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By

FILE:

[REDACTED]
SRC 04 206 50759

Office: TEXAS SERVICE CENTER

Date:

MAR 31 2006

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:

SELF-REPRESENTED

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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was organized on August 1, 2003 in the state of Florida. It is engaged in international trade, consulting, and finance and seeks to employ the beneficiary as its president and chief executive officer (CEO). 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 had failed to establish that it had been doing business in the United States for one year prior to filing this petition as required by 8 C.F.R. § 204.5(j)(3)(i)(D).

On appeal, the petitioner submits a brief disputing the director's findings.

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 had been doing business for at least one year prior to the date it filed the petition.

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."

As noted in the director's denial, the petitioner indicated in Part 5, Item 2 of the Form I-140 that it was established on August 1, 2003. According to the receipt date stamped on the first page of the petition, the service center

received the completed Form I-140 on July 19, 2004.¹ Therefore, according to the regulatory requirement specified in 8 C.F.R. § 204.5(j)(3)(i)(D), the petitioner must establish that it has been engaged in the "the regular, systematic, and continuous" course of business since July 19, 2003. *See* 8 C.F.R. § 204.5(j)(2). Here, the petitioner failed to submit this required evidence in support of the petition.

Accordingly, on March 21, 2005, the director issued a request for evidence (RFE) informing the petitioner that based on the date of filing of its Articles of Organization and the date of the filing of the I-140, the petitioner could not have been doing business for the requisite one-year period prior to filing its I-140.

The petitioner submitted a response, which included a letter dated April 19, 2005. The petitioner stated that even though its official date of organization was August 1, 2003, it was a successor-in-interest to a sole proprietorship owned and operated by the beneficiary. The petitioner referred to relevant case law where a courts acknowledged the concept of a successor-in-interest in cases of a sole proprietorship that converted to a limited liability company, which is analogous to the facts in the instant matter. *See State ex rel. Crosset Co., Inc. v. Conrad*, 87 Ohio St.3d 467 (Ohio 2000); *see also C & J Builders and Remodelers, LLC v. Geisenheimer et. al.*, 249 Conn. 415, 422 (Conn., 1999). The petitioner also submitted additional evidence including various correspondences and affidavits discussing work performed by the beneficiary prior to the petitioner's date of organization.

On July 13, 2005, the director denied the petition concluding that the petitioner had not been doing business for one year prior to filing the I-140 petition. The director specifically discussed portions of the affidavits submitted in response to the RFE and noted that it was the sole proprietorship rather than the petitioner that was providing its services prior to August 1, 2003.

On appeal, the petitioner submits a letter dated September 7, 2005 again raising the concept of successor-in-interest.² However, a sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). A corporation or a limited liability company, on the other hand, is a separate and distinct legal entity from its owners or stockholders. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). The fact that the petitioner's predecessor was a sole proprietorship indicates that the *beneficiary* was engaged in the regular course of business. As the petitioner was not officially established prior to August 1, 2003, it is factually impossible for it have been doing business prior to

¹ It is noted that the director indicated that the Form I-140 was filed on July 26, 2004. Although the receipt number may have been assigned to the petitioner's I-140 on July 26, 2004, the date that appears immediately to the left of the receipt number, the first page of the petition is stamped with the date of July 19, 2004. Therefore, regardless of when the receipt number was assigned, the date stamped on the Form I-140 is the official date of the service center's receipt of the petition. In the instant matter, the official filing date and the date that is relevant in the instant matter is July 19, 2004. While the AAO acknowledges the correct receipt date of the I-140, this error is not critical to the issue of the petitioner's eligibility and, therefore, will have no affect on the outcome of this matter.

² The Citizenship and Immigration Services record shows that the beneficiary was previously approved for L-1A nonimmigrant status from November 15, 2003 through November 14, 2004. The record further shows that the beneficiary did not enter the United States in the approved L-1A status until December 24, 2003. Therefore, the beneficiary's sole proprietorship could not have existed in order to do business prior to the beneficiary's entry, which took place only six months prior to the filing of the Form I-140.

the date of its own creation. Thus, regardless of the petitioner's ability to establish that it was engaged in the "the regular, systematic, and continuous" course of business since August 1, 2003, it could not have been doing business since July 19, 2003, one year prior to the date the petitioner filed the Form I-140. See 8 C.F.R. § 204.5(j)(2).

Additionally, the AAO will address various issues that were not previously discussed in the director's decision. First, the regulation at 8 C.F.R. § 204.5(j)(3)(B) requires that the petitioner establish that the beneficiary's duties abroad were of a qualifying nature. Although a June 15, 2004 letter included a list of the beneficiary's proposed responsibilities with the U.S. petitioner, the petitioner failed to provide any information about the beneficiary's duties with the foreign employer. For this additional reason, the petition may not be approved.

The regulation at 8 C.F.R. § 204.5(j)(5) also requires the petitioner to provide a detailed description of the beneficiary's proposed duties in the United States. 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). In the instant matter, the petitioner's description of the beneficiary's duties primarily consisted of vague job responsibilities, which fail to disclose what the beneficiary would be doing on a daily basis. As the petitioner has failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity, the petition must be denied.

Finally, the regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Although the petitioner claimed that the beneficiary would receive an annual salary of \$50,000, the record lacks any documentation to support this claim. 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Again, the petition must be denied due to the petitioner's failure to establish another required element—its ability to pay the proffered wage of the beneficiary.

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 issues 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 she shows 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.