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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: JUL 30 2013

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

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)

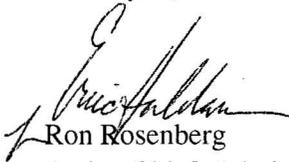
ON BEHALF OF PETITIONER:
[REDACTED]

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
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The petitioner's appeal was dismissed. The matter is now before the AAO on a motion to reconsider. This motion will be dismissed.

The petitioner is an Illinois corporation that seeks to employ the beneficiary 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 director denied the petition based on two independent grounds of ineligibility, concluding that the petitioner failed to establish: 1) that the beneficiary would be employed in a qualifying managerial or executive capacity; and 2) that it had a qualifying relationship with the beneficiary's foreign employer.

On appeal, regarding the first issue of managerial and executive capacity, the petitioner's counsel asserted that the director placed "undue emphasis on the size of the beneficiary's operation in determining his qualifications as a manager or executive" and the director did not consider the petitioner's investments or the "current global depressive economic conditions." Regarding the second issue of the qualifying relationship, counsel provided a missing page from the petitioner's Articles of Incorporation and asserted that the record sufficiently demonstrated a qualifying relationship between the foreign employer and the petitioner.

The AAO dismissed the appeal, concluding that the petitioner failed to overcome either basis for denial. In finding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity, the AAO noted that its decision was based on a number of factors including the petitioner's failure to submit the beneficiary's detailed position description in response to a request for evidence, a number of unexplained discrepancies in the record pertaining to the petitioner's staffing levels and organizational structure, and the absence of personnel available at the time of filing to perform the day-to-day non-managerial functions associated with operating the petitioner's motel. Further, the AAO determined that the petitioner had failed to resolve questions and inconsistencies noted in the director's decision regarding the existence of a qualifying relationship between the foreign company and the petitioner. Finally, the AAO acknowledged that the beneficiary had previously been granted L-1A nonimmigrant status as an intracompany transferee, and explained why the nonimmigrant approvals are not due deference in this immigrant visa proceeding.

The petitioner subsequently filed the instant motion to reconsider which consists of a Form I-290B, Notice of Appeal or Motion, and counsel's brief.

The regulations at 8 C.F.R. § 103.5(a)(3) state, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

With respect to the petitioner's claim that the beneficiary will be employed in a managerial or executive capacity, counsel cites to the general statutory and regulatory requirements for the requested immigrant visa classification and the statutory definitions of managerial and executive capacity found at section 101(a)(44) of the Act. Counsel also cites section 101(a)(44)(C) of the Act along with case law in support of his claim that "a company's size along may not be the determining factor in denying a visa to a multinational manager or executive." Counsel contends:

USCIS has erred in denying the Petition because they believe the duties provided are too vague. Petitioner has very clearly established the duties of the beneficiary in the record of evidence. Petitioner has timely responded to all requests for evidence that it has been issued. USCIS is again placing an undue emphasis on the size of the beneficiary's operation in determining his qualifications as a manager or executive. Under analogous provisions regulating the grant of temporary visas to managers and executives, there have been no requirements imposed as to the number of employees supervised. *Mars Jewelers, Inc. v. Immigration & Naturalization Service*, 702 F. Supp. 1570, 1574 (N.D. Ga. 1988); *Johnson-Laird, Inc. v. INS*, 537 F. Supp. 52 (DC Ore. 1981).

Counsel further states that the AAO "ignored numerous approved L-1A nonimmigrant approvals." Counsel citing *Omni Packaging, Inc. v. INS*, 733 F. Supp. 500, 504 (D.C.P.R. 1990), states "When a visa was granted and extended on the same standard under which the agency denies a subsequent visa, the agency must specifically explain why the previous L-1A visa approvals were erroneous."

With respect to the issue of the petitioner's qualifying relationship with the foreign entity, counsel cites controlling case law on this issue and simply concludes that "the record of evidence shows sufficient ownership and control" and that "USCIS has cast unneeded doubt on all documentation provided by petitioner."

Upon review, the petitioner has not met the requirements of a motion to reconsider. While counsel cites relevant statutory and regulatory provisions and precedent case law, counsel fails to establish how the AAO's decision was based on an incorrect application of law or USCIS policy.

The AAO discussed the deficiencies in the petitioner's evidence in considerable detail, noting the petitioner's description of a vague job description for the beneficiary's position, its failure to provide a more detailed description of the beneficiary's duties in its RFE response, its failure to provide consistent evidence of its organizational structure, and its failure to establish that it has employees to relieve the beneficiary from performing the day-to-day operational duties of the petitioner's

motel. The combination of these deficiencies, considered in light of the totality of the record, led the AAO to conclude that the petitioner had not met its burden to establish that it would employ the beneficiary would be employed in a primarily managerial or executive capacity.

The AAO did observe that the petitioner had documented the employment of only two workers other than the beneficiary during the quarter in which the petition was filed. The decision correctly acknowledged that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The AAO observed that, as the only employees documented as of the date of filing included the beneficiary and two part-time housekeepers, the petitioner had not established a reasonable need for the beneficiary to perform primarily managerial or executive duties. The petitioner offers no additional explanation as to how this staff would be sufficient to relieve the beneficiary from involvement in the company's day-to-day operations, nor has it attempted to resolve the other inconsistencies noted in the AAO's decision with regard to the company's staffing levels and organizational structure. For example, the petitioner stated on the Form I-140 that it has six employees, submitted an organizational chart depicting 15 employees, but documented the employment of a staff of only three employees at the time the petition was filed. Counsel does not address these inconsistencies in the instant motion and has not disputed the AAO's finding that the petitioner's motel had only two employees other than the beneficiary when the petition was filed.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, the AAO notes that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS), or *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In both *National Hand Tool Corp.* and *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. As noted in our previous decision, the AAO

has interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, the AAO has required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on the conclusion that the beneficiary is not primarily performing managerial duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

With respect to the issue of the petitioner's qualifying relationship with the beneficiary's foreign employer, counsel simply states that the evidence of record is sufficient to establish eligibility. Counsel fails to state how the AAO's dismissal of the appeal involved an incorrect application of law or USCIS policy, and fails to address the numerous inconsistencies discussed in detail in the AAO's decision. Counsel contends that "USCIS has cast unneeded doubt" on the petitioner's documentation. However, 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). Any doubt cast on the petitioner's evidence was the result of the petitioner's failure to submit consistent evidence of the company's ownership.

Finally, contrary to counsel's assertion, the AAO's decision did in fact acknowledge that USCIS previously approved L-1A classification nonimmigrant petitions filed by the petitioner on behalf of the instant beneficiary. Counsel cites *Omni Packaging, Inc. v. INS*, 733 F. Supp. 500 (D.C.P.R. 1990) for the proposition that denial of a third preference classification on the same record as an L-1 visa and extension that were approved is an abuse of discretion without specific elucidation stating why the previous approvals were in error. Counsel fails to note that the court in *Omni Packaging* revisited the issue and later determined that the Immigration and Naturalization Service had properly denied the immigrant petition and that it was not estopped from finding that the alien was not manager or executive after having determined that he was a manager or executive for purposes of issuing an L-1 visa. See *Omni Packaging, Inc. v. INS*, 930 F. Supp. 28 (D.C.P.R. 1996).

Overall, and for the reasons discussed above, the case law, legal authority and assertions by counsel in support of this motion do not establish how the AAO's decision to dismiss the petitioner's appeal was based on an incorrect application of law or USCIS policy. Counsel primarily cites to legal precedent and applicable law already discussed in the AAO's decision and fails to explain how such laws and precedents were misapplied in the adjudication of the appeal. Therefore, the motion will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4), which states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed.

It is noted that the filing of a motion to reopen and/or reconsider does not stay the AAO's prior decision to dismiss an appeal or extend a beneficiary's previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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NON-PRECEDENT DECISION

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The motion will be dismissed and the petition will remain denied for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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, that burden has not been met.

ORDER: The motion is dismissed.