to two undated proxy agreements to establish that the beneficiary's foreign employer controls the petitioning entity and that the beneficiary ultimately owns and controls both entities. The petitioner also provided both of the undated proxy agreements as corroborating evidence. The proxy regarding the foreign entity indicates that [REDACTED] appointed the beneficiary as proxy of his 34% ownership interest in the Indian partnership. Counsel contended that the 34% proxy vote, combined with the beneficiary's actual 37% ownership, gave the beneficiary control of the foreign entity. The proxy regarding the U.S. entity, also undated, indicated that two out of the four owners of the petitioning entity gave the beneficiary control of their respective membership interests, thus indicating that in addition to control of his original 25% membership units, the beneficiary also had control of an additional 50% membership units acquired by proxy from two of the petitioner's members. The petitioner also provided a membership list, signed on March 15, 2005, showing that [REDACTED] owned 30% of the petitioning entity, [REDACTED] owned 20%, and the beneficiary and [REDACTED] each held a 25% ownership interest.

In response to the RFE, the petitioner submitted additional evidence in the form of a sales and purchase agreement, dated July 5, 2007, in which [REDACTED] agreed to sell his 25% ownership interest in the petitioning entity to the purchasers, whom the agreement identified as the three remaining owners of the petitioning entity, in exchange for \$100,000 as consideration. As later pointed out in the director's denial, the petitioner failed to provide any documentation to show how [REDACTED] 25% ownership interest was redistributed among the three remaining owners, i.e., the purchasers.

The petitioner also provided its 2006 and 2007 federal tax returns. Schedule K of both tax returns identified only two partners, who together had a 100% ownership interest. In the 2007 tax return, Schedule K shows that while [REDACTED] and the beneficiary commenced the year with a 75% and a 25% ownership distribution, respectively, each ended the year equally owning 50% of the petitioning entity. No mention was

made of [REDACTED] whom the above mentioned purchase agreement listed as one of three remaining owners in 2007.

In his discussion of the petitioner's submissions, the director questioned the validity of the submitted proxies pointing to various anomalies and inconsistencies. Specifically, the director pointed out that the proxy agreements the petitioner submitted were not dated and that the foreign entity's proxy agreement was not formatted in a manner that was similar to other state-approved partnership documents that were previously submitted. The director further questioned why the proxy agreement pertaining to the U.S. entity referred to the petitioner's three owners as collectively owning only 75% of the petitioning entity when the purchase agreement referenced above purported to redistribute a 20% interest that previously belonged to a fourth partner among the three remaining partners. The director correctly surmised that if the 20% interest that was sold was meant to be redistributed among the three remaining partners, then those three partners should cumulatively own 100% of the petitioning entity. Regardless, the AAO points out that all of the above is entirely inconsistent with the petitioner's 2006 and 2007 tax returns, both of which list the same two individuals as the petitioner's only two partners with an ownership interest. 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).

Although counsel attempts to resolve the inconsistencies cited in the director's decision, the AAO finds that counsel's statements on appeal introduce new and uncorroborated information that gives cause to further question the validity of the petitioner's claims. Specifically, in his effort to clarify the statements made in the petitioner's proxy agreement in which the petitioner's three owners are said to collectively own 75% of the petitioner, counsel contends that [REDACTED] 25% ownership interest was allocated to the foreign entity where the beneficiary was previously employed and which he purports to control. However, counsel's explanation is based on new information that was not previously introduced and which is not corroborated by any of the documentation that the petitioner has submitted thus far. The AAO notes that without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Not only are counsel's assertions on appeal not supported by any of the submitted evidence, but they are actually contrary to statements that were previously made. Thus, counsel introduces information that creates yet another inconsistency, which must be resolved and explained in order to determine who in fact owns and controls the petitioning entity.

With regard to the proxy agreement which purports to affect control of the foreign entity in India, the AAO finds that it cannot make an assessment as to the validity of this document. In immigration proceedings, the law of a foreign country is a question of fact which must be proven if the petitioner relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). In this matter, only Indian law can dictate whether the proxy agreement that has been presented as a supporting document is a valid and legally binding document. The burden is on the petitioner to establish which foreign legal requirements apply in this matter and to determine that the proxy agreement presented meets those requirements and is therefore a valid document. The petitioner in this case has not provided the necessary supporting documentation.

In light of the anomalies and documentary deficiencies described above, the AAO finds that the petitioner has failed to establish by a preponderance of the evidence that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer. On the basis of this second adverse conclusion, the instant petition cannot be approved.

As a final note, counsel makes reference to the petitioner's current approved L-1 employment of the beneficiary. With regard to the beneficiary's L-1 nonimmigrant classification, it should be noted that, 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. U.S. Citizenship and Immigration Services (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 petitions were approved based on the same deficient supporting evidence that is 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. 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).

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.