

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

NOV 27 2007

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

CHU INVESTMENT, INC., a California  
Corporation,

Plaintiff - Appellant,

v.

MICHAEL B. MUKASEY,\*\* United  
States Attorney General; et al.,

Defendants - Appellees.

No. 05-56791

D.C. No. CV-04-07190-SJO

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
S. James Otero, District Judge, Presiding

Argued and Submitted June 8, 2007  
Pasadena, California

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* Michael B. Mukasey is substituted for his predecessor, John Ashcroft, as Acting Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

Before: HALL and CALLAHAN, Circuit Judges, and REED<sup>\*\*\*</sup>, District Judge.

Ze-Qiang Yu (“Yu”) owns a Chinese company, Julong Enterprises (“Julong”). Julong bought a fifty percent interest in Chu Investment (“Chu”), which owns a Burger King restaurant in Canoga Park, California. Chu sought both an I-140 visa and an I-129 visa for Yu to allow him to come to the United States as an international manager to manage the Burger King restaurant. The I-140 immigrant visa would have entitled Yu to seek permanent residence in the United States, while the I-129 non-immigrant intracompany transfer visa would have permitted Yu to work in the United States for only a limited period of time. The Director of the California Service Center of the Immigration and Naturalization Service, now the Citizen and Immigration Services, denied first the I-140 visa and subsequently the I-129 visa.

Chu chose to seek judicial review of the denial of the I-140 visa in the United States District Court for the Central District of California pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, alleging that the denial was arbitrary and capricious. The APA permits judicial review of agency

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<sup>\*\*\*</sup> The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

decisions when, as here, no law or regulation requires interagency review prior to seeking judicial review. *See Darby v. Cisneros*, 509 U.S. 137, 154 (1993).

Chu, however, chose to appeal the Director's denial of the I-129 visa to the Administrative Appeals Office ("AAO") of the agency. Although Chu initially sought a writ of mandamus from the district court to compel the agency to rule on the I-129 visa, it voluntarily dismissed its petition for writ after the AAO affirmed the denial of the I-129 visa. Thus, only the Director's denial of the I-140 visa was before the district court, and only the denial of the I-140 visa is before us as a result of Chu's appeal from the district court's affirmance of its denial.

Judicial review of visa requests is governed by, and permitted under, the APA. *See Young v. Reno*, 114 F.3d 879, 882 (9th Cir.1997). In reviewing an agency action under the APA, we are limited to reviewing the reasoning articulated by the agency. *Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001) ("Although we can affirm the judgment of a district court on any ground supported by the record, we cannot affirm the decision of an agency on a ground that the agency did not invoke in making its decision.") (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). We review the denial of a visa application for abuse of discretion. *Black Const. Corp. v. INS*, 746 F.2d 503, 504 (9th Cir. 1984) ("The decision whether to grant or deny a visa petition lies within the discretion of the INS and

will not be disturbed absent an abuse of that discretion.”). Moreover, we review de novo the district court’s grant of summary judgment upholding an agency decision. *N. Alaska Env’tl. Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir. 2006).

Here, we conclude that the Director’s reasons for denying the I-140 application constitute an abuse of discretion. None of the three reasons asserted is well taken. First, the Director held that Yu could not be a manager because the employees he would manage were not professionals. However, the applicable regulations do not limit managers to those who manage professional employees. *See* 8 C.F.R. § 214.2(l)(1)(ii)(B)(2) (indicating that a manager must supervise and control the work “of other supervisory, professional, *or* managerial employees, *or* manage[] an essential function within the organization, or a department or subdivision of the organization”) (emphasis added). Second, the Director held that Yu could not be a manager or executive because he did menial day-to-day tasks. The regulations clearly state, however, that the applicant’s duties need not be solely managerial; the fact that the work also involves non-managerial tasks does not make an applicant ineligible for a visa. *See* 8 C.F.R. § 214.2(l)(1)(ii)(B) (defining “managerial capacity” based on the individual’s “primary” responsibilities). Finally, the Director found that Julong and Chu did not have a qualifying business relationship because “the Service does not generally recognize franchise businesses

as qualifying organizations” due to lack of “control of the business due to licensing requirements.” Because the Director offered no specific analysis of the franchise agreement in this case to determine whether the requisite level of control was lacking, his reliance on a general rule alone was arbitrary and capricious. *Cf. Matter of Schick*, 13 I. &N. Dec. 647, 649 (BIA 1970) (examining contract in detail to determine whether relationship between foreign and domestic company establishes a qualifying relationship).

Because we find that the Director’s reasons for denying the I-140 visa application were arbitrary, we vacate the district court’s affirmance of the denial of the I-140 visa, and we direct the district court to remand the matter to the agency for re-evaluation. We recognize that the AAO denied the I-129 visa application on different grounds than the Director denied the I-140 and I-129 applications and that the AAO’s reasons may be applicable to the I-140 application. However, as we are limited to reviewing the Director’s grounds for denying the I-140 visa, we leave it to the agency on remand to consider the impact of the AAO’s reasons for denying the I-129 visa on Chu’s I-140 visa application. *See Chenery Corp*, 332 U.S. at 196 (“[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.”); *see also Northwest*

*Env. Defense Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 686 (9th Cir. 2007)

(“We may only sustain an agency’s action on the grounds actually considered by the agency.”).

The district court’s affirmance of the denial of Chu’s I-140 visa application is **VACATED**, and the district court is directed to remand the matter to the agency for re-evaluation.