

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



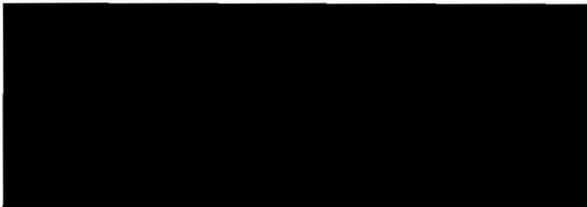
D-2

FILE: WAC 06 249 50143 Office: CALIFORNIA SERVICE CENTER Date: SEP 30 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

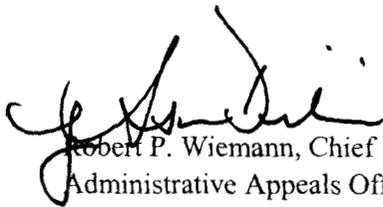
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO). The appeal will be rejected as untimely filed. The petition will be remanded for consideration as a motion.

The petitioner is a management, consulting, and investing company. It seeks to employ the beneficiary as its president.¹ Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file 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. § 103.5a(b). In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a Citizenship and Immigration Services (CIS) office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee. For calculating the date of filing, the appeal shall be regarded as properly filed on the date that it is so stamped by the service center or district office.

On July 16, 2007, the director denied the petition, determining that the petitioner did not have the ability to hire or fire or otherwise control the work of the beneficiary in a qualifying employer-employee relationship. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. According to the date stamp on the Form I-290B, Notice of Appeal, it was initially received by CIS on September 14, 2007, or 60 days after the decision was issued. Accordingly, the appeal was untimely filed. The AAO observes that although the appeal was untimely, on September 18, 2007, the director requested that counsel resubmit the Form I-290B with the original signature of the petitioner. On October 2, 2007 CIS received the Form I-290B properly completed.

Regulations at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) state that CIS must treat certain untimely appeals as motions pursuant to the following guidelines:

If an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. § 103.5(a)(2) of this part or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3) of this part, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

¹ The petitioner, in response to the director's request for further evidence, submitted a new petition and a new Form ETA 9035E, Labor Condition Application, requesting that the job title and description be amended to that of a financial and operations manager.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Upon review, the AAO finds that the director improperly directed the petitioner to resubmit information in support of an untimely filed appeal; however, the AAO also finds that the petitioner initially submitted argument in support of the appeal. Accordingly, the petitioner's untimely-filed appeal meets the requirements for a motion to reconsider.

The AAO observes that upon review of the record, the evidence shows that the director erred when determining that the petitioner would not act as the beneficiary's employer. The director determined that as the beneficiary was the sole employee of the petitioning limited liability company, the beneficiary would be self-petitioning. The AAO disagrees with the director's characterization of the petition as a self-petition. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). A limited liability company that has been incorporated, even if it is owned and operated by a single person, may hire that person, and the parties will be in an employer-employee relationship. In this matter the beneficiary is not self-employed, but rather is employed by a limited liability company, a separate legal entity from the beneficiary. In such an instance, the AAO would find that the petitioner would be the employer of the beneficiary. The AAO notes, however, that the petition would not be approved as the record does not establish that the beneficiary would be employed in a specialty occupation.

The petitioner initially identified the proffered position as president and stated that the beneficiary would be "responsible for identifying viable real estate and business projects, and negotiating all potential assets acquisitions," would "oversee the operational and financial evaluation of each project, and obtain any necessary financing and/or enroll investing partners," would "manage projects during developmental stages as well as provide property management and office management services for all acquired properties and business," and would be responsible for "supervising financial data entry and providing financial reports to partners." The petitioner submitted a Form ETA 9035E, Labor Condition Application (LCA) certified on August 4, 2006 identifying the work location as McAllen, Texas and the position as "president."

In an October 19, 2006 response to the director's RFE, counsel for the petitioner indicated that the more accurate title for the proffered position is financial and operations manager. Counsel submitted a copy of a petition on behalf of the beneficiary identifying the proffered position as a financial and operations manager and an LCA certified on October 16, 2006 identifying the work location as McAllen, Texas and the position as financial and operations manager. In an October 18, 2006 letter attached to the response, the petitioner provided a similar description of the duties of the position as initially provided and then added a paragraph of significantly different duties than initially provided.

However, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Service requirements. *Matter of Izummi*, 22 I&N Dec. at 176). The purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner may not offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. *See e.g. Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new or amended petition rather than seek approval of a petition that is not supported by the facts in the record. The petitioner's offer of a new position to the beneficiary with the addition of a completely different set of duties than initially offered without filing an amended petition is improper. Accordingly on motion, the director must analyze the duties of the proffered position of president.

The AAO observes that a petitioner must comply with 8 C.F.R. § 214.2(h)(2)(i)(E) when filing an amended petition. This regulation provides:

Amended or new petition. The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

In this matter, the petitioner did not file an amended petition with fee, but rather submitted a second petition as an exhibit to its response to the director's RFE. Submitting a second petition appended to a response to an RFE is insufficient to properly amend and file an initial petition requesting a beneficiary's employment. The AAO further observes that an LCA certified after the filing date of a petition would not be considered a valid LCA. A petitioner must submit an LCA in the occupational specialty certified prior to the date the petition is filed. Thus, the petitioner in this matter has also failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B) as an H-1B petitioner must document the filing of a labor certification application with the Department of Labor when submitting the Form I-129.

The appeal will be rejected as untimely filed the matter will be remanded for consideration as a motion to reconsider. The director shall review all the evidence of record, including the evidence and argument submitted on appeal.

ORDER: The appeal is rejected. The case is remanded to the director for further consideration of the appeal as a motion and the entry of a new decision.