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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

DATE:

JUN 03 2013

OFFICE: TEXAS 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,

A handwritten signature in black ink, appearing to read "Erica Halblom".
Ron Rosenberg

Acting 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, a New Jersey corporation, seeks to employ the beneficiary in the United States as its 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.

The record shows that while the petitioner electronically filed the Form I-140 on January 23, 2012, it did not provide any supporting documents following the electronic filing. The director therefore issued a request for evidence (RFE) dated May 2, 2012 informing the petitioner of the numerous evidentiary deficiencies in the record. The RFE addressed the following eligibility factors: (1) the petitioner's qualifying relationship with the beneficiary's employer abroad; (2) the beneficiary's employment abroad in a qualifying managerial or executive capacity; (3) the beneficiary's prospective qualifying employment with the petitioning entity; and (4) the foreign entity's continued and ongoing business activity. The petitioner was asked to provide additional evidence addressing the issues listed above to establish that it meets the statutory and regulatory eligibility criteria. With regard to the beneficiary's proposed employment, the director instructed the petitioner to provide a list of the beneficiary's proposed daily job duties indicating the percentage of time the beneficiary would spend performing each job duty on the list. The petition was also asked to provide IRS Form W-2s for each employee as well as the petitioner's organizational chart showing the employees who would be subordinate to the beneficiary along with their respective job titles, job duties, and educational levels.

In response, the petitioner provided a brief statement dated July 17, 2012 accompanied by a number of supporting documents addressing the eligibility criteria discussed in the RFE. With regard to the beneficiary's qualifying employment in a managerial or executive capacity, the petitioner provided a list, which was intended to represent the beneficiary's "typical accountabilities to the business" in the United States. The petitioner indicated that the same list of activities applies to the beneficiary's position with the foreign entity. With regard to the issue of a qualifying relationship, the petitioner provided a number of foreign documents and their translations identifying [REDACTED] as owner of the foreign entity. The petitioner also provided its own certificate of formation, which identified the beneficiary and [REDACTED] as the two members/managers of the petitioning entity, and the petitioner's state and federal partnership returns for 2011 in which the state tax return identified the beneficiary as owner of 99.99% of the petitioner. It is noted that the federal tax return did not identify who owns 99.99% of the petitioning entity and neither return identified who owns the remaining .01%. The petitioner's 2010 partnership return contained the same information as was provided in the state tax return for 2011 and similarly failed to identify any individual as minority owner of the remaining .01%. Additionally, the petitioner provided shipping documents from May, June, October, and November 2010 and February 2011, in which several transactions from 2010 involved both the petitioner and the foreign entity. Although a number of shipping documents from 2011 were also provided, none identified either the petitioner or the foreign entity as a party to the transactions.

Accordingly, after considering the various documents submitted in response to the RFE, the director determined that the petitioner failed to establish that it meets the eligibility requirements for the requested classification. Specifically, the director concluded that the petitioner failed to provide evidence to demonstrate that: (1) it has a qualifying relationship with the beneficiary's employer abroad; (2) the beneficiary was employed by a qualifying entity and in a qualifying managerial or executive capacity by the foreign entity; (3) the foreign entity continues to conduct business; and (4) the beneficiary would be employed with the U.S. entity in a qualifying managerial or executive capacity. With regard to the issue of a qualifying relationship, the director properly noted that the documents that establish the foreign entity's and the petitioner's ownership do not show that the two entities are similarly owned and controlled either as affiliates or in a parent-subsidary ownership scheme. With regard to the issue of qualifying employment abroad, the director noted that the petitioner failed to provide a definitive job description with time allocations. The director issued a similar finding with regard to the beneficiary's proposed employment and further added that even though the petitioning entity had a limited support staff at the time of filing, it failed to discuss a plan for relieving the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks. In light of these adverse findings, the director issued a decision dated August 29, 2012 denying the petition.

On appeal, counsel provides an appellate brief in which he disputes all four grounds for denial, asserting that the petitioner provided adequate proof to establish its eligibility. The petitioner offers supporting documents in an effort to overcome the director's denial.

After reviewing the record in its entirety, the AAO finds that the petitioner failed to provide persuasive evidence of its eligibility. Although the appeal has been supplemented with supporting evidence, such evidence is primarily comprised of documents that had been previously submitted and found insufficient to establish the petitioner's eligibility under the applicable statute and regulations. A comprehensive analysis of the evidence and the grounds for denial is provided in the discussion to follow.

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 the present matter is whether the petitioner has a qualifying relationship with the entity that employed the beneficiary abroad. 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 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.

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 (BIA 1988); *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 claims to be an affiliate of the beneficiary's foreign employer by virtue of being similarly owned by the same two individuals, the record does not corroborate this claim. Rather, as properly pointed out in the director's decision, the record contains foreign documents that list only one person [REDACTED] - as owner of the foreign entity. When turning to evidence of petitioner's ownership, the only documents provided included the petitioner's certificate of formation, which named the beneficiary and [REDACTED] as members/owners, and the petitioner's partnership tax returns for 2010 neither of which indicated that [REDACTED] had any ownership interest in the petitioning entity. Rather, the petitioner's 2010 federal tax return and its 2011 state tax return both named the beneficiary as 99.99% owner of the petitioning entity and provided no information at all about the ownership of the remaining .01% interest.

In light of the information discussed above, the evidence supports a finding that the petitioner and the beneficiary's employer abroad are owned by two different individuals, thus indicating that there is no common ownership. Although counsel disputes the director's adverse finding on appeal, claiming that the submitted documents "reflect that all the shares of the U.S. entity are in fact owned by the foreign entity," this claim is not only inconsistent with the submitted evidence, but is also inconsistent with counsel's own assertion, which he made in a follow-up sentence in the same appellate brief, in which he stated that "the beneficiary owns and controls, through his majority interests, both the petitioner and the foreign entity," which he claims created an affiliate relationship. First, the very fact that counsel made two competing claims within the same paragraph indicates that the probative value of his statements would be considerably diminished merely by virtue of the inconsistency. Second, and more importantly, 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 Obaighena*, 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). In light of the above described deficiencies, the AAO finds that petitioner has failed to overcome the adverse conclusion that the record lacks evidence establishing the existence of a qualifying relationship between the petitioner and the beneficiary's employer abroad.

Closely related to the issue of a qualifying relationship is the regulatory requirement discussed at 8 C.F.R. § 204.5(j)(3)(i)(B), which states that the petitioner must establish that the beneficiary was employed abroad by the same entity or an affiliate, parent, or subsidiary of the petitioner for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the petitioning entity. In light of the

AAO's conclusion that the petitioner failed to establish the existence of a qualifying relationship between itself and the beneficiary's employer abroad, it therefore follows that the petitioner cannot succeed on the claim that the beneficiary meets the foreign employment requirement.

Next, the AAO will address the two issues that deal with the beneficiary's employment capacity in his respective positions with the petitioning entity and with the foreign employer.

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 general, when examining the executive or managerial capacity of the beneficiary, the AAO reviews the totality of the record, starting first with the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed 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 will then consider information concerning the beneficiary's job duties in light of other relevant factors, including (but not limited to) job descriptions of the beneficiary's subordinate employees, the nature of the business conducted by the entities in question, the size of the subordinate staff of the foreign and U.S. entities, and any other facts contributing to a comprehensive understanding of the beneficiary's actual roles with the two respective entities.

In the present matter, the petitioner neglected to provide separate job descriptions for each of the beneficiary's positions, opting instead to use the same job description to account for the beneficiary's proposed position with the U.S. entity and for his prior position with the foreign entity. This was done despite the vast differences between the two entities' respective stages of development, organizational complexities, and numbers of support staff. More specifically, considering each entity's organizational chart and taking into account the length of time each entity has been in existence, the claim that the beneficiary's job duties with the petitioner - an entity that was in existence for just over two years and had only five claimed employees when the petition was filed - would be the same exact tasks as those that the beneficiary performed while employed at the foreign entity - which had been operational for approximately eight years and had evolved into a considerably more complex organization than the petitioning entity - simply lacks credibility. As the petitioner failed to make the necessary distinction between the types of job duties performed abroad versus those the beneficiary would perform in his proposed position, it is unclear whether the list of duties the petitioner provided was a more accurate depiction of the prior or proposed job duties.

Moreover, the AAO finds that the information offered in the job description is not consistent with the petitioner's level of organizational complexity and staffing hierarchy as has been illustrated in the petitioner's organizational chart. For instance, the petitioner claimed that the beneficiary would appoint department heads in an organization that was comprised of only two departments, one of which was headed by the beneficiary himself. The petitioner also claimed that the beneficiary would oversee communications of the imports and exports between the petitioner and the foreign entity. However, it is unclear who within the imports and exports department would actually carry out the communication, as the only employees in that department other than the beneficiary include a secretary and a purchase director, who also assumes the managerial position of marketing director within the petitioner's other main department. Next, with regard to the beneficiary's role in human resources, it is unclear what plans the beneficiary would approve as there is no one employee who has been specifically assigned to a human resources position. In other words, if it is the beneficiary's role to

oversee the individual who will devise human resources plans, select directors and high-level staff, and establish departments within the organization, the petitioner must clarify who within its organization (as it existed at the time of filing) was assigned to carry out these key tasks, which the beneficiary would oversee.

The AAO finds similar anomalies and vague statements throughout the petitioner's description of the beneficiary's proposed duties. For instance, the petitioner failed to associate specific tasks explaining how the beneficiary would undertake his responsibility of overseeing company goals, marketing, and financial aspects of the business, which are overly broad statements that provide little insight as to the beneficiary's daily tasks. Similarly, the petitioner provided no clarifying information to allow the AAO to gauge the daily tasks that would be involved in coordinating the development and implementation of budgetary controls and record keeping, directing and coordinating the organization's financial and budget activities, and directing and implementing policies and objectives of the organization. Again, these vague policy-making responsibilities cannot be substituted for a delineation of the beneficiary's actual daily tasks, which are necessary to provide the AAO with an accurate account of the job duties that will comprise the proposed position. As previously stated, there is considerable importance in providing a detailed job description, which should include actual daily tasks, as it is the tasks themselves that are the most reliable indicators of the true nature of the beneficiary's foreign and proposed employment. *Id.*

In summary, the petitioner's gravest error was failing to provide separate job descriptions and time constraints accurately reflecting each of the beneficiary's respective positions. As fully discussed above, failing to provide this information in the requested format essentially precludes the USCIS from being able to determine which tasks comprised and would comprise the primary portion of the beneficiary's time in his respective positions and the nature of those tasks. This information is particularly crucial with regard to the beneficiary's proposed employment, as the U.S. entity is operating with a limited support staff and more information is required in order to ascertain who within the U.S. organization is performing the non-qualifying operational tasks and how the organizational composition as it existed at the time of filing would have enabled the beneficiary to focus his time primarily on the performance of tasks that are within a qualifying managerial or executive capacity.

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 performed or would perform were/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).

Given the limited personnel structure the petitioner had at the time the Form I-140 was filed, the director was reasonable in questioning how the petitioner planned to relieve the beneficiary from having to allocate his time primarily to non-qualifying tasks. While the petitioner claimed five employees on Form I-140 filed in January 2012, the petitioner reported on three employees on its IRS Form 941, Employer's Quarterly Federal

Tax Return, for the fourth quarter of 2011, and paid wages of only \$3,560 during this three-month period. In the first quarter of 2012, the petitioner reported four employees on its IRS Form 941, but paid only \$1,037 in wages. These extremely low wages suggest that the petitioner's employees are working very limited hours on an occasional or intermittent basis.

Accordingly, the AAO finds that the petitioner's evidence fails to establish that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive. Moreover, with regard to the beneficiary's employment abroad, even if the petitioner had adequately supported the claim that the beneficiary was employed abroad in a managerial or executive capacity, the petition would nevertheless be denied based on the determination that the petitioner failed to establish that the beneficiary's foreign employer has a qualifying relationship with the petitioner.

The fourth and final ground of ineligibility that was addressed in the director's decision is the question of whether the foreign entity continues to conduct business on a regular, systematic, and continuous basis such that the petitioner continues to meet the key statutory requirement that it be a multinational entity. *See* 8 C.F.R. § 204.5(j)(2) for a definition of "multinational."

In the present matter, the director determined that the petitioner submitted insufficient evidence to establish that the foreign entity engaged in the regular, systematic, and continuous provisions of goods and/or services from January 23, 2012, i.e., the date the instant petition was filed, and beyond.

The AAO has reviewed the evidence of record, which includes some business invoices and shipping documents from 2010 and a few documents from 2011. The AAO has also reviewed the additional documents that have been submitted on appeal, including invoices, packing slips, and shipping documents from 2012. However, despite the dates on the newly submitted documents, which clearly address the time period in question, i.e., the time period since the filing of the petition, the relevance of these documents is highly questionable as none appear to contain the name of the foreign entity, thus indicating that the foreign entity was not a party to any of the sales or purchase transactions. For instance, an inspection certificate dated September 27, 2012 indicates that the customer is [REDACTED] and that the vendor is [REDACTED] while the document itself is titled in the name of [REDACTED]. It is unclear how any of these names relate to the foreign entity, whose name is [REDACTED]. The petitioner provided several similar documents bearing the same names and which were similarly dated during various months in 2012. While these documents undeniably pertain to the time period in question, they are themselves not relevant as there is no evidence that connects the foreign entity in question to any of the business transactions documented therein.

Accordingly, the AAO concludes that the petitioner has failed to provide sufficient relevant evidence to establish that the U.S. entity meets the multinational requirement that is statutorily mandated under the relevant provisions of the Act and on the basis of this additional adverse finding, the instant petition cannot be approved.

Finally, with regard to counsel's reliance on USCIS's prior approval of an L-1 nonimmigrant petition, which was filed by the petitioner on behalf of the same beneficiary, the AAO points out 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).

Furthermore, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval 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).

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.