



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

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF P-, INC.

DATE: MAR. 28, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of computer system design services, seeks to permanently employ the Beneficiary as its chief operating officer under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director, Nebraska Service Center, denied the petition. The Director concluded that the evidence of record did not establish that the Petitioner has been doing business for at least one year.

The matter is now before us on appeal. In its appeal, the Petitioner contends that the Director erred by requiring the Petitioner to submit sales invoices, and thus disregarded other evidence of the Petitioner's business activities.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

A U.S. employer may file Form I-140 to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager.

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

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or subsidiary thereof and the alien 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 regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) requires the Petitioner to submit evidence that the prospective U.S. employer has been doing business for at least one year.

II. DOING BUSINESS

The Director denied the petition based on a finding that the Petitioner did not establish that it has been “doing business” for at least one year prior to the filing date. *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. 8 C.F.R. § 204.5(j)(2).

A. Facts

The Petitioner filed Form I-140 on October 6, 2014. In an accompanying letter dated September 30, 2014, the Petitioner stated that it “has been doing business for more than one year because [it] was established on [REDACTED] and has been actively doing business since [REDACTED].”

The Petitioner submitted copies of its licenses, bank statements, and other documents which establish that it was incorporated in [REDACTED] and set up operations in [REDACTED], but these documents did not show when the Petitioner began actively doing business. The Petitioner’s documentation of its business activities dated from after October 2013.

The Director issued a request for evidence (RFE) on March 27, 2015, stating that the Petitioner had not submitted evidence that it was doing business for at least one year before filing the petition. The Director specifically requested copies of “sales invoices [dated] prior to October 6, 2013.”

In response, the Petitioner quoted the RFE and stated: “it should be October 6, 2014 rather than October 6, 2013, because the petitioner filed Form I-140 on October 2014, and not October 2013.” The Petitioner did not explain why this would be so. In order to show at least one year of qualifying business activity in accordance with 8 C.F.R. § 204.5(j)(3)(i)(D), the earliest documentation would need to be from 2013 rather than 2014.

The Petitioner’s response also included copies of previously submitted documents, and new materials such as “sample invoices” from October and December 2014 and “work statements” describing activities performed by employees. The work statements indicated that three employees performed the following activities more than a year before the filing date:

Software Engineer [REDACTED] September-October 2013:

- Learn the principles and commands of the Git version control system.
- Set up a development environment based on pkgin and CMake.

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- Discuss and design the basic module primitives for traffic.gen, a high-speed network traffic generator.
- Set up a source code repository for the traffic.gen project.
- Automate the building process of the project.
- Build project default usage routine and source tree for traffic.gen.
- Create example routines in traffic generation.
- Learn C++ coding conventions and styles.
- Analyze regular expression rule sets.
- Revise module settings to accommodate the Perl Compatible Regular Expression (PCRE) syntax.
- Create a skeleton mapper for rule parsing.

Research Scientist [REDACTED] October 2013:

- Gateway Operating System: Built a customized operating system based on FreeBSD
- Pattern Matcher: Implemented regular expression matching against network patches

Chief Executive Officer [REDACTED] October 2013:

- Packet Processing Platform: Surveyed [state]-of-the-art technologies in user-level packet processing
- Traffic Generator: Designed the overall architecture

The Director denied the petition on July 15, 2015, concluding that the Petitioner had documented its existence prior to October 6, 2013, but not that it was doing business at that time. The Director noted that the Petitioner's earliest contract was executed in March 2014 and emphasized that the Petitioner's bank statements and rent payments are insufficient to establish that the Petitioner was engaged in the regular, systematic and continuous provision of goods and/or services.

On appeal, the Petitioner contends that the Director erred by accepting only sales invoices as evidence of doing business, and thus disregarded other evidence of the Petitioner's business activities. The Petitioner submits copies of previously submitted exhibits, and cites an unpublished 2009 appellate decision in which we reversed the Director's finding that another petitioner had not been doing business for the required year prior to filing.

B. Analysis

Upon review of the evidence in the record, including evidence submitted on appeal, we find that the Petitioner has not established that it was "doing business" for at least one year prior to the time of filing. *See* 8 C.F.R. § 204.5(j)(2).

With the initial petition, the Petitioner submitted copies of its monthly bank statements for the period September 2013 to September 2014. The Director advised the Petitioner that bank statements alone

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cannot show qualifying business activity. Nevertheless, they have some value as secondary evidence, to the extent that they can corroborate other information and evidence. The September 2013 statement shows only two credits (other than a 92-cent payroll credit): a \$200 deposit from an unnamed source, and a \$48,000 wire transfer from the parent company. Both of these transactions occurred on the same date, September 5, 2013. There is no evidence that either of these transactions arose from the Petitioner's provision of goods or service. The Petitioner described the \$48,000 transfer as the parent company's "initial investment" in the Petitioner. An infusion of start-up capital is not payment for goods or services provided by the new company, and is not evidence of doing business. Rather, those funds allow the new company to meet its basic expenses during the preliminary period in which it has no commercial income, because it is not yet doing business. Moreover, the Petitioner's licensing agreements with the parent company are dated March 20, 2014, and therefore any credits or deposits before that date are not related to those agreements. The record also shows that the lease on the Petitioner's office space took effect on September 15, 2013, and therefore the Petitioner did not yet have any site from which to provide goods or services on September 5, 2013.

The October 2013 bank statement shows no deposits, and the only credits were in the form of two transactions, marked [REDACTED] totaling 21 cents. Absent any evidence of deposits of proceeds, the bank statements do not show that the Petitioner engaged in the provision of any goods or services during October 2013.

All the first-hand, contemporaneous documentation of the Petitioner's activity dates from well after October 2013. For example, as noted, the Petitioner signed a licensing agreement with the parent company in March 2014, signed a non-disclosure agreement in May 2014, and filed a patent application in July 2014. The only exhibits that purport to show work performed in September and October 2013 are the "work statements" described above. These statements are not contemporaneous documentation that the Petitioner engaged in the regular, systematic, and continuous provision of goods or services in September and October of 2013. Rather, they are unsigned, unattested lists of activities, prepared months after the fact. 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'l Comm'r 1972)). Even then, the listed activities do not describe the regular, systematic, and continuous provision of goods or services. Instead, they describe preparations for future work.

On appeal, the Petitioner makes two conflicting claims in its brief, both on page 2, indicating "[t]he petitioner has developed software since August 2013," and then that the Petitioner "has developed software products since September 16, 2013." The Petitioner submits no new evidence to support either of these claims, but instead asserts that the Petitioner's prior submissions establish that the Director erred in denying the petition. In support of this assertion, the Petitioner cites the following Federal Register passage from 1987:

The proposed definition of “doing business” requires the regular, systematic, and continuous provision of goods and/or services by a qualifying organization. One commenter was concerned that the definition of doing business would mean that representatives and liaison offices established in the U.S. to promote the business of foreign corporations through research and providing consultation to U.S. customers and trading companies would no longer qualify for L visas if adhered to literally. The commenter requested that liaison or representative offices be either exempted from the definition or stated to be doing business.

The Service recognizes that company representatives and liaison offices provide services in the United States, even if the services are to a company outside the United States. Such services are included in the doing business definition and aliens who perform such services may qualify for L classification, if they are otherwise qualified under section 101(a)(15)(L).

52 Fed. Reg. 5738, 5741 (Feb. 26, 1987).

Because the quoted passage included the word “research,” the Petitioner concludes: “It appears well established that one may count engaging in research as doing business.” The Petitioner also contends that “[d]eveloping Software can be counted as engaging in research as doing business,” but cites no source to support this assertion. The Petitioner’s reliance on this passage from the preamble to the former Immigration and Naturalization Service’s (INS) 1987 final rule promulgating the current “doing business” definition in the L-1 context is misplaced. The cited passage does not define “research” as a qualifying business activity; rather, it states “[t]he Service recognizes that company representatives and liaison offices provide services in the United States, even if the services are to a company outside the United States,” and that the provision of such services is included in the “doing business” definition outlined at 8 C.F.R. § 204.5(j)(2). The Petitioner has not provided evidence that its claimed software development activities, or associated research activities, were being provided as a service to any company in or outside the United States during the required timeframe, nor has it established that it was otherwise engaged in the regular provision of goods and/or services, as required.

Also on appeal, the Petitioner cites one of our unpublished 2009 decisions, in which we reversed the Director’s finding that that another petitioner had not been doing business for the required year. The Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. The record of proceeding related to the 2009 decision is not before us. However, based on the decision itself, the two cases do not appear to have closely similar fact patterns. In the 2009 case, our decision to withdraw the Director’s decision rested on evidence that “the petitioner has expended millions of dollars in sales and marketing in order to launch its target brand in U.S. markets,” while importing products through a third party while its own import license was pending. We concluded that “the promotion of a product through sales and marketing on such a large scale negates the director’s finding that the petitioner is merely an agent or a shell company.” In that case, we found that the Petitioner established a record of providing goods and

services during the required timeframe. We can make no such finding in this case. Furthermore, while the regulation at 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

For the reasons discussed above, we find that the Petitioner has not established that it was doing business, i.e., engaged in the regular, systematic, and continuous provision of goods or services, for at least one year prior to filing the petition on October 6, 2014. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). For this reason, the appeal will be dismissed.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reason. In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of P-, Inc.*, ID# 15938 (AAO Mar. 28, 2016)