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U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **MAR 31 2006**
SRC 05 050 51649

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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner was incorporated in the state of Texas on February 12, 2004.¹ It is engaged in the business of furniture retail and the rental of automobiles and seeks to hire the beneficiary as its sales 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 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 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 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 Form I-140.

¹ It should be noted that, according to the Texas Comptroller of Public Accounts, the petitioner is not currently in good standing in Texas due to its failure to satisfy all state tax requirements. Therefore, regardless of whether the petitioner's tax issues in Texas can be easily remedied or not, it raises the critical issue of the company's continued existence as a legal entity in the United States.

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 a letter dated December 9, 2004 that it was incorporated in February of 2004. The petitioner also provided its Certificate of Incorporation indicating that the petitioner was incorporated on February 12, 2004. According to the receipt dated stamped on the first page of the petition, the service center received the completed Form I-140 on December 13, 2004. Therefore, pursuant 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 December 13, 2003. See 8 C.F.R. § 204.5(j)(2).

In regard to the above regulatory requirement, the petitioner acknowledged that it was incorporated in February of 2004. However, the petitioner also stated that in May of 2004 it acquired a business that had been in operation for approximately eight years, implying that it was a successor-in-interest to a previously existing business, which had been doing business for longer than the one year prior to the filing date of the petitioner's Form I-140.

On June 16, 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. Although the director acknowledged the petitioner's purchase of an existing business, she stated that the one-year time period for doing business does not begin to toll until the petitioner itself is engaged in the business.

On appeal, counsel contends that the director violated 8 C.F.R. § 103.2(b)(8) by failing to request further evidence before denying the petition. The cited regulation, however, requires the director to request additional evidence in instances "where there is no evidence of ineligibility, *and* initial evidence or eligibility information is missing." *Id.* (Emphasis added). Thus, the director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation.

In the instant matter, the director did not deny the petition based on insufficient evidence of eligibility. Rather, the director concluded that the initial evidence, namely the petitioner's date of incorporation, warrants a denial of the Form I-140. As such, the AAO cannot deem the instant matter as one where there was no initial evidence of ineligibility. The documentation provided by the petitioner clearly suggests that the petitioner was not eligible for the benefit sought at the time the Form I-140 was filed.

Furthermore, even where the director commits a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has ample opportunity to supplement the record on appeal. Therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

Counsel also asserts that that the real focus should be on determining whether the business into which the beneficiary would be transferred had been doing business for one year. Counsel argues that the beneficiary was being transferred to a company that was a successor-in-interest to an entity that had existed for nearly eight years prior to the time the Form I-140 was filed. Counsel's argument, however, is without merit. The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) clearly requires that the petitioner establish that *it*, not its predecessor,

had been doing business for one year prior to the filing of the Form I-140. The language of the regulation is clear on its face, and is not subject to counsel's interpretation.

The record in the instant matter shows that the foreign entity purchased an existing business that predated the petitioner itself. However, the fact that the petitioner was not officially established as of December 13, 2003, makes it factually impossible for it to have been doing business as of that date, as the petitioner could not have been doing business prior to 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 February 12, 2004, it could not have been doing business since December 13, 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 the petitioner's support letter (dated December 9, 2004) included a list of the beneficiary's responsibilities during her employment abroad, the petitioner failed to provide a specific list of duties the beneficiary performed on a day-to-day basis. The actual duties themselves 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).

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 primarily consisted of beneficiary's vague job responsibilities, which fail to disclose what the beneficiary would be doing on a daily basis.

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.

In the instant matter, the petitioner indicated in Part 6, Item 9 that the beneficiary's proposed salary was not yet determined. Thus, since the petitioner failed to provide a proposed salary, the U.S. Citizenship and Immigration Service is precluded from making a determination as to the petitioner's ability to pay.

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 three separate and 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.