

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY



U.S. Citizenship
and Immigration
Services



B4

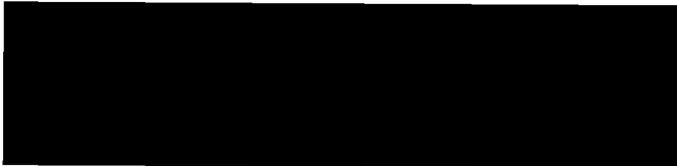
DATE: OFFICE: NEBRASKA SERVICE CENTER
MAR 07 2012

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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded for further consideration.

The petitioner, claiming to be a limited liability company, seeks to employ the beneficiary as its 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.

After issuing a request for evidence and reviewing the record, the director denied the petition. The director concluded that, based on the beneficiary's ownership interest in the foreign entity where he was previously employed as well as his ownership interest in the U.S. petitioner, the beneficiary was not an employee of the foreign entity and would not be an employee of the petitioning entity.

In response to the director's adverse decision, the petitioner submitted a Form I-290B in which counsel checked off two boxes at part two of the form. While counsel checked off box A to indicate his intent to file an appeal, he also checked off box F to indicate that he was filing a combined motion to reopen and reconsider. Counsel also submitted a supporting brief which is clearly titled "Motion to Reopen/Reconsider."

The record indicates that the petitioner filed the Form I-290B as a motion to reopen and reconsider. The regulation at 8 C.F.R. § 103.5(a)(ii) states that the official having jurisdiction over a motion is the official who made the latest decision in the proceeding. As the director is the official who made the last decision and therefore has jurisdiction over the petitioner's motion, the AAO will remand the matter back to the service center for the director's consideration.¹

Additionally, the AAO notes the following for consideration on remand:

First, the petitioner is required to provide sufficient information about the beneficiary's foreign and proposed employment such that U.S. Citizenship and Immigration Services is able to conclude that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer as required at 8 C.F.R. § 204.5(j)(3)(i)(B), and that the beneficiary would also be employed by the petitioning organization in a managerial or executive capacity in his proposed position with the U.S. entity, as required by 8 C.F.R. § 204.5(j)(5).

Second, the AAO also notes an inconsistency in statements pertaining to the petitioner's organizational hierarchy. Although the petitioner stated in the RFE response that it does not have any employees, other statements indicate that the beneficiary "supervises all employees" and in Part 5, Item 2 of the Form I-140 the petitioner claimed "2-4" employees. As no objective documentation was provided, it is unclear which of these statements represents the petitioner's true organizational hierarchy at the time of filing, nor can the AAO readily determine that the petitioner was adequately staffed at the time of filing to relieve the beneficiary from

¹ While an appeal may be treated as a motion by the director, there is no provision in the regulations that would allow the director to treat a properly filed motion as an appeal. See 8 C.F.R. § 103.3(a)(2)(iii). If counsel intended to file a motion with an appeal in the alternative, such action would be impermissible under the regulations.

having to primarily perform non-qualifying tasks. While the AAO acknowledges that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to his/her proposed position. 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).

Third, the record shows that the petitioner failed to submit sufficient evidence of a qualifying relationship with the beneficiary's foreign employer and thus did not establish that it has satisfied the provision described at 8 C.F.R. § 204.5(j)(3)(i)(C). Although the petitioner claims that the beneficiary's foreign employer and the U.S. petitioner are affiliates based on the beneficiary's 50% ownership of the foreign entity and 100% ownership of the petitioning entity, the record lacks evidence to support this claim. 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)).

Finally, the AAO finds that the record lacks evidence to establish that the petitioner met the requirements discussed at 8 C.F.R. § 204.5(j)(3)(i)(D), which states that the 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." Although the petitioner's initial June 18, 2008 support letter indicated that the petitioner sells and offers upgrades to mobile homes, the record lacks any evidence to establish that the petitioner actually provided such services in the manner and during the time prescribed by regulation.

In summary, while the AAO has resolved to remand this matter to the director to address the petitioner's motion to reopen and reconsider, the record strongly suggests that the petitioner may be ineligible for the immigration benefit sought based on the analysis provided above. Therefore, the director is instructed to address these issues prior to issuing a new decision.

ORDER: The matter is remanded for further action and consideration consistent with the above discussion.