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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Avenue, N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

[Redacted]

B4

FILE: [Redacted] OFFICE: TEXAS SERVICE CENTER Date: DEC 22 2010

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:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the 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 Texas corporation that seeks to employ the beneficiary as its president and chief executive officer (CEO). 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 based on two grounds of ineligibility: 1) 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); and 2) the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage. 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) 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."

According to the receipt dated stamped on the first page of the petition, the service center received the completed Form I-140 on February 5, 2009. Therefore, pursuant to 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 February 5, 2008. See 8 C.F.R. § 204.5(j)(2). However, according to Part 5, Item 2 of the Form I-140 and the petitioner's Certificate of Filing, the petitioning entity was established on October 1, 2008, thereby indicating that the petitioner could not have been doing business for longer than four months prior to filing the petition.

Accordingly, on April 20, 2009, the director denied the petition concluding that the petitioner had not been doing business for one year prior to filing the I-140 petition. The director properly pointed out that it is factually impossible for the petitioner to have been doing business prior to the date it was created.

On appeal, counsel cites to portions of 8 C.F.R. § 214.2(l), which applies to any petitioner that seeks L-1 nonimmigrant classification for its beneficiary. In particular, counsel focuses on 8 C.F.R. § 214.2(l)(7)(i)(A)(3), which applies to a beneficiary who is coming to the United States to open or be employed in a new office. The AAO notes, however, that the petitioner in the present matter seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Act. Therefore, the regulatory provisions contained in 8 C.F.R. § 214.2(l) do not apply in the matter at hand. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. See §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). However, there are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. Cf. §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427.

In the present matter, the petitioner must refer to the regulations contained in 8 C.F.R. § 204.5(j) to determine the filing requirements that apply to the type of immigration benefit the petitioner is seeking to obtain on behalf of the beneficiary. The regulations governing the employment-based immigrant petition that the petitioner has filed in the present matter do not allow for a new office petitioner. The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) expressly states that the petitioner is required to establish, at the time of filing, that it has been doing business for at least one year prior to the date the Form I-140 is filed. Although counsel states that the petitioner has acquired an ownership interest in another U.S. corporation that has been doing business since October 2007, the AAO finds that this information is irrelevant in the present matter, as the petitioner must establish that the entity filing the Form I-140 has been doing business for the requisite amount of time. Here, the entity that has been doing business since October 2007 is not the entity that has filed the instant Form I-140 on behalf of the beneficiary. Therefore, its business activity is irrelevant in the context of the petitioner's eligibility. As the petitioner has not been doing business since February 2008, it has failed to satisfy the requirements discussed at 8 C.F.R. § 204.5(j)(3)(i)(D) and on the basis of this initial finding, the instant petition cannot be approved.

The second issue addressed in the director's decision is whether the petitioner has the 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 denial, the director noted that the petitioner failed to submit evidence to support the claim that the beneficiary would be compensated at a weekly rate of \$692.23. Accordingly, the director concluded that the petitioner failed to establish that it meets the criteria set forth at 8 C.F.R. § 204.5(g)(2).

On appeal, counsel challenges the director's finding on the basis of the petitioner's net income and net current assets, which he claims are sufficient to pay the beneficiary the proffered wage. However, the AAO notes that the evidence establishing the petitioner's net income and net current assets is in the form of unaudited statements of revenues and expenses and a 2008 balance sheet pertaining to the petitioner's U.S. subsidiary, [REDACTED]. As the submitted documents do not pertain to the petitioner's financial status, they have no probative value in this proceeding and will not be given any evidentiary weight.

Additionally, the AAO notes that even if the petitioner were to submit its own unaudited balance sheets and financial statements for 2008, such documents would have very limited probative value in this proceeding. First, 8 C.F.R. § 204.5(g)(2) requires that the petitioner establish its ability to pay at the time the priority date is established, i.e., as of February 5, 2009. The documents submitted, even if they pertained to the petitioning entity, do not address the relevant time period. Second, the statements submitted were unaudited and thus do not fit the criteria of the documents that are expressly listed at 8 C.F.R. § 204.5(g)(2) as acceptable means of establishing the petitioner's ability to pay. Although 8 C.F.R. § 204.5(g)(2) indicates that other documentation may be accepted in "appropriate cases," the petitioner has not provided evidence to explain why the documentation that is expressly allowed by regulation would not illustrate an accurate depiction of the petitioner's financial status at the time of filing.

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. As the petitioner does not claim to have employed the beneficiary at the time of filing, it cannot provide *prima facie* proof of its ability to pay.

As an alternate means of determining the petitioner's ability to pay, the AAO would next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). As the petitioner did not provide any financial documents pertaining to the petitioning entity, the AAO cannot conduct the necessary analysis. It is noted that 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)). As the petitioner in the present matter has not provided relevant documentation regarding its financial status at the time the Form I-140 was

filed, the AAO cannot conclude that the petitioner had the ability to pay the beneficiary's proffered wage and for this additional reason, the instant petition cannot be approved.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision. Specifically, the AAO finds that the petitioner has failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity pursuant to 8 C.F.R. § 204.5(j)(3)(i)(A) or that he would be employed by the U.S. entity in a qualifying managerial or executive capacity pursuant to 8 C.F.R. § 204.5(j)(5). Although the petitioner provided job descriptions for both the beneficiary's foreign and proposed positions, neither included sufficiently detailed information disclosing the beneficiary's specific daily job duties and thus neither description successfully demonstrated that the primary portion of the beneficiary's time in his foreign and proposed positions has been and would be spent performing managerial- or executive-level job duties.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional grounds of ineligibility discussed above, this petition cannot be approved.

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 met that burden.

ORDER: The appeal is dismissed.