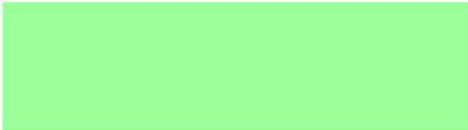


(b)(6)

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



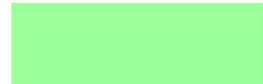
U.S. Citizenship
and Immigration
Services



DATE: DEC 31 2013

OFFICE: TEXAS SERVICE CENTER

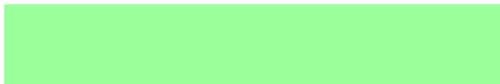
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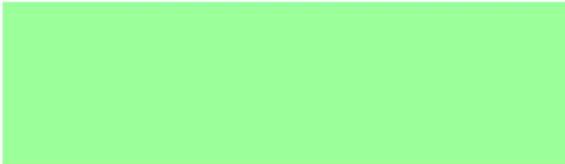
Petitioner:

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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The matter will be remanded for further consideration and entry of a new decision.

The petitioner was organized on September 23, 2008 in the State of New York. It operates as an automotive spare parts distributor and seeks to employ the beneficiary as its general director. 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.

On September 16, 2013, the director denied the petition concluding that the petitioner is a mere agent of its foreign affiliate and therefore not doing business as defined in the regulations. In reaching this conclusion the director relied heavily on the petitioner's ownership and its affiliate relationship with the beneficiary's former employer abroad. The director's consideration of these factors led him to conclude "that the petitioner is merely an agent of the foreign business because of common ownership and full power over executive personnel assignment and marketing and operational policies."

On appeal, counsel for the petitioner asserts that the director's decision is "premised upon a complete misreading of the regulations" defining the term "doing business." Counsel emphasizes that the director did not dispute that the petitioner is engaged in the regular, systematic and continuous provision of goods and/or services in the United States. Counsel submits a detailed brief and additional evidence in support of the appeal.

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 sole issue addressed by the director is whether the petitioner established that it is doing business in the United States.

The regulation at 8 C.F.R. § 204.5(j)(2) defines doing business as 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 reflects that the petitioner is a multimillion-dollar export company which has entered into contracts with U.S. suppliers for the export of automobile parts to the Russian market. In denying the petition, the director did not address or question the petitioner's level of business activity. Instead, the director found that the petitioner, by exporting goods to Russia for distribution, was acting as a "mere agent" of the foreign affiliate. Specifically, the director found that "[a] company that is the mere agent of another company is not considered to be 'doing business' within the meaning of 8 C.F.R. § 204.5(j)(2)."

On appeal, counsel asserts that the director incorrectly interpreted the regulatory definition to mean that "any US business that meets the definition of 'agent' is excluded from showing that it is 'doing business' in the US." Counsel contends that the director's decision expands the language of the definition of "doing business" to exclude any company in the United States which serves as an agent of its foreign parent or affiliate without considering the petitioner's actual business activities, in plain contradiction to the plain language of the regulation.

Upon review, counsel's assertions are persuasive. The director's decision was based on an improper standard and will be withdrawn.

When the regulation states that "doing business" does not include the "mere presence of an agent or office," the emphasis of the director's review should be on the phrase "mere presence" and not on the fact that a petitioner is acting as a representative or agent. 8 C.F.R. § 204.5(j)(2). The form of business will not disqualify an entity as long as that entity is providing services in a regular, systematic, and continuous manner in accordance with the regulations, even in cases in which those services are provided for a foreign employer. An example of a company with a "mere presence" in the United States would be a shell company that is not engaged in any business transactions. According to the regulatory definition, a determination of whether or not an entity is doing business must focus on that entity's provision of goods and/or services, i.e., its business transactions.

In the present matter, the decision does not indicate that the director considered relevant documents that reflect whether the petitioner engaged in the regular, systematic, and continuous provision of goods or services during the one-year period prior to the filing of the Form I-140 and continuing beyond that date. As the director failed to

consider the relevant evidence and instead based his decision on factors that cannot be deemed as indicators of whether or not an entity is doing business, the director's decision must be withdrawn.

Notwithstanding the director's error in applying the regulatory definition of "doing business" to the facts of this case, the record lacks evidence pertaining to the beneficiary's proposed employment with the petitioning entity. Specifically, the evidence of record does not establish that the beneficiary's prospective employment meets the statutory criteria of managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act.

In order to establish that the beneficiary would be employed in a qualifying managerial or executive capacity, the petitioner must provide a detailed description of the beneficiary's proposed job duties. 8 C.F.R. § 204.5(j)(5). Although the petitioner in the present matter provided a description of the proposed employment along with an organizational chart depicting the beneficiary's position at the top of the petitioner's organizational hierarchy, the job description lacks specific details regarding the beneficiary's actual daily tasks, which are essential to determining the true nature of the proposed 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). The general lack of specificity in the proposed job description coupled with the petitioner's references to a financial and legal team, neither of which appears to be part of the petitioner's organizational hierarchy, precludes a comprehensive analysis of the beneficiary's role and specific tasks within the petitioning entity.

Although the petitioner provided a supplemental job description in its response to the director's request for evidence, the information is presented in a confusing manner, as the petitioner provided a percentage breakdown which accounts for 105%, rather than 100%, of the beneficiary's time. Further, in order to establish that the beneficiary would spend his time primarily carrying out tasks within a qualifying managerial or executive capacity, the petitioner must provide a detailed account of the actual tasks that would comprise the beneficiary's proposed employment along with evidence showing who within the petitioning entity would carry out the daily operational tasks so as to effectively relieve the beneficiary from having to do so.

Here, seven of the beneficiary's eight subordinates are engaged in general warehouse duties under the supervision of a "warehouse manager" who also performs "general warehouse duties" and "operates a forklift." The only other employee is an "operations manager" who "oversees and cross-checks all company operations," performs "various administrative duties" and jointly oversees the warehouse staff. While it appears that the beneficiary's subordinates would relieve him from performing warehouse functions, the evidence does not establish that they would relieve him from performing non-qualifying duties associated with his financial, supplier relationship/purchasing, and business development responsibilities.

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

In the present matter, additional evidence is required to establish the petitioner's eligibility for the immigration benefit sought. As such, the petition will be remanded to the director for further action and entry of a new decision. The director is instructed to request any additional evidence needed in order to make a final determination as to the petitioner's eligibility.

ORDER: The director's decision dated September 16, 2013 is withdrawn. The record is remanded to the director for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which, if adverse, shall be certified to the AAO for review.