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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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

B4

[Redacted]

FILE:

[Redacted]

Office: TEXAS SERVICE CENTER

Date:

AUG 26 2010

IN RE:

Petitioner:

Beneficiary:

[Redacted]

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:

[Redacted]

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 \$585. 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 initially approved by the Director, Texas Service Center. Upon further review of the record, the director determined that the petitioner was not eligible for the benefit sought. The Administrative Appeals Office ("AAO") rejected an appeal as improperly filed. The petitioner has now filed a motion. The AAO will dismiss the petitioner's motion to reopen and reconsider due to its untimely filing.

This matter has a complex procedural history that is rife with errors on part of both the petitioner and the director. Accordingly, the AAO will start with a review of the case history. The preference visa petition was initially approved on May 9, 2005. However, upon further review, the Director, Texas Service Center, determined that the approval may not have been warranted. Accordingly, the director issued a notice of intent to revoke. The approval was subsequently revoked by the director in a decision dated July 19, 2006.¹

The petitioner subsequently attempted to appeal the matter to the AAO. However, instead of filing the appeal on the correct Department of Homeland Security Form I-290B with the then correct fee of \$385, the petitioner submitted a Department of Justice Form EOIR-29 with a fee of \$110. Despite the director's error in notifying the petitioner to submit this form, the AAO noted that it had no discretion to consider an improperly filed appeal. The AAO rejected the appeal on May 1, 2007.

The petitioner then filed a motion, which the director denied without forwarding to the AAO. It is noted, however, that jurisdiction over a motion belongs to the official who made the last decision in the proceeding, in this case the AAO. *See* 8 C.F.R. § 103.5(a)(1)(ii). As the AAO issued the last decision, the AAO maintains jurisdiction over the petitioner's motion. Therefore, despite the fact that the director was correct in determining that the motion could not be granted due to its untimely filing, the AAO must withdraw the director's decision in order to enter its own finding.

Pursuant to 8 C.F.R. § 103.5(a)(1)(i), the following time restrictions apply to motions to reopen and reconsider:

Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before the period expires, may be excused in the discretion of the Service *where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.*

(Emphasis added).

¹ It is noted that, according to the Texas Comptroller of Public Accounts, the petitioner had forfeited its corporate privileges in Texas on January 6, 2006 due to its failure to satisfy all state tax requirements. In addition, the petitioner's corporate privileges were not reinstated until May 22, 2007. The binding precedent decision, *Matter of Thornhill*, 18 I&N Dec. 34 (Comm'r 1981), holds that a petitioner whose status is impermanent, or otherwise "not settled," is not competent to offer permanent employment to an alien, if that offer would serve as the basis for issuance of an immigrant visa.

In the present matter, the record shows that on May 1, 2007, the AAO issued a decision rejecting the petitioner's appeal as having been improperly filed with an incorrect form and insufficient filing fee. The record further shows that on June 1, 2007, the petitioner, through counsel, attempted to file a motion to reopen and reconsider the AAO's decision. However, counsel improperly submitted the Form I-290B and filing fee directly to the AAO. The AAO promptly responded with a notice dated June 1, 2007 in which counsel was informed that the motion and proper filing fee must be submitted to the office where the petitioner originally filed its application or petition.

The regulations specifically require the petitioner to file a motion with the office that maintains the record of proceeding so that it can be forwarded to the office with jurisdiction. 8 C.F.R. § 103.5(a)(1)(iii)(E). The AAO had duly informed the petitioner on the coversheet of the AAO's May 1, 2007 decision that the file had been returned to the Texas Service Center and that all further inquiries must be made at that office.

Counsel subsequently attempted to resubmit the motion and filing fee according to the prescribed protocol. However, the record shows that the Form I-290B was received at the Texas Service Center on June 13, 2007, or 43 days after the AAO issued its decision. While the regulations permit the AAO to excuse a late filing when the petitioner establishes that the lateness was both reasonable and beyond the petitioner's control, there is not evidence that the untimely filing was beyond the petitioner's control. Therefore, the untimely motion is hereby dismissed.

Furthermore, the motion shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

Upon review, the AAO did not err in rejecting the petitioner's appeal. However, given the extensive errors in this matter, it is appropriate to examine the merits *arguendo*. Even if the AAO had granted the petitioner's motion to reopen the matter to consider the director's decision to revoke the approval of the petition, the adverse decision would have been affirmed.

As concluded by the director in the original decision, the petitioner failed to meet the criteria specified at 8 C.F.R. § 204.5(j)(3)(i)(D) which specifically requires the prospective U.S. employer 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 November 30, 2004, the petitioner must establish that it had been doing business as of November 30, 2003. The petitioner has acknowledged that it was incorporated in February 12, 2004, approximately nine months before filing the petition, but further stated that in May of 2004 it acquired a business that had been in operation for approximately eight years. Thus, the petitioner implies that it was a successor-in-interest to a previously existing business, which had been doing business for longer than one year prior to the filing date of the petitioner's Form I-140.

First, the regulations are clear on their face that the "prospective United States employer," i.e. the petitioner itself, must establish that it has been "doing business" for at least one year. 8 C.F.R. § 204.5(j)(3)(i)(D). Therefore, the regulation requires that the petitioner establish that it, not its predecessor, had been doing business for one year prior to the filing of the Form I-140.

To interpret the regulation otherwise would undermine the regulatory safeguards for this visa classification. The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) was intended to serve as a test of the petitioner's legitimacy as an employer prior to approving a petition for a permanent immigrant visa. In publishing the final rule, the former Immigration and Naturalization Service ("the Service") responded to criticism of this provision by noting that: "The Service has found that the one-year time limit is important as a measure of the viability of the United States employer." 56 Fed. Reg. 60897, 60899 (Nov. 29, 1991). Accordingly, it is critical that USCIS review the actual petitioner as a United States employer, and verify that it has been "doing business" in a regular, systematic and continuous manner for at least one year, to ensure that the permanent offer of employment is bona fide.

The petitioner itself was formed as a new company, not as a continuation of the previous entity. It was not officially incorporated as of November 30, 2003. Thus, it would be factually impossible for the petitioner to have been doing business prior to the date of its own creation. Regardless of the petitioner's ability to establish that it was engaged in the "the regular, systematic, and continuous" course of business since February 12, 2004, it could not have been doing business since November 30, 2003, i.e., one year prior to the date the petitioner filed the Form I-140.

Second, even if the AAO were to accept evidence of the claimed predecessor business, it is noted that the record is devoid of evidence to establish that the petitioner not only purchased the predecessor's assets, but also acquired the essential rights and obligations necessary to carry on the business in the same manner as the predecessor. Cf. *Matter of [REDACTED]*, 19 I&N Dec. 481 (Comm'r 1986) (discussing a successor-in-interest employer in the context of labor certification cases).

Finally, for the petitioner's assertion to carry any persuasive weight, the record should necessarily show that the same "United States employer" continued to exist after the sale of the predecessor business to the petitioner. The record shows that AZ Affordable Furniture was a sole proprietorship. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). In comparison, a corporation is a distinct legal entity which is separate from its owners and shareholders, the assets of its shareholders, and the assets of other enterprises or corporations. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530.

Therefore, the sole proprietorship that sold its assets to the petitioner is, by function of law, a different entity from the petitioner and could not continue to operate as a United States employer once the sole proprietor sold its assets and ceased operations, in accordance with the terms of the agreement to sell. The record in the instant matter shows that the petitioner simply purchased the assets of an existing sole proprietorship. Again, the petitioner was a newly formed corporate entity, not the continuation of the preexisting sole proprietorship

where owner and entity are one and the same and where the assets of the owner are synonymous with those of the entity. As such, the petitioner has not established itself as the same United States employer as the previously existing entity.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." As the petitioner had not been doing business in a "regular, systematic, and continuous" manner for at least one year prior to filing the petition, the director erroneously approved the petition. By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

As a final note, the proper filing of a motion to reopen and/or reconsider does not stay the AAO's prior decision to dismiss an appeal or extend a beneficiary's previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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, the petitioner has not sustained that burden.

ORDER: The motion is dismissed.