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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER  
SRC 08 134 53439

Date: FEB 16 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:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
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 an Alabama corporation that seeks to employ the beneficiary as its general manager/vice president. 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 meet the criterion cited in 8 C.F.R. § 204.5(j)(3)(i)(D), which requires that the petitioner establish that it had been doing business in the United States for one year prior to filing this petition. The director also questioned the reliability of the petitioner's claim in light of the petitioner's failure to resolve an inconsistency with regard to the nature of its business operation in the United States. 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 primary 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."

The record shows that the service center received the petitioner's completed Form I-140 on March 19, 2008. 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 "the regular, systematic, and continuous" course of business since March 19, 2007. See 8 C.F.R. § 204.5(j)(2). In support of the Form I-140, the petitioner provided a letter dated February 12, 2008, variously stating that the beneficiary was employed abroad until July 31, 2007 and July 31, 2008, the date he was transferred to work at the petitioning entity. The record indicates that the beneficiary actually entered the United States on July 5, 2007. In the same letter, the petitioner stated that the beneficiary came to the United States to start up the U.S. operation. The record also contains the following additional documents: the petitioner's IRS Form SS-4, Application for Employer Identification Number, a copy of the petitioner's sales tax license effective as of July 1, 2006, a letter dated November 9, 2007 indicating that the petitioner had been approved for a beer and wine license at the [REDACTED], a convenience store license, the petitioner's occupational license issued on October 31, 2007, and the petitioner's lease agreement dated September 20, 2007. Given the dates of the petitioner's lease and license to operate a convenience store, neither of which took place prior to March 19, 2007, the petitioner could not have engaged in any retail transactions one year prior to the date the petition was filed.

On August 29, 2008, the director issued a notice of intent to deny (NOID) instructing the petitioner to provide, in part, evidence of the U.S. entity doing business through 2007. The director also pointed out that evidence shows that the petitioner is doing business as a retail convenience store, which is inconsistent with the petitioner's earlier claim at Part 5, Item 2 of the Form I-140, which indicates that the petitioner is a construction consulting services provider. Given this inconsistency, the director asked the petitioner to clarify what type of U.S. entity is actually petitioning to employ the beneficiary.

In response, the petitioner provided a letter dated September 30, 2008 stating that "the U.S. entity did not start full business operation till [*sic*] July 2007." The petitioner further stated that it consists of two different types of businesses—a retail business and a construction consulting business. The petitioner's supporting evidence included consulting service invoices, the earliest of which was dated December 20, 2007, and payment receipts for payments made in 2008.

In a decision dated December 5, 2008, the director denied the petition. The director took note of the petitioner's admission that it did not start doing business until July 2007 and further found that the petitioner failed to clarify the inconsistency with regard to the nature of its business. With regard to the latter finding, the AAO notes that the last page of the petitioner's response to the NOID contains a statement from the petitioner explaining that it "is performing two distinct businesses," one of which is the constructing consulting business. Although the petitioner's Form I-140 does not clearly make this distinction, the record includes sufficient evidence to support the petitioner's claim with regard to the nature of its business. As such, the AAO concludes that the director's finding of inconsistency was unfounded and is hereby withdrawn. Notwithstanding the erroneous finding, the director properly concluded that the petitioner had not been doing business for one year prior to filing the instant Form I-140.

On appeal, counsel urges the AAO to accord a broad interpretation to the term "doing business," arguing that the legacy Immigration and Naturalization Service intended for such a broad interpretation in the context of L-1 nonimmigrant visa petitions. Counsel also points out that the definition of "doing business" is the same in the L-1 context and in the context of the Form I-140 petition for multinational manager or executive. While the AAO acknowledges this similarity, counsel's general argument is not persuasive, as it entirely ignores the differences between the regulations that govern the filing of an L-1 nonimmigrant petition and those that

govern the filing of a Form I-140 immigrant petition. More specifically, while the regulations that govern the filing of an L-1 nonimmigrant petition allow and provide express requirements for a new office petitioner, the same is not true in the case of an I-140 immigrant petition where the petitioner seeks to employ an alien in the category of a multinational manager or executive. Unlike the L-1 regulations, 8 C.F.R. § 204.5(j)(3)(i)(D), which is among the requirements that pertain to the petition filed in the present matter, expressly states that in order to establish eligibility to classify an alien in the immigrant category of multinational manager or executive, the petitioner must establish that it has been doing business for at least one year prior to the date the petition was filed. Therefore, by virtue of filing a Form I-140 immigrant petition for multinational manager or executive the petitioner cannot be a new office as defined in 8 C.F.R. § 214.2(l)(1)(ii)(F).

In the present matter, according to the petitioner's own statements as submitted initially in support of the petition and in response to the NOID, the petitioner fit the definition of a new office petitioner at the time the Form I-140 was filed. *See id.* Thus, the petitioner, by its own admission, had not been doing business for at least one year at the time of filing. As such, the petitioner does not meet the requirement specified in 8 C.F.R. § 204.5(j)(3)(i)(D). For this 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.

First, 8 C.F.R. § 204.5(j)(5) requires that the petitioner provide a job offer clearly describing the beneficiary's proposed job duties. The petitioner must also establish that it has the ability to relieve the beneficiary from having to primarily perform non-qualifying tasks. It is noted that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In the present matter, the petitioner claimed four employees on its Form I-140. However, given the petitioner's operation of two separate businesses, i.e., the convenience store and the consulting business, the petitioner must specify how a staff of only four employees would relieve the beneficiary from having to primarily perform the non-qualifying tasks that are associated with either or both of the petitioner's business operations. 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)). The petitioner did not provide the necessary clarification and instead supplemented the record with a deficient job description that vaguely describes the beneficiary as a policy maker, goal setter, and supervisor of employees and contractors. There is no indication how much of the beneficiary's time would be specifically attributed to the supervision of contractors, a task that in itself is not deemed qualifying within a managerial or executive capacity. The petitioner also indicated that the beneficiary would supervise various bookkeeping activities and that 20% of the beneficiary's time would be spent performing such non-qualifying duties as developing existing and new clientele, conducting market research, seek out new business opportunities, and develop sales strategies. In summary, given the deficient job description, the petitioner's limited support staff, and the non-qualifying duties that have already been assigned to the beneficiary's position, the AAO cannot conclude that the petitioner was ready and able to employ the beneficiary in a primarily managerial or executive capacity at the time of filing the petition.

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. The director expressly addressed the issue of a qualifying relationship in the NOID, which instructed the petitioner to provide documentation showing an affiliate relationship between the petitioner and the entity that employed the beneficiary abroad.

The regulation 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; *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 context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

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

*Affiliate* means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

\* \* \*

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the response to the NOID, although the petitioner described itself as a subsidiary of the foreign entity, the evidence submitted presents conflicting information with regard to the petitioner's foreign ownership. Specifically, the petitioner submitted a copy of a U.S. Income Tax Return for an S Corporation (Form 1120S) for the year 2007. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. *See* Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity. This conflicting information has not been resolved. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of*

*Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As there is no evidence on record reconciling the conflicting information described above, the AAO cannot make any affirmative findings with regard to the petitioner's ownership. Therefore, the AAO cannot conclude that the petitioner has established the existence of a qualifying relationship with the beneficiary's foreign employer.

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 additional findings as 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 sustained that burden.

**ORDER:** The appeal is dismissed.