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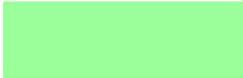
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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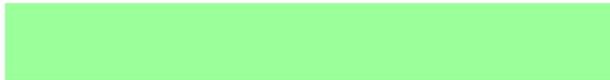
OFFICE: TEXAS SERVICE CENTER

Date: JUN 11 2013

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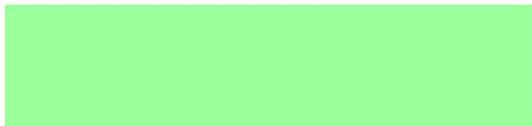
Petitioner:

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 AAO inappropriately applied the law in reaching its 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 motion 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 any motion to 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 "Ron Rosenberg".

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 is a Minnesota corporation that seeks to employ the beneficiary as its president and chief designer. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director denied the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that it has been and continues to conduct business on a regular, systematic, and continuous basis; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel submits a brief disputing the denial and asserting that the petitioner has been doing business in the United States and is not merely present as an agent or office.

The AAO hereby withdraws first ground cited as a basis for denial and will therefore limit the instant decision to the second ground—the beneficiary’s employment capacity in his proposed position with the U.S. entity.

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 primary issue in this proceeding is whether the petitioner submitted sufficient evidence to establish that it would employ the beneficiary 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.

In support of the Form I-140, the petitioner submitted a letter which includes the following description of the beneficiary's proposed employment:

Contract Negotiation, Presentation, Model Development, Project Conceptualization: 30%

- Directing the work of his design team in developing models and other documentation for contract negotiation and presentation to U.S. customers and potential customers;
- Negotiating architectural design contracts; and
- Negotiating collaboration contracts and plans with U.S. architectural firms.

Project Supervision: 30%

- Communicating specific client needs for architectural design projects to subordinate Design Project Manager and/or Architects and Designers;
- Management of Project Parameters and budget;
- Directing, reviewing, and approving company design layout and blueprints created by [the] Project Manager and Architects/Designers;
- Evaluating comments of [the] Project Manager and COO in advising on [the] company's architectural designs in period meetings;
- Supervising project schedule through meetings with [the] Project Manager and COO; and
- Approving project completion after comprehensive reviews performed by [the] Project Manager and COO.

Personnel Management: 25%

- Understanding and analyzing company's financial statements prepared by COO and Accountant in making appropriate business decisions, e.g., office expansion, staffing, project schedules;
- Making ultimate decisions on hiring, firing, recommendation, and other personnel actions (such as promotion and leave authorization) for both companies; and
- Specifically the [beneficiary] needs to grow his U.S. design team and needs to be able to enter the U.S. market and find 1-2 additional designers to support additional projects for the U.S. company; also, the [beneficiary] will be searching for a director-level person to grow the medical device and equipment distribution business

Business Relationship Development: 15%

- Development business relationship with new clients and business partners;
- Specifically the VP/COO has made contacts with a couple [of] large construction development firms with experience in hospital construction. . . . [The beneficiary] will meet directly with business partners on this critical business development project and opportunity.

The petitioner also stated that it is currently staffed with four employees, who occupy the following positions: COO/vice president, project manager, architect/designer, and accountant. The COO/vice president would be assigned the petitioner's "day-to-day administration" leaving the beneficiary to manage conceptual projects and develop models for new business presentations.

The director denied the petition concluding that the petitioner failed to submit sufficient evidence to establish that the beneficiary has been and would be employed at the U.S. entity within a qualifying managerial or executive capacity.

On appeal, counsel focuses primarily on establishing that the petitioner has been and continues to do business in the United States in a regular, continuous, and systematic manner. As the AAO has withdrawn this ground as a basis for denial, counsel's arguments with regard to the issue of the petitioner's business activity need not be addressed at the present time. It is noted, however, that counsel does not address or dispute the second ground for denial, which focuses on the beneficiary's employment capacity in his proposed position. After conducting a *de novo* review of the record, the AAO finds that the petitioner has not overcome the second ground for denial in that it has failed to submit sufficient evidence to establish that the beneficiary's time would be primarily allocated to qualifying managerial or executive tasks.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties to determine what tasks will be performed and how much time the beneficiary would spend on qualifying tasks versus those tasks that are necessary to produce a product or provide a service. See 8 C.F.R. § 204.5(j)(5). It is noted that 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).

In the instant matter, the petitioner states that it is in the business of providing architectural services. In describing the beneficiary's role within its architectural firm, the petitioner has stated that the beneficiary's job duties include negotiating architectural and collaboration contracts, managing the budget of each project, relaying client needs to the petitioner's architects and designers, and developing business relationships with clients and business contacts. However, the petitioner has not established that any of these are qualifying tasks, nor has a specific time allocation been assigned to these job duties. Rather, the petitioner assigned time allocations to the general areas of responsibility into which the more specific job duties are categorized, thus failing to establish how much time the beneficiary would allocate to each of the listed job duties.

The AAO further observes that the job duties listed under the category "Project Supervision" employ the plural forms of the words architect and designer, thus indicating that the beneficiary's job duties would be performed in the context of multiple architects and designers. However, by the petitioner's own admission, it did not employ multiple architects/designers at the time of filing the Form I-140. In fact, the employee list that was included on page four of the petitioner's initial support letter indicates that a single person would assume responsibility for the architectural and design tasks. Although the petitioner indicated that it intends to hire another employee in the position of architect/designer, eligibility must be established at the time of filing, not 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). It is unclear whether a single architect/designer is sufficient to relieve the beneficiary from having to allocate some portion of his time to providing these services.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The fact that an individual manages a small business does not necessarily establish eligibility for classification as a multinational manager or executive in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. Rather, the record indicates that the beneficiary will assume the sales role, as he will assume the responsibility of conceptualizing his firm's design ideas and attempting to sell those ideas, i.e., his firm's architectural and design services, to potential clientele. The petitioner further indicated that the beneficiary would maintain contact with existing clients to gauge their needs and relay those to the staff who will be responsible for completing the project. While the AAO does not dispute that the beneficiary would play a pivotal role within the petitioner's operational success, solely establishing the need for the beneficiary's services is not sufficient, particularly when the petitioner's operation depends on the beneficiary spending a significant portion of his time performing the tasks that are necessary to produce a product or to provide a service.

The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the director's decision, the record lacks consistent and sufficient documentation to establish that the petitioner meets the regulatory requirements set forth in 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. First, while the petitioner indicated on page four of its initially submitted support letter that the beneficiary has an 80% ownership interest in the petitioner and is two foreign affiliates, the petitioner has not provided any evidence to support this claim. 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)). Despite the petitioner's submission of the articles of association of the two foreign entities, each document only names the beneficiary as one of two shareholders, but does not specify the percentage of shares owned in either entity.

Second, while the support letter indicates that the beneficiary is 80% owner of the petitioner's shares, the petitioner's IRS Form 1120S for 2008, which was submitted on appeal, indicates that the beneficiary owns 100% of the petitioning entity's stock. 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). While the petitioner's tax return does not alter the overall claim that the beneficiary has majority ownership of the petitioning entity, the unresolved inconsistency lends itself to further scrutiny and gives rise to doubt the veracity of the petitioner's claim.

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 (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.

In the present matter, the petitioner has failed to provide documentation establishing that the beneficiary is majority owner of the petitioning entity or the two foreign entities that employed him abroad. As ownership is a critical element of this visa classification, the petitioner's failure to submit adequate documentation in support of its claim precludes the AAO from concluding that the petitioner has a qualifying relationship with 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 grounds of ineligibility discussed above, this petition cannot be approved.

Lastly, regarding counsel's reference to the petitioner's current 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 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 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 illogical 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

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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).

Accordingly, 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.