



U.S. Citizenship
and Immigration
Services

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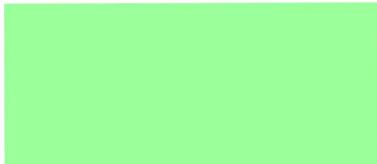
DATE: **DEC 11 2014** OFFICE: TEXAS SERVICE CENTER

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you

Ron Rosenberg
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 corporation that was established in the Commonwealth of Virginia. It operates as an importer, distributor, and retailer of natural stone and seeks to employ the beneficiary in the United States as its "IT Director/SAP Project Manager." Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition, finding the petitioner ineligible based on the following three independent grounds: (1) failure to establish that the beneficiary was employed abroad continuously for one year pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(B); (2) failure to establish the existence of a qualifying relationship between the petitioner and the beneficiary's employer abroad; and (3) failure to establish that the petitioner has the ability to pay the beneficiary's proffered wage in compliance with 8 C.F.R. § 204.5(g).

I. The Law

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.

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.

Also applicable to the facts in the matter at hand are the provisions found at 8 C.F.R. § 204.5(g)(2), which states, in pertinent part, the following:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

II. Factual Background and Procedural History

The record shows that the petition was filed on June 17, 2013. The petition was accompanied by a supporting statement, dated June 7, 2013, which was issued by [REDACTED], the petitioner's general manager. Mr. [REDACTED] discussed the beneficiary's positions with the foreign and U.S. entities and provided the beneficiary's work history with both organizations. The petitioner also provided the beneficiary's résumé, evidence of the beneficiary's wages for 2012 and his prior and current nonimmigrant status in the L-1A classification, the petitioner's financial statements for 2011 and 2012 accompanied by an independent accountant's review report of the petitioner's, and evidence of the petitioner's website.

On August 29, 2013, the director issued a request for evidence (RFE), informing the petitioner that the record lacked sufficient evidence establishing that (1) a qualifying relationship exists between the beneficiary's former employer abroad and the petitioning entity that seeks to employ the beneficiary in the United States; (2) the beneficiary was employed for one year during the three years prior to his entry to the United States as a nonimmigrant to work for the U.S. petitioner; and (3) the petitioner has the ability to pay the beneficiary's proffered wage. The petitioner was instructed to supplement the record with additional evidence to establish that it meets the three statutory and regulatory requirements listed in the RFE.

The petitioner's response included the following documentation: (1) the petitioner's articles of incorporation showing an incorporation date of April 21, 1989; (2) a certificate of incorporation issued on April 10, 1998, indicating that the petitioner's incorporation was effective as of May 4, 1989; (3) stock certificate nos. 1-3 issuing 800 shares of the petitioner's stock to [REDACTED] and 100 shares to [REDACTED] and [REDACTED] respectively; (4) the petitioner's bylaws; (5) evidence of the foreign entity's ownership; (6) the petitioner's financial statement for 2011 and 2012 accompanied by an independent accountant's review report; and (7) the beneficiary's pay stubs and their corresponding English translations for the beneficiary's employment abroad covering a 16-month time period from January 2006 through April 2007.

The director reviewed the above submissions and concluded that they were insufficient to overcome the three deficiencies listed in the RFE. The director therefore issued a decision dated March 19, 2014, denying the petition.

On appeal, counsel submits a supporting brief contending that the petitioner is eligible for the benefit sought herein. He asks for a review of the additional evidence submitted in support of the appeal.

Upon review, and for the reasons stated below, we find that the petitioner has failed to establish its eligibility for the benefit sought herein. In the discussion below, we will address the director's findings, review the petitioner's submissions, and fully expound on the reasons for our adverse conclusion.

III. Issues on Appeal

As indicated above, the primary issues to be addressed in this proceeding call for an assessment of whether the beneficiary was employed abroad for the requisite one-year period during the three years prior to his entry to the United States as an L-1A nonimmigrant, whether the petitioner has established that it has a qualifying relationship with the foreign entity where the beneficiary was previously employed, and whether the petitioner has the ability to pay the beneficiary's proffered wage.

A. Employment Abroad

As indicated above, section 203(b)(1)(C) of the Act requires the petitioner to establish that the beneficiary was employed abroad for a period of year in a qualifying managerial or executive capacity by a qualifying entity. The regulation at 8 C.F.R. § 204.5(j)(3)(i)(B), which lists one of four initial filing requirements applicable in the filing of a Form I-140 where the petitioner seeks to classify the beneficiary in the category of a multinational manager or executive, further states that any beneficiary who is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the beneficiary was employed overseas, in the three years preceding his/her entry as a nonimmigrant, must have been employed by the entity abroad for at least one year in a managerial or executive capacity.

In the present matter, the director referred to section 101(a)(15)(L) of the Act, which applies to L-1 nonimmigrant intracompany transferees, and determined that the petitioner failed to meet the provisions of 8 C.F.R. § 214.2(l)(1)(ii)(A), a corresponding regulatory provision, which requires the nonimmigrant intracompany transferee to have been "employed abroad continuously for one year." It is apparent, given the statutory and regulatory use of the term "continuously" in the nonimmigrant context, that the requirements for a nonimmigrant L-1 intracompany transferee are not identical to those that pertain to the immigrant classification sought by the petitioner in the present matter. Specifically, the statutory and regulatory requirements that are relevant to the filing of the instant petition require only that the beneficiary's qualifying employment abroad totals to at least one year in the three years that either preceded the filing of the petition, if the beneficiary is not employed by the petitioner or an affiliate entity in the United States at the time of filing, or that it totals to one year within the three years that preceded the beneficiary's nonimmigrant entry to the United States, if that entry was for the purpose of working for the petitioner or an affiliate entity in a nonimmigrant classification. See 8 C.F.R. §§ 204.5(j)(3)(i)(A) and (B). In other words, within the context of the immigrant classification, the one year of employment need not have been for a continuous one year period so long as the beneficiary had one year in the aggregate within the relevant three-year time period. To the extent that the director's entire analysis of the beneficiary's employment abroad focused entirely on whether or not the beneficiary's period of employment was for a continuous one-year period, that analysis was incorrect and cannot be applied within the context of the immigrant classification sought herein. As such, we hereby withdraw the portion of the director's finding that erroneously applies irrelevant statutory and regulatory provisions that are intended for application within the context of a nonimmigrant L-1 petition.

Notwithstanding the director's error, the record does not establish that the beneficiary's period of employment abroad satisfies the statute and regulations that are applicable to the facts in the matter at hand. Namely, the record shows that within the three years prior to the beneficiary's entry to the United States as an L-1 nonimmigrant to work for the petitioner, i.e., during the three-year period of employment abroad, the beneficiary came to the United States on numerous occasions to assist the petitioner with various IT matters. As the record is unclear as to the aggregate length of the beneficiary's physically absences from his overseas employment with [REDACTED] the overseas employer, we are unable to determine whether the beneficiary had the requisite one year of employment abroad within the relevant three-year time period.

Further, with regard to the director's focus on the beneficiary's unlawful employment in the United States, such information is only relevant in the instant matter to the extent that it establishes that the beneficiary was present and working in the United States and was therefore not working for the foreign employer during the

relevant time period. Whether or not such employment was lawful, while relevant to the overall issue of the beneficiary's admissibility to the United States, is not relevant to the issue of the beneficiary's eligibility for the benefit the petitioner seeks to obtain. So long as the petitioner is able to establish that the beneficiary's absences from his employment overseas were not so extended as to preclude the beneficiary from having attained an aggregate of one year of employment abroad within the relevant three-year time frame, the petitioner would not be precluded from establishing eligibility under the above statutory provisions. However, the evidence presented in the matter at hand, does not specify the precise cumulative length of the beneficiary's absence from his employment abroad during the relevant time period. As such, despite the director's flawed analysis, which focused on statutory and regulatory requirements that apply to a nonimmigrant, rather than an immigrant, petition, the petitioner has failed to establish that the beneficiary's employment abroad, in terms of the total time of such employment, meets the applicable requirements for the immigrant classification sought herein.

B. Qualifying Relationship

The next issue to be addressed in this proceeding 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 a foreign entity with a U.S.-based office) or that the two entities are related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

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

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the present matter, the director properly observed that while 300 of the petitioner's 500 issued shares are held by [REDACTED], who therefore owns a majority of the petitioner's stock, no one person owns a majority of the foreign entity's stock, which is distributed among six individuals with the two largest shareholders –

[REDACTED] and [REDACTED] – owning 40% of the stock each. Based on these stock distributions, the director concluded that the two entities do not have a qualifying relationship. The director also noted that the name variations among certain shareholders, i.e., [REDACTED] and [REDACTED] create an uncertainty as to whether the two entities have any shareholders in common.

On appeal, counsel distinguishes between "de jure" control, which is control by reason of ownership of 51 percent of outstanding stocks of an entity, and "de facto" control, which occurs when a party does not own a majority of the stock, but rather has control over the voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). Despite the fact that there is no de jure control of the foreign entity, counsel fails to specify that [REDACTED], who is majority owner of the U.S. entity, has de fact control of the foreign entity. Instead, counsel contends that "the two companies' operations are so intertwined that the management decisions of one have material effects on the operations of the other." Counsel fails to establish how this level of commonality meets the qualifying relationship criteria.

Further, counsel's assertion that the two entities "are owned by a common group of individuals" is also insufficient to establish the existence of a qualifying relationship. The evidence indicates that six individuals own the foreign company, while only three individuals own the petitioning U.S. entity. Accordingly, the two entities are not "owned and controlled by the *same group of individuals*, each individual owning and controlling approximately the same share or proportion of each entity" 8 C.F.R. § 204.2(j)(2) (emphasis added). In addition, there is no parent entity with ownership and control of both companies that would qualify the two as affiliates. Although counsel claims that the same three individuals who own 100% of the foreign entity together own 52% of the foreign entity, this ownership structure does not fit the definition of affiliate. *Id.*

In light of the above, the petitioner has failed to establish that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer and the basis of this adverse finding the instant petition cannot be approved.

C. Ability to Pay

The last issue to be addressed in this proceeding is the petitioner's ability to pay the beneficiary's proffered wage.

In the present matter, the record includes the petitioner's tax returns for 2011 and 2012 showing taxable incomes that consistently exceeded, by considerable amounts, the beneficiary's proffered wage. The 2011 and 2012 tax returns also show that the petitioner paid over \$4 million and over \$5 million in employee salaries, respectively. In analyzing a petitioner's ability to pay the proffered wage, the fundamental focus is whether the employer is making a "realistic" or credible job offer and has the financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm'r 1977). Here, the petitioner has provided sufficient evidence to establish that the employment offer is credible and that the petitioner has and would continue to have the ability to pay the beneficiary's proffered wage going forward.

Accordingly, in light of the above, we find that the petitioner has provided sufficient evidence to overcome the director's adverse finding with regard to the issue of its ability to pay the beneficiary's proffered wage. Therefore, the director's conclusion to the contrary is hereby withdrawn.

IV. Prior L-1 Approvals

Lastly, service records show the petitioner's previously approved L-1 employment of the beneficiary. We note, however, 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. 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. Any prior nonimmigrant approvals would 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). Similarly, 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 similar unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. USCIS 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, our 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, we 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).

Accordingly, despite the petitioner's approval of the petitioner's previously filed L-1 petitions, evidence in the matter at hand indicates that the petitioner failed to establish its eligibility for the immigration benefit sought herein and based on the grounds discussed above this petition cannot be approved.

V. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, in light of the findings issued in the director's decision and the additional finding issued by this office, that burden has not been met.

ORDER: The appeal is dismissed.