



U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: MAY 12 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. 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). The director also cited perceived inconsistencies, which resulted in his doubt as to the petitioner's overall credibility and consequently the reliability of the statements made in support of its claims.

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 first 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.

The regulation at 8 C.F.R. § 204.5(j)(2)¹ 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."

The record shows that the service center received the petitioner's completed Form I-140 on December 20, 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 "regular, systematic, and continuous" course of business since December 20, 2003. *See* 8 C.F.R. § 204.5(j)(2). However, as noted in the director's denial, the petitioner was incorporated on February 12, 2004 as shown in its Certificate of Incorporation. Therefore, according to the documentation submitted, the petitioner did not exist in December 2003.

On August 30, 2005, the director issued a notice of intent to deny (NOID) informing the petitioner of the adverse information with regard to the petitioner's failure to meet the provisions of 8 C.F.R. § 204.5(j)(3)(i)(D).

Counsel provided a response statement dated August 11, 2005² in which he discussed the petitioner's May 2004 purchase of a business that has been operating for eight years. Counsel claimed that the petitioner was a successor-in-interest to a previously existing entity, which had been doing business for longer than the one year prior to the filing date of the petitioner's Form I-140.

On November 14, 2005, the director issued a denial of the petitioner's Form I-140, rejecting counsel's argument that incorporated the concept of a successor-in-interest. More specifically, the director stated that the petitioner cannot rely on the length of time other businesses were operating prior to the petitioner's purchase in order to satisfy the provisions in 8 C.F.R. § 204.5(j)(3)(i)(D). Although the director acknowledged the petitioner's purchase of an existing business, she concluded that the one-year time period for doing business does not begin to toll until the petitioner itself is doing business.

On appeal, counsel asserts on page six of the appellate brief that the director failed to previously raise the issue of whether the petitioner was doing business for the requisite time period. However, the director clearly made the petitioner aware of adverse information on the first page of the NOID. The director discussed the respective dates of incorporation of the petitioner itself as well as the company that was subsequently purchased by the petitioner and informed the petitioner that it failed to establish that it had been doing business for one year prior to filing its Form I-140. Therefore, the record shows that counsel's assertion that the petitioner was not informed of relevant adverse information is without merit.

Counsel also challenges the director's inference that counsel himself submitted questionable evidence to support the petitioner's claim that it was doing business. Specifically, counsel disputes the assertion that he created the evidence in question and suggests that it was the petitioner's choice to provide such documentation. While the director properly pointed out that the evidence in question was unsigned and

¹ On the second page of the denial, the director states the regulatory definition of "doing business" and indicates that the definition can be found in 8 C.F.R. § 204.5(j)(2)(D). This citation, however, is incorrect. As indicated above, the relevant definition can be found in 8 C.F.R. § 204.5(j)(2). While this typographical error is noted for the record, it has no bearing on the outcome in this proceeding.

² Despite the fact that counsel referred to the director's NOID, noting that the date of the NOID was August 30, 2005, the response statement was dated August 11, 2005, prior to the date the NOID was issued. This appears to be a typographical error on counsel's part and will not affect the outcome in this matter.

untitled, its lack of evidentiary weight should not result in an adverse finding regarding counsel's own credibility or the credibility of the petitioner's claims. Accordingly, the director's improper statement is hereby withdrawn.

Notwithstanding the error discussed above, the director properly interpreted 8 C.F.R. § 204.5(j)(3)(i)(D) as requiring 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 20, 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. Regardless of the petitioner's ability to establish that it was engaged in the "regular, systematic, and continuous" course of business since February 12, 2004, it could not have been doing business since December 20, 2003, one year prior to the date the petitioner filed the Form I-140. *See* 8 C.F.R. § 204.5(j)(2). Therefore, the petition cannot be approved due to the petitioner's failure to satisfy the provisions in 8 C.F.R. § 204.5(j)(3)(i)(D).

The other issue in this proceeding is the petitioner's overall credibility and, therefore, the reliability of the claims made in support of the petition.

In the denial, the director made a number of findings, which led to her adverse conclusion regarding the petitioner's credibility. The director's first point was that the petitioner provided the beneficiary's name as the resident agent responsible for filing the petitioner's Articles of Incorporation.

On appeal, counsel provided evidence showing that the director's finding was erroneous and that it was the beneficiary's son, not the beneficiary himself, who was identified as the registered agent. Accordingly, the director's comment with regard to this finding is hereby withdrawn.

The director also questioned the fact that the beneficiary's proposed employment is in Arizona while the petitioner itself is incorporated in Texas. However, the record clearly shows that the petitioner acquired an Arizona company shortly after its date of incorporation. The mere fact that the petitioner is incorporated in one state while the beneficiary is employed in another has no significance with respect to the relevant regulatory requirements for a multinational manager or executive. Therefore, the director's comment is hereby withdrawn.

Next, the director addressed the fact that the employees identified in the petitioner's organizational chart do not appear in the submitted quarterly tax returns. On appeal, counsel disputes the implication that the organizational chart conflicts with the submitted tax returns and claims that the organizational chart represents the compilation of all employees employed by the various companies purchased by the petitioner. Counsel also asserts that many employees are contractors and, therefore, would not appear on a quarterly tax return. However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In the instant matter, the record contains copies of cashed checks and invoices showing payment for services in 2005. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new

set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The record lacks sufficient documentary evidence to establish that at the time the petitioner filed its Form I-140 it had the staffing structure indicated in the organizational chart. Merely claiming that various employees worked on a contractual basis does not relieve the petitioner of having to provide evidence 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)).

Additionally, the director noted the beneficiary's status as a B-2 visitor for pleasure when the petitioner and its various investment companies commenced operations. Counsel responds, stating that the beneficiary's involvement in the mere purchase and initial set-up of the petitioner's business operations does not amount to unauthorized employment. However, the record suggests that the beneficiary was being paid for his services and that his involvement was more than merely that of an investor. Specifically, the record contains a letter on the petitioner's letterhead, dated August 12, 2005 and signed by the petitioner's president, referring to the beneficiary's continued employment at a salary of \$34,000 per year. The indication that the petitioner will "continue" to employ the beneficiary strongly suggests that the beneficiary has been a paid employee, despite the fact that the record lacks documentation to show that Citizenship and Immigration Services (CIS) authorized such employment.

Lastly, the director determined that the overall lack of reliability of the evidence on record precluded the conclusion that the beneficiary would be employed in a qualifying managerial or executive capacity. As the director's determination was based on her perception of the petitioner's overall credibility, the description of the beneficiary's proposed duties was not specifically addressed. However, 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, while the petitioner provided a percentage breakdown of the beneficiary's responsibilities, it failed to identify the specific duties the beneficiary would perform on a daily basis. For example, the petitioner stated that 25% of the beneficiary's time would be devoted to expanding the petitioner's existing business. However, there is no indication as to the actual duties involved in such expansion. The petitioner also indicated that an additional 20% of the beneficiary's time would be allotted to planning and developing the petitioner's U.S. investments, which would include seeking out new locations, analyzing market trends and setting sales goals. However, there is no indication that planning and developing investments is in any way different from expanding the petitioner's business. The petitioner reiterated the beneficiary's responsibility for formulating policies and setting sales goals and attributed another 20% of the beneficiary's time to this unspecified set of duties. 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, however, at least 65% of the beneficiary's time would be spent performing duties that are entirely undefined. As such, the AAO cannot affirmatively determine that the beneficiary would primarily perform duties 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 AAO's inability to conclude that the beneficiary would primarily perform qualifying duties, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown 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.