

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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

34

FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: JUN 24 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 \$585. 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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a foreign entity that seeks to send the beneficiary to be employed at [REDACTED], a Florida corporation, as the U.S. entity's chief executive officer. 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 independent grounds of ineligibility: 1) the petitioner is not a U.S. employer; and 2) the petitioner failed to establish that the provisions specified at 8 C.F.R. § 204.5(j)(3)(i)(D) had been met. The director additionally noted that in the event the U.S. entity decides to file a petition seeking to employ the beneficiary, it would need to submit evidence establishing that 1) the beneficiary was employed abroad in a qualifying managerial or executive capacity for one year during the relevant three-year period; 2) the beneficiary would be employed in the United States in a managerial or executive capacity; and 3) the U.S. entity has the ability to pay the beneficiary's proffered wage at the time of filing and continuing until the beneficiary obtains permanent resident status.

On appeal, counsel disputes the director's conclusions and submits an affidavit from the beneficiary asserting that the petitioner is a U.S. entity and that the beneficiary has been doing business in the United States since 2007 on behalf of the U.S. entity.

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 is a U.S. employer as required by section 203(b)(1)(C) of the Act. As properly noted in the director's decision, Part I of the Form I-140 lists Badd & Bad AB as the petitioning entity. The same entity submitted a support letter dated August 18, 2008, on its own company letterhead, claiming to be the parent entity of [REDACTED] the U.S. entity that seeks to employ the beneficiary.

Accordingly, after reviewing these documents the director denied the petition in a decision dated March 6, 2009, concluding that the petitioning entity is not a U.S. employer and therefore was not eligible to file a Form I-140 petition on the beneficiary's behalf.

On appeal, counsel submits a statement dated April 30, 2009 asserting that the petitioner is a U.S. employer with a U.S. business address in the State of Florida. In the same statement counsel states, "[REDACTED] has employed [the beneficiary] as an Officer and Trustee of its U.S. subsidiary during its course of business in the United States." Counsel seemingly suggests that the petitioner and the U.S. entity are considered to be the same entity based on their claimed parent-subsidary relationship. Counsel fails to consider that the parent and subsidiary are two separate entities. Therefore, any action taken by the petitioner, including the filing of the instant petition, will not be attributed to the U.S. entity even if the petitioner were to submit sufficient evidence establishing that a qualifying relationship exists between the foreign petitioner and the U.S. entity.

Although the petitioner submits an affidavit from the beneficiary in support of the appeal, the affidavit merely reiterates the mistaken belief that the foreign entity is a U.S. employer. However, in light of the express provisions of section 203(b)(1)(C) of the Act, a foreign employer is not qualified to file a petition to employ the beneficiary in the United States. As stated above, the petition must be filed by the U.S. entity that seeks to employ the beneficiary. As the record clearly shows that a foreign entity, rather than the prospective U.S. employer, filed the instant Form I-140, the petition cannot be approved.

The second issue in this proceeding is whether the petitioner meets the regulatory criteria specified at 8 C.F.R. § 204.5(j)(3)(i)(D), which states that the U.S. petitioner must establish that it has been doing business for at least one year prior to filing 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 director concluded that, because the Form I-140 was not filed by the prospective U.S. employer, the petitioner does not meet the regulatory requirement specified at 8 C.F.R. § 204.5(j)(3)(i)(D).

On appeal, counsel asserts that the foreign entity has been doing business in the United States through the beneficiary of the instant petition and that the requirements specified at 8 C.F.R. § 204.5(j)(3)(i)(D) have been satisfied. 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 Obaigbena*, 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). Despite the claims of both counsel and the beneficiary

that the beneficiary has been in the United States as the officer and trustee of the U.S. subsidiary since July 1, 2007, the regulations are clear in requiring the U.S. petitioner to establish that it has been doing business for the requisite time period. The fact that the petitioner in the present matter is not the U.S. employer makes it factually impossible for the petitioner to meet the provisions of 8 C.F.R. § 204.5(j)(3)(i)(D), regardless of whether or not the U.S. entity had been doing business for the requisite time period. That being said, the record shows that the service center received the petitioner's completed Form I-140 on August 27, 2008. Therefore, pursuant to the regulatory requirement specified in 8 C.F.R. § 204.5(j)(3)(i)(D), the record must contain evidence establishing that the petitioning U.S. employer had been engaged in "regular, systematic, and continuous" business activity since August 27, 2007. See 8 C.F.R. § 204.5(j)(2). In the present matter, the petitioner has submitted the U.S. entity's articles of incorporation, which were electronically filed on June 12, 2008, as well as a letter from the Internal Revenue Service showing that the petitioner was assigned an employer identification number on August 11, 2008. In light of this information, the U.S. entity would have been precluded from engaging in any type of lawful business transactions prior to August 11, 2008. Therefore, even if the U.S. entity had filed the Form I-140 on behalf of the beneficiary, it too would not have been able to meet the provisions of 8 C.F.R. § 204.5(j)(3)(i)(D).

Additionally, while the director cited only the two above grounds as the bases for the denial, the AAO finds that the petitioner failed to provide other initial evidence specified at 8 C.F.R. § 204.5(j)(3)(i) as well as other evidence specified at 8 C.F.R. § 204.5(j)(5) and 8 C.F.R. § 204.5(g)(2). Specifically, the petitioner failed to meet the following regulatory requirements: 1) the petitioner failed to establish that the beneficiary was employed abroad for at least one year within the three years prior to the filing of the petition in a managerial or executive capacity; 2) the petitioner failed to establish that it has a qualifying relationship with the prospective U.S. employer; 3) the petitioner failed to establish that the beneficiary's prospective U.S. employment would be within a qualifying managerial or executive capacity; and 4) the petitioner failed to establish that the prospective U.S. employer has the ability to pay the beneficiary's proffered wage at the time of filing and continuing through the date the beneficiary adjusts his status to that of a permanent U.S. resident.

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, even though the director did not include the four findings enumerated in the above paragraph as grounds for denial, the AAO finds that 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 sustained that burden.

ORDER: The appeal is dismissed.