

## Internal Revenue Service

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Department of the Treasury  
Washington, DC 20224

Third Party Communication: None  
Date of Communication: Not Applicable

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, ID No.

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PLR-123170-05

Date:  
November 08, 2005

Legend:

X =

Y =

State =

D1 =

D2 =

Dear

This letter responds to the letter dated February 17, 2005, submitted on behalf of X, requesting rulings under §§ 1362(b)(5) and 1362(f) of the Internal Revenue Code.

### Facts

X was incorporated on D1 under the laws of State. The shareholders of X intended X to be treated as an S corporation effective D1, but X inadvertently failed to timely file an S corporation election. In addition, the shareholders of record on D1 included Y, an ineligible shareholder. In D2, steps were taken to remove the ineligible shareholder. X requests a ruling under § 1362(b)(5) that it will be treated as an S corporation effective D1 and a ruling under § 1362(f) that the effects of X's invalid § 1362(a) election will be waived.

### Law and Analysis

Section 1361(a)(1) defines an "S corporation" as a small business corporation for which an election under § 1362(a) is in effect.

Section 1361(b)(1) defines a “small business corporation” as a domestic corporation which is not an ineligible corporation which does not (A) have more than 75 shareholders, (B) have as a shareholder a person (other than an estate and other than a trust described in subsection (c)(2)) who is not an individual, (C) have a nonresident alien as a shareholder, and (D) have more than 1 class of stock.

Section 1362(b)(2) provides in relevant part that if an S election is made within the first two and one-half months of a corporation's taxable year, then the corporation will be treated as an S corporation for the year in which the election is made. Under § 1362(b)(3), however, if an S election is made after the first two and one-half months of a corporation's taxable year, then that corporation will not be treated as an S corporation until the taxable year after the year in which the S election is filed.

Section 1362(b)(5) provides that if (1) no § 1362(a) election is made for any taxable year and (2) the Secretary determines that there was reasonable cause for the failure to timely make such election, then the Secretary may treat such an election as timely made for such taxable year and § 1362(b)(3) shall not apply.

Section 1362(f) provides that if (1) an election under § 1362(a) by any corporation was not effective for the taxable year for which made (determined without regard to subsection (b)(2)) by reason of a failure to meet the requirements of § 1361(b) or to obtain shareholder consents, (2) the Secretary determines that the circumstances resulting in such ineffectiveness were inadvertent, (3) no later than a reasonable period of time after the discovery of the circumstances resulting in such ineffectiveness, steps were taken so that the corporation is a small business corporation, and (4) the corporation, and each person who was a shareholder of the corporation at any time during the period of inadvertent ineffectiveness of the S election, agrees to makes such adjustments (consistent with the treatment of the corporation as an S corporation) as may be required by the Secretary with respect to such period, then, notwithstanding the circumstances resulting in such ineffectiveness, the corporation is treated as an S corporation during the period specified by the Secretary.

In the present situation, X did not timely file its election to be treated as an S corporation under § 1362(a)(1). X has, however, established reasonable cause for not making a timely S election and is entitled to relief under § 1362(b)(5). Had X timely file the election under § 1362(b), it may have been invalid under § 1361(b)(1) because Y, an ineligible shareholder, was one of the shareholders of X.

### Conclusion

X did not timely file an election to be treated as an S corporation under § 1362(a). X has, however, established reasonable cause for not making a timely S election and is entitled to relief under § 1362(b)(5). Therefore, based solely on the facts submitted and the representations made, and provided that X otherwise qualifies as an S corporation, we conclude that X will be treated as an S corporation effective D1. This ruling is

conditioned on X, within 60 days of the date of this letter, filing a new Form 2553 with the appropriate service center with an effective date of D1. A copy of this letter should be attached to the election.

X represents that at all relevant times, X and its shareholders treated X as an S corporation. X and its shareholders agree to make any adjustments required by the Secretary consistent with the treatment of X as an S corporation with respect to the period specified by § 1362(f). Under the provisions of § 1362(f), X will be treated as an S corporation as of D1 and thereafter, provided that X's S corporation election is not otherwise terminated under § 1362(d).

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, no opinion is expressed concerning whether X is a valid S corporation.

This letter ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Under a power of attorney on file in this office, a copy of this letter will be sent to your authorized representatives.

Sincerely,

Dianna K. Miosi

Dianna K. Miosi  
Chief, Branch 1  
Office of Associate Chief Counsel  
(Passthroughs and Special Industries)

Enclosures (2):

Copy of this letter  
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cc: