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NOV 03 2008

FILE: EAC 05 245 50093 OFFICE: NEBRASKA SERVICE CENTER Date:

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, 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 Delaware corporation seeking to employ the beneficiary as its senior account 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 determined that the petitioner no longer has a qualifying relationship with the beneficiary's foreign employer and is therefore ineligible for the immigration benefit sought in the present matter.

On appeal, counsel disputes the director's conclusion and submits a brief in support of her assertions.

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 continues to have a qualifying relationship with the foreign entity that previously employed the beneficiary.

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 support of the Form I-140, the petitioner provided a letter dated July 15, 2005, which included an ownership breakdown establishing how the beneficiary's foreign and U.S. employers shared common ownership as affiliates of P2i, Inc. The petitioner also discussed the recent mergers and acquisitions that ultimately caused P2i, Inc. to transfer its United Kingdom operation to the United States as of April 1, 2004.

On December 15, 2006, the director issued a request for evidence (RFE) in which he instructed the petitioner to submit *inter alia* evidence that the beneficiary's foreign and proposed U.S. employers had a qualifying relationship as of September 9, 2005, the date the Form I-140 was filed, and that the two entities continue to have a qualifying relationship to the present day.

In response, counsel submitted a letter dated March 6, 2007 in which she expressly stated that the entity that employed the beneficiary abroad ceased operations prior to the date the petitioner filed the Form I-140. However, counsel argued that this factor is irrelevant to the issue of the petitioner's eligibility. Counsel referred to sections within the Code of Federal Regulations that address nonimmigrant petitions for intracompany transferees as well as 8 C.F.R. § 204.5(j)(2), which applies directly to the type of immigrant petition filed in the present matter. Counsel argued that none of the relevant regulations require that the petitioner and the beneficiary's foreign employer have a qualifying relationship at the time of filing. Counsel continued her argument, asserting that the petitioner obtained an approval of a petition to extend its employment of the beneficiary in the L-1A nonimmigrant visa category despite the fact that the beneficiary's foreign employer was no longer operating. Counsel argued that the approval of the extension petition was an indication that U.S. Citizenship and Immigration Services (CIS) accepts the petitioner's status as a multinational entity based on the petitioner's continued operation of its overseas affiliate in Malaysia. Counsel also relied heavily on *Matter of Chartier*, 16 I&N Dec. 284 (BIA 1977), where the petitioner sought approval of an L-1A nonimmigrant petition for one of its employees.

The director did not find counsel's reasoning to be persuasive and denied the petition in a decision that was issued on May 19, 2007. The director found that while the precedent decision and arguments employed by counsel were relevant with regard to nonimmigrant L-1A petitions, the same is not true with regard to Form I-140 immigrant petitions such as the one filed by the petitioner in the present matter. The director restated the provisions of 8 C.F.R. § 204.5(j)(3)(i)(C), finding that the word "is" implies that the petitioner bears the

burden of establishing the continued operation of the beneficiary's foreign employer at the time the Form I-140 is filed. The director determined that in light of the fact that the U.K. entity was no longer in existence at the time the Form I-140 was filed, the petitioner could not have met the provisions of 8 C.F.R. § 204.5(j)(3)(i)(C).

On appeal, counsel reasserts the arguments she previously raised in her response to the director's RFE, vehemently disputing the director's determination that the petitioner must have a qualifying relationship with the beneficiary's foreign employer at the time the Form I-140 is filed. In support of her argument, counsel again makes numerous references to case law and regulations that apply to the nonimmigrant L-1A intracompany transferees, maintaining that both are relevant in matters concerning Form I-140 immigrant petitions.

In reviewing counsel's arguments and the director's findings with regard thereto, the AAO finds that the director's determination was properly made and need not be withdrawn.

First, counsel's repeated references to regulations pertaining to L-1A nonimmigrant petitions are irrelevant in the present matter, where the petitioner seeks to employ the beneficiary permanently in an immigrant classification. While the AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity, the regulations that apply to each type of classification are distinct and are not interchangeable as counsel's arguments suggest. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). For example, the multinational immigrant regulations at 8 C.F.R. § 204.5 require that a petitioner be a "United States employer" and that this employer establish its ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2) and 204.5(j)(1). In addition, L-1B specialized knowledge employees are not eligible for an immigrant visa under section 203(b)(1)(C) of the Act.

Moreover, 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. CIS 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 CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS 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). If the initial nonimmigrant petition was approved based on the same 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 a prior approval 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 CIS 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).

Second, while it is agreed that *Matter of Chartier*, 16 I&N Dec. 284 (BIA 1977) was not overturned, counsel's reliance on this precedent decision in this matter is misplaced. First, *Matter of Chartier* is a removal decision regarding an alien beneficiary previously granted L-1A nonimmigrant status, not an alien beneficiary of an immigrant preference petition.

Second, the BIA's principal concern in *Matter of Chartier* was the imposition of a requirement that the U.S. employer have "a subsidiary or affiliate in Canada." 16 I&N Dec. at 286. The AAO agrees that neither the statute nor the current regulations require that a U.S. petitioner have a subsidiary or an affiliate abroad in either the L-1 or multinational immigrant petition context. As the current regulations at 8 C.F.R. §§ 204.5(j)(3)(C), 214.2(l)(1)(i), 214.2(l)(1)(ii)(G), and 214.2(l)(3)(i) clearly indicate, an intracompany transferee may be employed by the "same employer" (immigrant context) or by a "branch" of the same employer (nonimmigrant context).

Although counsel recognized the regulatory changes that have occurred since 1977, she argues that the holding in the *Matter of Chartier* decision permits the "closing of the business entity abroad where the L-1 employee gained qualifying experience," if "the employer maintains foreign operations through another affiliate abroad. Counsel's Brief on Appeal, p. 5 (July 16, 2007). In support of this assertion, counsel points to the supplemental information in a final rule published in the Federal Register and states that "a qualifying organization could 'demonstrate its ongoing international nature' based on [t]he existence of foreign operations[] – not necessarily the employee's previous employer abroad – 'to which the employee can reasonably be expected to be transferred at the end of his/her authorized stay in the United States.'" Counsel's Brief on Appeal, p. 5 (July 16, 2007) (citing 52 Fed. Reg. 5738, 5741-5748 (Feb. 26, 1987)).

It appears that counsel has misconstrued both the supplemental information found in 52 Fed. Reg. 5738 (Feb. 26, 1987) and the holding in *Matter of Chartier*. In *Matter of Chartier*, the alien beneficiary's employer in Canada is the same employer in the United States. 16 I&N Dec. at 284 – 285. While the employer in *Matter of Chartier* may not continue to employ anyone in Canada, the employer did not cease to exist and, as such, it can be distinguished from the matter currently before the AAO. Counsel appears to confuse this issue, i.e., the continued existence of the beneficiary's employer abroad, with the separate issue of whether the "qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States." 8 C.F.R. § 204.5(j)(2) (definition of "Multinational").

In this matter, it is recognized that the petitioner continues to conduct business in two or more countries, one of which is the United States. However, the issue here is not whether the petitioner meets the definition of multinational under 8 C.F.R. § 204.5(j)(2), but whether it maintained (at the time the petition was filed) and continues to maintain a qualifying relationship with the separate legal entity that employed the beneficiary abroad. The current regulations expressly state that the petitioner must establish the beneficiary's "prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity" which employed the beneficiary abroad. 8 C.F.R. § 204.5(j)(3)(i)(C). As properly pointed out by the director, the regulation's use of the word "is" prescribes that the relationship between the petitioner and the beneficiary's foreign employer must exist in the present, i.e., at the time of filing and continue to exist until such time as the beneficiary is granted an immigrant visa or adjusts status to that of a permanent resident of the United States. The petitioner's burden of establishing eligibility for the benefit sought is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

In direct contradiction to the express language in the relevant regulatory provision, counsel's faulty reasoning focuses on the petitioner's circumstances prior to the filing of the Form I-140, thereby suggesting that eligibility need not be present at the time of filing so long as the petitioner established that it met the relevant regulatory provisions at some other time. This line of reasoning suggests that once a qualifying relationship is established as having existed, the petitioner can continue relying on that old qualifying relationship for a

petition filed in the future, even if the relationship ceases to exist at the time of filing, as is the case in the present matter. The AAO cannot, however, adopt counsel's interpretation. Precedent case law specifically instructs against such unsound logic by specifically requiring that each petitioner establish its eligibility at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The facts presented by the petitioner in this matter indicate that the circumstances that would have rendered the petitioner eligible for the immigration benefit sought did not occur contemporaneously with the filing of the Form I-140. Rather, by the time the petitioner filed the Form I-140, it was no longer eligible for the immigration benefit it was seeking by virtue of the ceased legal existence of the beneficiary's foreign employer. It would be factually impossible for the petitioner to establish an ongoing qualifying relationship with a foreign entity that no longer exists. Accordingly, as the petitioner did not have a qualifying relationship with the beneficiary's foreign employer at the time the Form I-140 was filed, this petition cannot be approved.

Furthermore, while not previously addressed in the director's decision, the record does not contain documentary evidence to establish that the petitioner satisfies 8 C.F.R. § 204.5(j)(3)(i)(D), which states that the petitioner must establish that it had been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." Although the petitioner provided various financial documents, including a tax return and a balance sheet, neither can be relied upon to determine whether an entity is conducting business on a "regular, systematic, and continuous" basis. *See id.* Despite the petitioner's claim that it generates income by providing web-based services to its clients, there is no indication that services were provided in the manner and frequency described in this paragraph.

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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(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.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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.