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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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FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: APR 08 2010
LIN 08 004 57652

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reopen or reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner subsequently filed a motion to reconsider, which the director granted and subsequently issued a new decision affirming the prior findings. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Colorado limited liability company that seeks to employ the beneficiary as its shop director. 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 that the beneficiary 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 has the requisite 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 August 14, 2007, which explained that [REDACTED] the beneficiary's employer in Canada, and the U.S. entity that seeks to currently employ the beneficiary as a multinational manager or executive were affiliates by virtue of being among a group of companies that were owned by [REDACTED]. However, the petitioner also stated that the Canadian entity that employed the beneficiary abroad "ceased business operations in October 2005." The petitioner further stated that it continues to conduct business abroad through a different Canadian affiliate entity.

On August 1, 2008, 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 the date the Form I-140 was filed, that a qualifying relationship continues to exist between the two entities, and that the beneficiary's foreign employer continues to do business.

In response, counsel submitted a letter dated September 10, 2008 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 maintained that the petitioner is nevertheless eligible for the immigration benefit it is currently seeking based on its continued business operations abroad via entities other than the one that previously employed the beneficiary. Counsel also referenced a letter dated November 17, 1992 from [REDACTED] asserting that the letter supports counsel's interpretation of the regulations.

The director did not find counsel's reasoning to be persuasive and denied the petition in a decision that was issued on September 30, 2008. 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 beneficiary's Canadian employer ceased its business operations prior to the time the Form I-140 was filed, the petitioner did not meet the provisions of 8 C.F.R. § 204.5(j)(3)(i)(C).

On December 17, 2008, the director reaffirmed his prior findings in a decision that was issued in response to the petitioner's motion to reconsider. The director referred to the nonimmigrant L-1A visa category, finding its requirements to be different from those pertaining to the immigrant visa petition filed in the present matter. Specifically, the director stated that unlike the provisions pertaining to the L-1A nonimmigrant visa category, which does not render a beneficiary ineligible for L-1A classification even when his/her foreign employer has been sold or dissolved so long as the petitioner continues to do business abroad, the eligibility requirements for the immigrant classification sought herein are different in that they require the U.S. petitioner to maintain a qualifying relationship with the beneficiary's foreign employer up through and continuing beyond the date of filing.

On appeal, counsel asserts that rather than focusing on the word "is," proper emphasis must be placed on the word "entity" when interpreting 8 C.F.R. § 204.5(j)(3)(i)(C), which states "[t]he prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas." Counsel points out that the petitioner, the beneficiary's foreign employer, and a third foreign entity that continues to exist are all part of a corporate structure that encompasses numerous affiliate entities. Counsel asserts that the continued operation of the beneficiary's foreign employer is not specifically required so long as the petitioner continues to do business abroad through another foreign subsidiary or affiliate. Counsel also contends that the business operations of the beneficiary's foreign employer "are being streamlined and absorbed by the other operational entities" and that as a result the foreign employer continues to operate and expand.

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 emphasis on the term "entity" is misplaced. Counsel appears to confuse the issue of 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 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 an interpretation 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).

Second, the AAO is not persuaded by counsel's assertion that the business activities of the beneficiary's foreign employer have been streamlined and absorbed by other affiliate entities that continue to exist. While this may be true, the ceased existence of the beneficiary's foreign employer is key in determining whether the requisite qualifying relationship exists. While the petitioner may maintain relationships with other entities, including some that are located abroad, the only qualifying relationship is one that exists between the petitioner and whatever foreign entity previously employed the beneficiary. It is undisputed that the beneficiary's foreign employer no longer exists and did not exist at the time the petitioner filed its Form I-140. Regardless of whether or not the ceased entity's business activities are now carried on by other entities, any qualifying relationship that may have existed earlier terminated with the dissolution of the beneficiary's foreign employer.

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 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 establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity, per 8 C.F.R. § 204.5(j)(3)(i)(B), or that he would be employed in the United States in a qualifying managerial or executive capacity, per 8 C.F.R. § 204.5(j)(5). Although the petitioner responded to the RFE with supplemental job descriptions addressing the beneficiary's foreign and proposed employment, both job descriptions lacked sufficient information about the beneficiary's specific day-to-day job duties that would convey a meaningful understanding of the nature of the beneficiary's employment with each entity. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). While the petitioner generally indicates that the beneficiary's discretionary authority fits the definition of managerial or executive capacity, these definitions are meant to serve only as guidelines to be applied to a specific list of duties. The actual duties themselves reveal the true nature of the employment. *Id.* Where, as in the instant case, the petitioner fails to adequately specify the beneficiary's daily job duties, the AAO cannot determine that the beneficiary's foreign and proposed employment consisted and would consist, respectively, of primarily managerial or executive tasks.

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 two additional grounds of ineligibility discussed above, this petition cannot be approved.

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.