

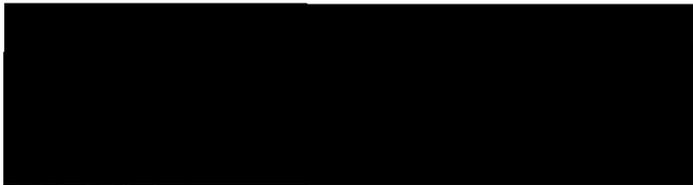
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



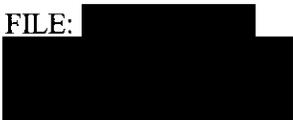
U.S. Citizenship
and Immigration
Services



B4

DATE: JUN 13 2012

OFFICE: NEBRASKA 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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

The petitioner is a limited liability company (LLC), organized in the state of Michigan, which claims to be in the business of acquiring, developing, and operating various businesses. The petitioner claims to be the wholly-owned subsidiary of [REDACTED], located in Iraq. The petitioner seeks to employ the beneficiary on a permanent basis as the Chief Executive Officer at a salary of \$130,000 per year. Accordingly, the petitioner filed the current petition seeking to classify the beneficiary 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).

After requesting additional information, the director denied the petition. The director noted that the beneficiary is the sole member and owner of the LLC with unlimited and unconditional authority. The director concluded that the beneficiary is not subject to the petitioning organization's control. Citing to sections 101(a)(44) and 203(b)(1)(C) of the Act, 8 U.S.C. §§ 1101 and 1153, the director concluded that the beneficiary is not an employee of the petitioning organization.¹

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party or the attorney or representative of record must submit the complete appeal within 30 days of service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.8(b). The date of filing is not the date of submission, but the date of actual receipt with the required fee. *See* 8 C.F.R. § 103.2(a)(7)(i).

The record indicates that the service center director issued the decision on August 18, 2010. The service center director properly gave notice to the petitioner that it had 33 days to file the appeal. Neither the Act nor the pertinent regulations grant the AAO authority to extend this time limit.

Although counsel signed and dated the Form I-290B as of September 17, 2010, the service center did not receive the appeal until September 21, 2010, or 34 days after the director issued the decision. Accordingly, the appeal was untimely filed.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the

¹ The AAO notes that the words "employee" and "employ" are complex and nuanced legal terms. While the words "employee" and "employ" are an important component of the statutory language, an immigration officer should not fixate on these words to the exclusion of other more relevant issues, such as the qualifying relationship or the "doing business" requirement. *See* 8 C.F.R. §§ 204.5(j)(2) and (j)(3)(i)(D). Although the director alluded to the issues in the denial, the director did not specifically discuss the conflicting ownership claims or the lack of a fully developed business organization. These issues will be fully discussed in this decision.

last decision in the proceeding, in this case the director of the Nebraska Service Center. *See* 8 C.F.R. § 103.5(a)(1)(ii). The director determined that the late appeal did not meet the requirements of a motion and forwarded the matter to the AAO.

Although the appeal will be rejected, the AAO notes additional grounds for the petition's denial, beyond the decision of the director.

First, the petitioner failed to meet the criteria specified at 8 C.F.R. § 204.5(j)(3)(i)(D) which requires the petitioner to establish that it has been doing business in a "regular, systematic, and continuous" manner for at least one year prior to filing the petition. *See also* 8 C.F.R. § 204.5(j)(2) (defining "doing business"). Since the petition in the present matter was filed on March 25, 2010, the petitioner must establish that it had been doing business in a regular, systematic, and continuous manner since at least March 25, 2009.

In support of the petition, the beneficiary submitted a letter dated February 28, 2010, with a list of ten newly-established business ventures, along with bank statements and various organizational documents. Nine of the ten companies are housed in the same office at [REDACTED]. These businesses include the petitioner, an investment firm, a solar energy company, a real estate company, a construction company, a gas station operation, a trading firm, and a café-style restaurant and catering company. Although the petitioner submitted bank account balances and projected budgets for the companies, the petitioner failed to demonstrate that the petitioner or any of the affiliated business ventures are actually doing business. Instead, in the cover letter submitted with the initial petition, the petitioner admitted that "since the company is in the startup phase, it did not have any revenues" and that the "businesses are newly acquired and have not started producing the expected revenues."

And while the petitioner claims that it employs 48 U.S. workers through its operations, the petitioner submitted no evidence in support of this claim, other than unsupported lists and organizational charts. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 204.5(j)(2). The act of organizing or legally establishing a business entity, while significant, does not rise to the level of "doing business" as contemplated in the regulations. By itself, such action would equal "the mere presence of an agent or office." Until the business is operational and conducting business in a regular, systematic, and continuous manner for an entire year, the petitioner is ineligible by law to file the present petition. 8 C.F.R. § 204.5(j)(3)(i)(D). For this additional reason, the petition may not be approved.

Second, the petitioner has not established that it has a qualifying relationship with the claimed overseas parent company in Iraq. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally*

section 203(b)(1)(C) of the Act; *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The petitioner initially claimed that it was a "branch" of the Iraqi "parent" company. The petitioner submitted the LLC's operating agreement, which identifies the Iraqi company as the sole member of the LLC. However, the Michigan 2010 Annual Statement of the petitioner indicates that the beneficiary is the member of the LLC. Additionally, the petitioner's 2008 IRS Form 1120, U.S. Corporation Income Tax Return, indicates at Schedule K that no foreign person – such as the purported Iraqi parent company – owned at least 25% of the total value of the LLC's stock or membership interest. Finally, the AAO notes that the beneficiary submitted a letter dated February 28, 2010, stating that he personally established and owns the petitioning organization. The conflicting statements and evidence leave considerable doubt regarding the true ownership of the petitioning LLC.

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 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 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.

As general evidence of a petitioner's claimed qualifying relationship, a certificate of formation or organization of an LLC alone is not sufficient to establish ownership or control of an LLC. LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member.

These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 362. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The petitioner's conflicting statements and the inconsistent evidence prevent the AAO from determining the true ownership of the petitioning LLC. 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). For this additional reason, the petition may not be approved.

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).

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.

As the appeal was untimely filed, the appeal must be rejected.

ORDER: The appeal is rejected.