

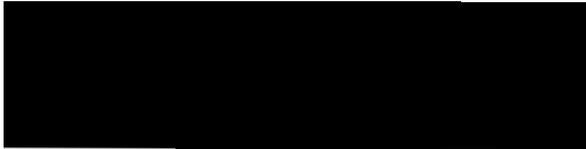
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



BU

FILE: [REDACTED]
SRC 05 251 51035

Office: TEXAS SERVICE CENTER Date:

18 2006

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 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 is a branch office that claims to be doing business in the state of Texas. It 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 denied the petition on two separate grounds of ineligibility: 1) the petitioner had failed to establish that it is doing business in the United States; and 2) the petitioner failed to establish its ability to pay the beneficiary's proffered wage.

On appeal, counsel for the petitioner disputes the director's findings and provides additional documentation in support of his assertions.

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 first issue in this proceeding is whether the petitioner has and continues to do business 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.*" (Emphasis added.)

The regulation at 8 C.F.R. § 204.5(j)(2) also defines *multinational* as "the qualifying entity, or its affiliate, or subsidiary [that] conducts business in two or more countries, one of which is the United States."

In the instant matter, the petitioner claims that it is a branch office whose base operation is located in the Republic of Korea. The petitioner further claims that it conducts business as an oil and gas development company. More specifically, in a letter dated August 25, 2005, which the petitioner provided in support of its Form I-140, the petitioner provided the following description of the nature of its business:

[The petitioner] explores and develop[s] domestic and overseas oil resources, exports, imports, stores, transports, leases, and sells crude oil and petroleum products, construct[s], manage[s], operates, and leases petroleum storage facilities, invests in, make[s] loan[s] to, and guarantees equipment to legal entities that engage in investigation and research for, [sic] and provides information to related businesses.

The petitioner claims that its U.S. branch office was established for the purpose of facilitating and enhancing the foreign entity's ability to compete for market share in the United States, South America, and the West African countries.

Although the petitioner provided several of its bank statements, it did not provide any documentation suggesting that it has and continues to engage in any type of business transactions.

The director attempted to address this issue, as well as several others, in the request for additional evidence (RFE) dated October 11, 2005. More specifically, the director instructed the petitioner to provide copies of its federal tax returns, audited financial statements, or annual reports. The director further invited the petitioner to submit any other evidence, which may not have been specifically enumerated.

The petitioner responded by submitting documentation, including its audited financial report for the 2003/2004 year ending on December 31, 2004. While this document clearly establishes the viability of the petitioner's overseas operation, neither it nor any of the other documentation provided in response to the RFE can be deemed as evidence corroborating any business transactions conducted by the U.S. branch office.

Accordingly, on December 20, 2005, the director denied the Form I-140 concluding that the petitioner failed to provide evidence to establish that it has been doing business. The director acknowledged all of the evidence previously provided by the petitioner in support of the Form I-140 and in response to the RFE, but concluded that none of the documentation suggests that the petitioner's Houston, Texas branch office provides goods or services.

On appeal, counsel reasserts the claim that the petitioner is not required to pay income tax in the United States as a result of a tax treaty between the United States and the Republic of Korea and further states that the U.S. branch office is engaged in joint ventures to develop exploration programs with major oil companies. While the AAO acknowledges the numerous copies of checks issued by the petitioner and subsequently cashed by the receiving party, the checks are not accompanied by service contracts to enable the AAO to conclude that the petitioner has engaged in business transactions that involved the provision of goods and/or services. The AAO also notes that neither the petitioner's payment of utility bills nor its payment of the beneficiary's wages is indicative of business transactions between the petitioner and a third party. In order to establish that the U.S. branch office is doing business, the petitioner must provide evidence of actual business transactions and establish that such transactions have occurred and continue to occur on a "regular, systematic, and continuous" basis. *See 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)). In the instant matter, such documentation has not been provided. Therefore, the AAO

concur with the director's conclusion that the petitioner has not established that it has been doing business as defined above. *See* 8 C.F.R. § 204.5(j)(2).

The other issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary's proffered wage. 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 AAO concludes that the petitioner's financial status as indicated in its audited financial report strongly suggests that the petitioner does have the ability to pay the beneficiary's proffered wage despite the fact that the petitioner was not actually paying the proffered wage at the time the Form I-140 was filed. However, despite the petitioner's success in overcoming one of the grounds for ineligibility cited in the director's decision, the petitioner's failure to establish that it has and continues to engage in "the regular, systematic, and continuous provision of goods and/or services," precludes the AAO from approving the petition. *See* 8 C.F.R. § 204.5(j)(2).

Additionally, though not addressed in the director's decision, the AAO notes that when examining the executive or managerial capacity of the beneficiary, the petitioner's description of the job duties must be considered. *See* 8 C.F.R. § 204.5(j)(5).

In the instant matter, neither the description of the beneficiary's job duties abroad, nor the description of his proposed job duties in the United States are sufficiently detailed to enable the AAO to determine what actual tasks the beneficiary performed abroad and would perform in the United States 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). As such, the AAO cannot affirmatively determine that the beneficiary has performed and would continue to perform duties that are primarily of a qualifying nature.

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 grounds for ineligibility as 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.