

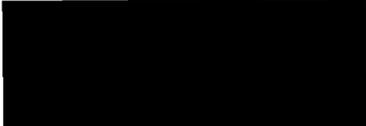
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave. N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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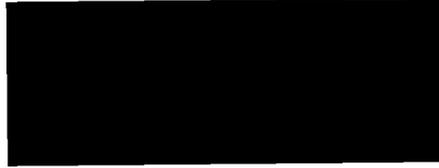
B4

DATE: **MAY 17 2011** OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:   
Beneficiary:

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:**

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 organization 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 the determination 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). On appeal, counsel asserts that the service center erroneously deemed the petitioner as a new office without taking into account the fact that the petitioner has an ownership interest in an entity that has been operating since 2005.

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 the Form I-140 was filed.

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 receipt date stamped on the Form I-140 indicates that it was filed on January 29, 2009. Therefore, according 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 January 29, 2008. *See* 8 C.F.R. § 204.5(j)(2). However, as noted in the director's denial, the petitioner was established on September 4, 2008, thus indicating that the U.S. entity was not in operation for one year prior to the date of filing.

Accordingly, on May 24, 2009, the director issued a request for evidence (RFE) instructing the petitioner to submit evidence establishing that it had been doing business for the requisite one-year period prior to filing its I-140.

The petitioner's response included a letter dated April 30, 2009 from counsel, who discussed the petitioner's acquisition of an ownership interest in an entity that has been operating in the United States since 2005. Counsel referred to regulations that pertain to the filing of nonimmigrant petitions seeking temporary employment of intracompany transferees. The petitioner did not provide evidence to establish that it had been engaged in "the regular, systematic, and continuous provision of goods and/or services" for at least one year prior to the filing of the Form I-140. *See* 8 C.F.R. § 204.5(j)(2).

On August 4, 2009, the director denied the petition concluding that the petitioner failed to meet the initial filing requirement discussed at 8 C.F.R. § 204.5(j)(3)(i)(D) because it had not been doing business for one year prior to filing the I-140 petition.

On appeal, counsel submits a brief in which he refers to various subsections of 8 C.F.R. § 214.2(l), which pertains to the filing of a nonimmigrant petition seeking to classify the beneficiary as an L-1 intracompany transferee. Counsel makes specific reference to the regulation pertaining to a "new office," which 8 C.F.R. § 214.2(l)(1)(ii)(F) defines as an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. Counsel asserts that the director erred "in applying the 'new office' regulations apply [sic] to all cases where the petitioning corporation has been doing business for less than a year."

Counsel's argument, however, is unpersuasive, as the regulations pertaining to nonimmigrant petitions do not apply in the present matter where the petitioner filed an immigrant petition. Although the AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity as well as the term "doing business," the filing requirements for the two classifications are significantly different. One significant distinction is the new office provision that is incorporated into the regulations pertaining to Form I-129 nonimmigrant visa petitions. The regulation at 8 C.F.R. § 204.5(j) has no similar provision that applies to the immigrant visa classification being sought by the instant petitioner. As such, the petitioner in the present matter is not subject to the limitations nor afforded treatment under the new office regulations. Rather, as the petitioner of an employment-based immigrant classification under section 203(b)(1)(C) of the Act, the petitioner is subject to the filing requirements enumerated at 8 C.F.R. § 204.5(j)(3)(i). There is no regulation that exempts the petitioner from having to meet the provisions of 8 C.F.R. § 204.5(j)(3)(i)(D), which requires the petitioner to provide evidence to establish that it has been doing business for at least one year prior to filing the Form I-140.

In the present matter, the fact that the petitioner was formed as a corporate entity only four and a half months prior to the filing of the instant petition makes it factually impossible for the petitioner to have been doing business prior to the date of its own creation.

Counsel also points out that the petitioner purchased a 50% ownership interest in an entity that has been doing business since 2005, seemingly implying that the petitioner became the successor-in-interest to a previously existing entity. Counsel's argument, however, is inherently flawed and therefore does not overcome the basis for denial. The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) clearly requires the petitioner to establish that *it*, not a 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 petitioning entity purchased an existing business that predated the petitioner itself. However, the record is devoid of evidence establishing that the petitioner replaced or absorbed the rights and obligations of its predecessor. The fact that the petitioner was not officially established as of January 29, 2008 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. Thus, even if the petitioner has the ability to establish that it was engaged in the "the regular, systematic, and continuous" course of business since the date of its incorporation, it could not have been doing business since January 29, 2008, or one year prior to the date the petitioner filed the Form I-140. *See* 8 C.F.R. § 204.5(j)(3)(i)(D).

Additionally, the AAO will address two issues that were not previously discussed in the director's decision. First, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) requires that the petitioner establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. The regulation at 8 C.F.R. § 204.5(j)(5) requires the petitioner to provide a detailed description of the beneficiary's proposed job duties establishing that the beneficiary's proposed employment would also be within a qualifying managerial or executive capacity. In the present matter, the record lacks sufficient evidence to establish that the beneficiary meets these requirements.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. Published case law has held that the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the present matter, the job descriptions that address the beneficiary's foreign and proposed employment are overly vague and fail to disclose the specific job duties the beneficiary performed abroad and those he would perform in his proposed position with the U.S. entity. As such the AAO is unable to conclude that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity.

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 issues 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.