INTERPRETER RELEASES®
Report and analysis of immigration and nationality law
WEST®

Vol. 91, No. 14 • April 7, 2014

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USCIS Reaches FY 2015 H-1B Cap

U.S. Citizenship and Immigration Services (USCIS) announced on April 7, 2014, that it has received a sufficient number of H-1B petitions to reach the statutory cap for fiscal year (FY) 2015. USCIS has also received more than the limit of 20,000 H-1B petitions filed under the U.S. advanced degree exemption.

Before running a random selection process, USCIS will complete initial intake for all filings received during the filing period which ended April 7. Due to the high number of petitions, USCIS is not yet able to announce the date on which it will conduct the random selection process.

A computer-generated process will randomly select the number of petitions needed to meet the caps of 65,000 visas for the general category and 20,000 under the advanced degree exemption. USCIS will reject and return filing fees for all cap-subject petitions that are not selected, unless found to be a duplicate filing.

The selection process for the advanced degree exemption will be conducted first. All advanced degree petitions not selected will become part of the random selection process for the 65,000 limit.

USCIS will continue to accept and process petitions that are otherwise exempt from the cap. Petitions filed on behalf of current H-1B workers who have been counted previously against the cap will not be counted towards the congressionally

11. In Nonprecedent Decision, AAO Addresses Meaning of "Doing Business" For Purposes of Multinational Executive/ Managerial I-140 Petition

In *Matter of [Redacted]*, File No. [redacted] (AAO Mar. 27, 2014), a nonprecedent decision rendered by the Administrative Appeals Office (AAO), the AAO sustained the appeal of the petitioner, a U.S. subsidiary of a Chinese clothing manufacturing company that filed an I-140, Immigrant Petition for Alien Worker, to classify the beneficiary as a multinational manager or executive pursuant to INA § 203(b)(l)(C) [8 USCA § 1153(b)(1)(C)] in order to employ the beneficiary in the position of Deputy General Manager. The Texas Service Center (TSC) Director denied the petition, finding that the petitioner failed to establish that it had been doing business for at least one year as of the date the petition was filed.

The subsidiary-petitioner is an affiliate of the beneficiary's former Hong Kong employer, which is also owned by the petitioner's Chinese parent company. Established in New York in 2008, the petitioner imports and sells the parent company's products to U.S. customers, primarily major clothing retailers. The petitioner directly performed these sales activities through 2011. However, beginning on or about January 2012, it has provided marketing, sales, and shipping services in the U.S. pursuant to a service agreement with its Hong Kong affiliate.

The TSC Director concluded that the petitioner was not doing business as required by the regulations, reasoning that the petitioner's evidence did not indicate "doing business" with independent corporations or entities for a full year preceding the filing of the petition, but rather only demonstrated the shipment of goods from the foreign company to the U.S. company. Specifically, the Director found that the petitioner, as a clothing importer, should have provided invoices or evidence of payment of invoices from the customers that purchased the clothing for the year preceding the filing of the petition. The petitioner contended that the Director erred and that existing case law and regulatory history support a conclusion that the petitioner is doing business in a regular, systematic, and continuous fashion despite the fact that it is not a named party to contracts with U.S. buyers. The petitioner argued that the evidence establishes it acts as an intermediary between its Hong Kong affiliate and the U.S. buyers and suppliers by locating customers and finalizing the details of sales contracts for the benefit of the Hong Kong affiliate and that while its affiliate is named on customer contracts, the record shows the petitioner continues to secure these sales contracts by marketing, designing, corresponding and finalizing the terms of every U.S. sales contract, and by receiving all shipments of imported goods for U.S. customers at its New York location. The petitioner further contended that the regulatory definition of "doing business" does not require that it be a direct party to contracts or a direct provider of goods and services to a U.S. customer.

INA § 203(b)(1) identifies priority workers and in subparagraph (C) describes a multinational executive and managers as an alien who, "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." 8 CFR § 204.5(j)(3)(i)(D) requires the petitioner to establish that it has been doing business for at least one year and 8 CFR § 204.5(j)(2) provides that "[d]oing 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."

The AAO found that the definition of "doing business" at 8 CFR § 204.5(j)(2) contains no requirement that a petitioner for a multinational manager or executive must provide goods and/or services to an unaffiliated third party and that nothing in the regulatory history of the "doing business" provision supports such a requirement. The AAO explained that the definition of doing business in 8 CFR § 204.5(j)(2) is virtually identical to that in 8 CFR § 204.5(*l*)(1)(ii)(H) for L-1 nonimmigrant intracompany transferees and that, in response to public concern about that definition voiced at the time the regulation was under consideration, the INS explained in its preamble to the final rule that it recognized that company representatives and liaison offices provide services in the U.S., even if the services are to a company outside the U.S., and that such services are included in the doing business definition. As such, the AAO determined that it would treat the two provisions similarly and declined to read a third party or non-affiliation requirement into 8 CFR § 204.5(j)(2). Accordingly, the AAO said, for a petitioner to establish that it is "doing business," it need only demonstrate that it provides goods and/or services regularly, systematically, and continuously.

In this case, the AAO said, the petitioner established that it provides services to its foreign affiliate by marketing the foreign entity's products, locating buyers, maintaining relationships with U.S. customers, and facilitating the completion of sales contracts and shipping arrangements in the U.S. and provided a copy of its service agreement with the foreign affiliate and substantial evidence that it is in fact performing the services specified in the contract on a regular, systematic, and continuous basis. Thus, the AAO concluded, the petitioner established that it is doing business based on its regular, systematic, and continuous provision of services in the U.S., and it demonstrated that its operation does not constitute the "mere presence" of an office. Accordingly, the Director's decision was withdrawn.

The AAO's decision is reproduced in Appendix III of this Release.

The petitioner was represented by Alan Lee, Esq., of New York City, New York, who kindly provided this decision to Interpreter Releases. Similar submissions, including unpublished AAO and BIA decisions, may be directed to Beverly Jacklin, Principal Attorney Editor, beverly.jacklin@thomsonreuters.com. ■