



U.S. Citizenship  
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File:

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Office: NEBRASKA SERVICE CENTER

Date:

MAR 04 2008

IN RE: Petitioner:

Beneficiary:

[Redacted]

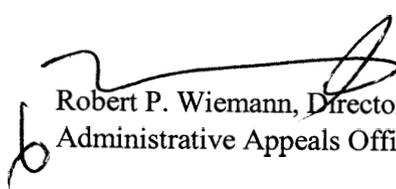
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[Redacted]

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 Director, California Service Center initially approved the employment-based visa petition despite lacking geographical jurisdiction of the matter. Upon review of the record, the Director, Nebraska Service Center issued a notice of intent to revoke and ultimately revoked approval of the petition. The director certified this matter and a related decision to the Administrative Appeals Office (AAO) for review. The director's decisions will be affirmed.

The petitioner is a foreign corporation that contends it is doing business in the United States. It is engaged in the shipping industry. It seeks to employ the beneficiary as its deputy general manager. 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 petitioner initially filed a petition in August 2000 with the Nebraska Service Center, receipt number LIN 00 236 52254. The Director, Nebraska Service Center denied the August 2000 on September 19, 2000 because the petitioner had failed to establish that it was a United States employer. The petitioner appealed the decision. On August 31, 2001, the AAO remanded the decision to the Service Center observing two deficiencies in the record:

- (1) the record lacked evidence of the petitioner doing business in the United States as defined by 8 C.F.R. § 204.5(j)(2); and,
- (2) the record lacked evidence of the beneficiary's employment in a primarily executive or managerial capacity as defined in 101(a)(44)(A) and (B) of the Act.

The AAO indicated in its decision that the director should address the two deficiencies in the record and could request any additional evidence necessary to assist in making his decision. The director requested additional evidence on both issues and set forth the regulatory deadline for the petitioner to submit the additional evidence. The petitioner failed to present additional evidence on either issue, thus, the director considered the petition abandoned and denied pursuant to 8 C.F.R. § 103.2(b)(13). The director certified his decision to the AAO for review.

The petitioner filed a second petition on April 27, 2001, receipt number WAC 01 230 52274. The Director, California Service Center approved the petition despite the lack of geographical jurisdiction on January 15, 2002. The petitioner was notified on March 4, 2003 of CIS' intention to revoke the approved petition. CIS expressed concern in the notice of intent to revoke that the petitioner had not identified the submission and denial of a prior petition and that the petition was improperly filed with the California Service Center. CIS notified the petitioner that the grounds of revocation were:

- (1) failure to demonstrate that the petitioner was doing business for at least one year prior to filing the petition; and,
- (2) failure to demonstrate that the beneficiary had one year of qualifying experience during the three years preceding his admission into the United States.

The Director, Nebraska Service Center, determined upon review of rebuttal evidence submitted on behalf of the petitioner that:

- (1) counsel was responsible for the errors of failing to notify CIS of filing a prior petition and for improperly filing the current petition with the California Service Center,
- (2) the petitioner had provided sufficient evidence that the beneficiary had one year of qualifying experience during the three years preceding his admission into the United States, and
- (3) the petitioner had submitted documentation relating to the issue of doing business from mid 2001 forward, and not to the one-year time period preceding the filing of the petition on April 21, 2001; thus, had not overcome the ground of revocation relating to the issue of doing business.

The director also certified this decision to the AAO for review.

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 that 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. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established it was engaged in doing business for one year prior to the filing of the petition.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

"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.)

In a brief submitted in support of the appeal certified to the AAO for review, counsel for the petitioner asserts that the petitioner conducts business in the United States.

The focus of the issue in this matter is the petitioner's Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation for 2000, including Form 8833, Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b). The petitioner states on the IRS Form 8833:

The taxpayer's activities in the U.S. are limited to information gathering and liaising with the home office in Korea. Pursuant to Article 9 of the US-Korea Income Tax Treaty, such activities would not result in a permanent establishment. Therefore, the taxpayer should not be deemed to be engaged in a U.S. trade or business nor [sic] derive income effectively connected with a U.S. trade or business.

Counsel asserts on appeal that the petitioner's statement was made to establish the basis for exemption from taxation of income derived from "doing business." Counsel explains that "the petitioner did not state that it does not do business in the U.S., only that it should not be taxed as if it did." Counsel also submits a copy of an agency agreement with a third party and asserts that the petitioner has engaged in the shipping business in the United States. The agreement appointed the third party company as the petitioner's agent to arrange berths for the petitioner's vessels, contract with tugs and pilots to service the petitioner's vessels, and arrange for entry and clearance and payment of port charges for the petitioner's vessels, among other duties. Counsel further provided copies of invoices dated February 2000 through January 2001 issued to the petitioner for goods and services purchased by the petitioner. Counsel also submitted copies of the petitioner's bank statements. Counsel asserts that the documentation submitted serves to demonstrate, despite the petitioner's statement, that the petitioner is "doing business" in the United States.

Counsel's assertions are not persuasive. The critical focus in the definition of "doing business" is not whether the petitioner is an agent or representative office, but whether the entity constitutes the "mere presence of an agent or office" without conducting any business activities. The proper focus on this issue thus, is the nature and conduct of the petitioner's business activities, if any. In the matter at hand, the petitioner has presented evidence that it contracts with agency companies to provide services for its ships and purchases necessary equipment for the maintenance of its ships. The petitioner has not submitted evidence on how its ships facilitate trade. The documentation provided shows only that the petitioner's ships dock at United States ports. The petitioner has not adequately established that it is engaged in facilitating the regular, systematic, and continuous provision of goods or services in the United States.

In sum, the petitioner has stated that its activities in the United States are limited to information gathering and acting as liaison with the home office. This statement coupled with the lack of evidence regarding its actual operational activities in the United States does not establish that the petitioner is conducting business in the United States in a systematic, regular, and continuous manner. Counsel's explanation that the petitioner's statement was made solely for tax purposes does not overcome the petitioner's view that it only gathers information and is a liaison with the home office, rather than conducting business in the United States.

Beyond the decision of the director, the record before the AAO does not establish that the beneficiary's duties for the petitioner will consist primarily of managerial or executive duties. The description of the beneficiary's duties submitted with the first petition is more indicative of an individual performing operational tasks for the petitioner. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The AAO observes that the invoices submitted to the petitioner for payment are submitted to the attention of the beneficiary. The director did not provide the AAO with a complete record of proceeding for the second filed petition. As such, the AAO will not comment further on the beneficiary's duties for the petitioner.

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. Here, that burden has not been met.

ORDER: The director's decisions are affirmed.