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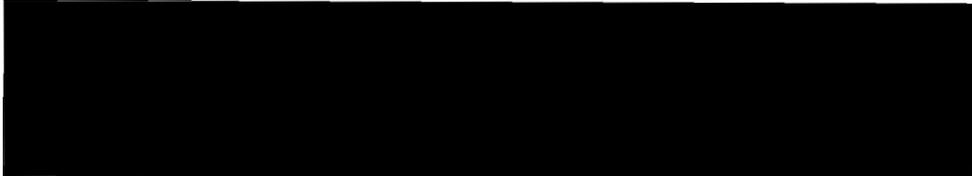
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] OFFICE: TEXAS SERVICE CENTER Date: OCT 31 2008
SRC 02 101 51173

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, Texas Service Center. Upon further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice of her intention to revoke the approval of the preference visa petition (NOIR), and her reasons therefore. The director ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

In Part 5 of its Form I-140, the petitioner indicated that it was established in July 2001 as a joint venture entity created by Internet Payment Services, Inc. (IPS), a Florida corporation, and Startcomm Corp., a Florida corporation. The petitioner claimed that it was established for the purpose of conducting business as a telecommunications and communications security software entity. The petitioner seeks to employ the beneficiary as its executive 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 revoked approval of the petition based on the determination 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, counsel disputes the director's findings and submits a brief, asserting that the regulatory provision upon which the director based her revocation is irrational and erroneous and must not be given deference in determining the petitioner's eligibility for the immigration benefit sought.

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 the Form I-140 was filed.

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 briefly discussed above, the petitioner provided the month and year it claimed to have been established. More specifically, the petitioner indicated in Part 5 of the Form I-140 that it was established in July 2001. According to the receipt dated stamped on the first page of the petition, Citizenship and Immigration Services (CIS) received the completed Form I-140 on February 7, 2002. 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 "regular, systematic, and continuous" course of business since February 7, 2001. *See* 8 C.F.R. § 204.5(j)(2). No such evidence was submitted in support of the Form I-140 because, as claimed by the petitioner, the joint venture entity that filed the Form I-140 on behalf of the beneficiary had not yet been formed.

Although the Form I-140 was approved, CIS reviewed the supporting documentation subsequent to the beneficiary's interview regarding his adjustment of status application, Form I-485, and determined that the petitioner would need to present further documentation in order to establish eligibility for the immigration benefit it was seeking. Accordingly, on January 23, 2006, the director issued a NOIR notifying the petitioner that the record shows that Startcomm Corp., one of the alleged members of the joint venture, became inactive on August 23, 2001 and further noting that the record does not contain evidence establishing that IPS was in existence and doing business for one year prior to filing the instant petition. In light of the director's observations, additional documentation was requested.

In response, the petitioner provided StartComm of Venezuela's board meeting of shareholders and directors as well as the English translation of this document, which states that on October 4, 2001, StartComm of Venezuela, C.A.'s shareholders unanimously voted to form a joint venture alliance with IPS. The record also contains a copy of the joint venture agreement signed on October 4, 2001 by representatives of StartComm Venezuela and IPS, respectively. It is noted that the joint venture agreement states that the newly created company will be called SCIP and further addresses how SCIP will be operated and managed.

On August 23, 2006, the director issued a final notice revoking the prior approval of the Form I-140. Specifically, the director restated that StartComm Corp. became inactive on August 23, 2001 and further noted that IPS failed to establish that it was in existence and doing business in the United States for at least one year prior to filing the Form I-140. The AAO notes that StartComm Corp.'s inactive business status brings to light questions as to how an inactive entity can partake in a joint venture or in any business transaction.

Additionally, while the director's observations are accurate, the AAO notes that the more relevant issue in the present matter is the lack of documentation establishing the existence of SCIP, the entity discussed in the joint venture agreement, and, more importantly, the entity that is purportedly the petitioner that filed the Form I-140 in order to permanently employ the beneficiary. There is no evidence that SCIP, as a separate entity, was actually formed. 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)). Without the fundamental

documentation establishing the petitioner's legal existence, the AAO must question which entity would actually employ the beneficiary in the United States in the proffered position.

Moreover, even if the existence of the U.S. petitioner were not in any way in question, the mere fact that Part 5 of the Form I-140 indicates that the petitioning entity was established in July 2001 clearly establishes that the petitioner could not have been doing business for longer than seven months prior to filing the Form I-140. As the petitioner could not have been doing business for at least one year prior to filing a Form I-140, it fails to meet the criteria specified in 8 C.F.R. § 204.5(j)(3)(i)(D).

On appeal, counsel disputes the validity of 8 C.F.R. § 204.5(j)(3)(i)(D), urging the AAO to find the regulation invalid. Counsel bases his dubious argument on case law precedent set by the U.S. Supreme Court as well as a number of circuit courts where various regulatory requirements had been invalidated based on the respective courts' adverse findings. Counsel's argument is premised on the assumption that the AAO may ignore various regulations at its own discretion. This conjecture, however, is absolutely without basis, as the AAO has no legal authority to disregard or nullify any regulation, including the one at issue in the present matter. As counsel has not presented any case law precedent nullifying 8 C.F.R. § 204.5(j)(3)(i)(D), the petitioner must comply with that regulation by establishing, first and foremost, its legal existence and second, that it was doing business during the course of the one-year period prior to the date the Form I-140 was filed. In the present matter, counsel does not contend, nor is there any doubt, that the petitioner has failed to establish that it was doing business for the prescribed one-year time period. Rather, in light of the petitioner's claimed date of establishment and the date the Form I-140 was filed, doing business since February 2001 is a factual impossibility. Therefore, the petitioner has failed to meet the provisions of 8 C.F.R. § 204.5(j)(3)(i)(D). On this initial basis, the AAO cannot approve this petition.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer. Similarly, 8 C.F.R. § 204.5(j)(5) also instructs the petitioner to provide a job offer in the form of a statement, containing a description of the job duties to be performed by the beneficiary. In the present matter, the beneficiary's past and proposed employment is described using vague and ambiguous terms that give the impression of a manager or executive, but in essence, fail to convey a meaningful understanding of the actual tasks the beneficiary has performed and would perform on a daily basis. 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). Without sufficient information about the beneficiary's actual job duties and his position with respect to others in each entity's organizational hierarchy, the AAO does not have sufficient information in order to determine that the beneficiary's foreign and proposed employment can be classified as being in a managerial or executive capacity.

Second, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. In the present matter, the support letter dated January 31, 2002 stated that the joint venture entity, created by IPS and StartComm Communications (a Venezuelan entity), would be the U.S. petitioner and that the beneficiary's foreign employer was OEM. The regulations

and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the present matter, there is no information or evidence that would lead to the conclusion that the petitioning entity (assuming that it is a legally created entity) and the beneficiary's foreign employer shared common ownership and control. Rather, the petitioner primarily focused on common ownership between the two entities that created the joint venture agreement, despite the fact that neither entity was claimed to be the official foreign employer of the beneficiary. As the record contains no documentation establishing the ownership of the beneficiary's foreign employer, the AAO cannot conclude that this entity and the proposed petitioning entity share common ownership and control.

Lastly, 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 present matter, the petitioner is claimed to be an entity that purportedly resulted from a joint venture agreement. However, as previously discussed, the legal existence of this entity has not been established. Accordingly, it serves to reason that an entity whose legal existence has not been established cannot establish the ability to pay the beneficiary's proffered wage, which, in the present matter, was claimed to be in excess of \$150,000 annually.

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 revokes approval of 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 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

The approval of the petition is revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation. 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.