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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

134

[REDACTED]

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date: **AUG 01 2006**

SRC 06 001 52018

IN RE:

Petitioner:  
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:

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 Director, Texas Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter will be remanded to the director for further consideration and entry of a new decision.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Michigan that is engaged in information technology consulting. The petitioner seeks to employ the beneficiary as its operations manager.

The director denied the petition concluding that the petitioner had not established that: (1) it had been doing business in the United States for at least one year prior to the filing of the immigrant petition; or (2) a qualifying relationship existed between the foreign and United States entities at the time of filing.

On appeal, counsel for the petitioner disputes the director's findings, claiming that the record demonstrates that the petitioner has been doing business in the United States for the required period, and that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer. Counsel submits a brief and documentary evidence in support of the appeal.

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 or managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 first issue in this proceeding is whether the petitioner had been doing business for at least one year in the United States prior to the filing of the immigrant petition.

The regulation at 8 C.F.R. § 204.5(j)(2) defines "doing business" as:

[T]he 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.

The petitioner filed the immigrant petition on September 30, 2005, on which it identified its business as information technology consulting. In an attached letter, dated September 28, 2005, the petitioner indicated that its services include consulting and software development. The petitioner submitted its tax returns for the years 2002 through 2004, and a month-to-month service agreement, dated August 22, 2005, identifying the petitioner's use of office space in Sugar Land, Texas.

On October 27, 2005, the director issued a notice of intent to deny noting the statutory definition of "doing business," and requesting that the petitioner submit documentary evidence that it has been doing business for at least one year prior to the instant filing on September 30, 2005.

Counsel for the petitioner responded in a letter dated November 22, 2005, and submitted the following documentary evidence of the petitioner's business: (1) the petitioner's fourth annual report and financial statements for the period ending December 31, 2004; (2) August and September 2005 bank statements; (3) Internal Revenue Service (IRS) Forms W-2 and W-3 for 2004; (4) statements of the hours worked by employees during August 2004 through September 2005; (5) a service agreement for office space dated November 9, 2005; and (6) a company brochure.

In a December 9, 2005 decision, the director concluded that the petitioner had not demonstrated that it has been doing business in the United States for at least one year prior to filing the immigrant petition. The director noted that the month-to-month lease entered into by the petitioner in August 2005 did not specify that the lease would be continued after its termination date. The director stated that regardless of the length of the lease, it "demonstrates that a company has a plausible location for engaging in business but does not show the provision of goods and/or services." The director acknowledged the company brochure, weekly log of employees, and Forms W-2 provided by the petitioner, but noted that they only indicated that "employees are being compensated" and that the petitioner "has set itself up to engage in business," but does not establish that the company has been doing business. The director concluded that the record demonstrated that the petitioner has been doing business since August 2005, but not for at least one year prior to the instant filing. Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on January 9, 2006. In an attached brief, counsel addresses the documentary evidence previously submitted by the petitioner in support of its business operations in the United States prior to filing the petition. Counsel submits on appeal a lease for office space in Charlotte, North Carolina, dated February 16, 2004, as well as an amendment extending the lease until January 31, 2006, invoices for services rendered during the years 2001 through 2005, and its 2004 tax return, which counsel stresses reflects a gross income of approximately \$2.6 million.

Upon review, the petitioner demonstrated that it has been doing business in the United States for at least one year prior to the filing of the immigrant petition. In addition to the invoices reflecting services rendered to

customers in the months of May, July, September and November 2004, and March, April and September 2005, the petitioner's gross receipts in the amount of approximately \$2.6 million for the year 2004 corroborate the claim that the petitioner was been doing business during this period. Equally important is the petitioner's audited financial statement for the period ending December 31, 2004, which addresses income earned by the petitioner for "software services." Accordingly, the director's decision with regard to this issue is withdrawn.

The AAO will next address the issue of whether a qualifying relationship existed between the foreign and United States entities at the time of filing.

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;

\* \* \*

*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.

As the petitioner did not specifically address its relationship with the beneficiary's overseas employer, the director requested in her October 27, 2005 notice of intent to deny that the petitioner submit documentary evidence, including stock certificates and stock transfer ledger, of the ownership and control of both organizations.

In his November 22, 2005 letter, counsel suggested an affiliate relationship between the petitioning entity and the beneficiary's overseas employer, noting that both are wholly owned and controlled by [REDACTED]. As evidence of the petitioner's ownership, counsel provided stock certificates numbered one through twenty-five, identifying [REDACTED] as the owner of 41,817 shares of the petitioner's 60,000 shares of authorized stock. In addition, counsel attached [REDACTED]'s March 31, 2005 annual report which identified both the petitioning entity and the beneficiary's foreign employer as subsidiaries of the organization. Documentation from the website of Sundram Fasteners, Ltd., also submitted by counsel, identified [REDACTED] as being part of the corporate "group" in which the United States and foreign entities belonged. Counsel also provided an organizational chart listing the petitioner and the beneficiary's foreign entity as subsidiaries [REDACTED].

In her December 9, 2005 decision, the director concluded that the petitioner had not established that the United States company and the beneficiary's foreign employer are affiliates. Referencing Schedule K of the petitioner's tax returns for the years 2001 through 2004, the director stated that the record indicated a "foreign

person" rather than a foreign company, as claimed by the petitioner, owned the United States company. The director noted that the petitioner had not clarified this inconsistency. Consequently, the director denied the petition.

On appeal, counsel for the petitioner addresses the meaning of "person," as defined by the Internal Revenue Service, noting that "person" includes a corporation. Counsel submits a letter from the petitioner's accountant confirming the definition of "person" under the Federal Tax Code. Counsel contends that information contained on the petitioner's tax returns does not create an inconsistency in the petitioner's ownership, and claims that the record demonstrates Sundram Fasteners, Ltd.'s ownership of the United States entity.

Upon review, the petitioner has demonstrated the existence of a qualifying relationship between the United States entity and the beneficiary's foreign employer.

The record contains sufficient documentation establishing an affiliate relationship between the petitioning entity and the beneficiary's foreign employer. With regard to the petitioning entity, the petitioner's stock certificates, as well as the annual report and website documentation of confirm that owns and controls the United States entity. Additionally, the foreign entity's annual report together with the mention of a related party on the petitioner's Internal Revenue Service Form 5472 are sufficient to establish Sundram Fastener's ownership of the beneficiary's foreign employer. The AAO notes that the director specifically requested Sundram Fastener's annual report as evidence of a qualifying relationship. As a result, the petitioner has demonstrated that the United States entity and the beneficiary's foreign employer are affiliates. Accordingly, the director's decision with regard to this issue is withdrawn.

Although the petitioner has overcome the specific deficiencies found by the director, the AAO notes that the director did not address the issues of whether the beneficiary was employed abroad in a primarily managerial or executive capacity or would be employed by the United States entity in a qualifying capacity.

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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner indicated on the Form I-140 that the beneficiary would be employed as the petitioning entity's operations manager. In an accompanying letter, dated September 28, 2005, the petitioner provided the following job description for the beneficiary's proposed position:

[The beneficiary's] job will be responsible for business development functions of the company. Specific job duties will include: (i) directing the activities of the company, establish goals and policies, provide executive direction and supervise; (ii) establish sales, marketing and technology partnerships and alliances; (iii) develop business strategy and business plans for domestic and international entity. In his duties, he would oversee the business activities of personnel, which are all degreed professionals, and will exercise substantial discretionary decision-making authority.

The vague job description offered by the petitioner fails to identify the specific managerial or executive job duties to be performed by the beneficiary in the position of operations manager, such as the "activities" to be directed by the beneficiary, the "strategy" and "plans" that the beneficiary would develop, and the beneficiary's role in establishing the petitioner's marketing, sales, and technology partnerships. The AAO notes that the beneficiary's resume with respect to his proposed position is equally vague, noting only that the beneficiary hires staff, manages contracts and work orders, and develops the business. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Following a request from the director for a description of how the beneficiary would qualify as a manager or executive, the petitioner submitted a similarly brief job description that outlined essentially the same job duties. The petitioner's failure to submit

requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In addition, the petitioner failed to clarify the true position to be held by the beneficiary. Specifically, the beneficiary was named as the company's operations manager on both the Form I-140 and the petitioner's organizational chart, while the petitioner's August 22, 2005 service agreement for office space identified the beneficiary as its "[d]irector – business development." 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).

With regard to the beneficiary's employment abroad, based on his resume, during the three years prior to his entrance into the United States as a nonimmigrant, the beneficiary was employed in the position of "senior business development manager," and more recently, as the foreign company's "assistant general manager." The beneficiary also outlined job responsibilities associated with the company's business development and recruitment. In its September 28, 2005 letter, the petitioner stated only that the beneficiary "served [the foreign] company in many different capacities." The petitioner has not provided evidence in the form of a job description, organizational chart, or documentation of the foreign entity's staffing levels demonstrating that the beneficiary was employed by the foreign organization in a primarily managerial or executive capacity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The AAO notes that it is not clear which job responsibilities outlined on the beneficiary's resume correspond to the positions of "senior business development manager" and "assistant general manager." Regardless, the brief statements are not sufficient to establish that the beneficiary was primarily employed as a manager or executive. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (holding that the actual duties themselves reveal the true nature of the employment).

The record as presently constituted does not establish the beneficiary's eligibility for the requested immigrant visa classification, and the petition will therefore be remanded to the director for further action and consideration. The director is instructed to consider the issues of whether the beneficiary was employed abroad and would be employed in the United States in a primarily managerial or executive capacity, and, if necessary, request additional evidence related to the beneficiary's former and proposed employment capacities. The director should enter a new decision based on her review of the record and any additional documentary evidence.

**ORDER:** The decision of the director dated December 9, 2005 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.