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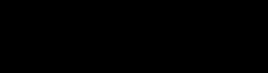
**U.S. Citizenship  
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FILE:



Office: TEXAS SERVICE CENTER

Date: APR 03 2006

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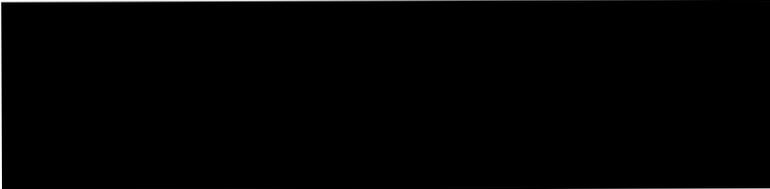
Petitioner:



Beneficiary:

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:



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, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based petition. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Delaware in March 2002. It provides online educational services. It seeks to employ the beneficiary as its vice-president of operations. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established: (1) that it had been doing business for one year prior to filing the petition; or (2) that it had the ability to pay the beneficiary the proffered annual wage of \$75,000.

On appeal, counsel for the petitioner submits a brief and documentation in support of the appeal.

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 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.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established that it had been doing business for one year prior to filing the petition and continues to do business. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984). Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

\* \* \*

- (D) The prospective United States employer has been doing business for at least one year.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*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."

The petitioner initially provided: (1) a Certificate of Incorporation in the State of Delaware dated March 2002 for [REDACTED]; (2) its Certificate of Amendment changing its name in August 2003 to [REDACTED]; (3) an unaudited balance sheet for December 31, 2003; (4) an assumed certificate to do business in the State of Texas; (5) the first and last page and exhibit B to a September 13, 2004 provider agreement with the Board of Education of the City of Chicago; (6) several "first pages" of proposed contracts with various school districts; (7) the first page of a lease for premises in Plano, Texas dated November 1, 2004; and (8) a Certificate of Incorporation of the foreign entity dated December 24, 2003.

On May 24, 2005, the director requested further evidence. The director specifically requested evidence of the petitioner's business, such as invoices, bills of sale, and product brochures from April 2004 to present. The director also requested a copy of the petitioner's 2004 corporate tax return.

In an August 18, 2005 response, the petitioner provided a copy of an invoice dated September 2004 for computers being shipped to the foreign entity with an accompanying air waybill dated September 24, 2004. The petitioner also submitted: a copy of an Internal Revenue Service (IRS) Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return to September 15, 2005; a balance sheet as of December 31, 2004; and a profit and loss statement for the 2004 year. The petitioner noted in an undated statement that the petitioner would be operating in 20 states in the academic year of 2005-06 and had entered into sales agreements to help build its sales. The petitioner provided a sales agreement dated in July 2005 and other documents showing the petitioner doing business in 2005.

On August 30, 2005, the director denied the petition determining that the record did not contain documentation showing that the petitioner had been doing business prior to September 2004; thus the record did not support the petitioner's claim that it had been doing business for one year prior to filing the petition in April 2005.

On appeal, the petitioner submits: a purchase order from [REDACTED] to the Indianapolis public schools for \$180,000 dated June 2003 for delivery by August 30, 2003; a purchase order from [REDACTED] to the Indianapolis public schools for \$198,000 dated November 6, 2003 for delivery by August 14, 2004, supported by a contract dated October 6, 2003 for the petitioner to provide supplemental services to eligible students in the 2003-2004 school year; and a contract dated February 20, 2004 to provide academic assistance from February 25, 2004 to May 28, 2004 and June 14, 2004 to August 20, 2004. The petitioner also submitted documents previously submitted.

The petitioner, for the first time on appeal, has submitted documentation to establish that it had begun doing business one year prior to filing the petition in April 2005. However, where as here when the petitioner has failed to provide evidence specifically requested by the director, the AAO will not consider the evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director. The record before the director did not establish that the petitioner had been doing business for one year prior to filing the petition in April 2005.

Moreover, even if considering the documentation submitted on appeal, the petitioner has not sufficiently established that it was doing business for one year prior to filing the petition. The petitioner has not provided evidence of actual payments received for its services for one year prior to filing the petition nor has it provided a copy of its 2003 IRS Form 1120, U.S. Corporation Income Tax Return, or an explanation regarding its unavailability. For this reason, the petition will not be approved.

The next issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered annual wage of \$75,000.

The regulation at 8 C.F.R § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner initially provided an unaudited balance sheet for December 31, 2003. On May 24, 2005, the director specifically requested evidence that the petitioner could pay the beneficiary the proffered wage. The director noted that to establish its ability to pay the proffered wage, the petitioner must submit copies of federal tax returns, audited financial statements, or annual reports. The director also noted that other evidence could be submitted in addition to these items.

In an August 18, 2005 response, the petitioner submitted a copy of an Internal Revenue Service (IRS) Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return to September 15, 2005; a balance sheet as of December 31, 2004; a profit and loss statement for the 2004-year; and a payroll record

showing payment to 15 employees for the second half of July 2005. Counsel for the petitioner also referenced several contracts that the petitioner had entered into for services to be rendered in 2005 and asserted that the contracts showed the petitioner's ability to pay all of its employees.

On August 30, 2005, the director denied the petition observing that the petitioner had not submitted an annual report, federal tax returns, or audited financial statements. The director determined that as the petitioner had not yet employed the beneficiary and had not submitted one of the accepted forms of documentation, the petitioner had not established its ability to pay the beneficiary the proffered wage.

On appeal, counsel for the petitioner re-submits the petitioner's 2004 balance sheet, the petitioner's 2004 profit and loss statement, and its payroll record for the second half of July 2005. Counsel also references the petitioner's several contracts and purchase orders from three large school districts for the 2005-2006 year, as well as a joint venture agreement with Microsoft to be effective October 8, 2005, and notes that it has provided its bank statements from May 2003 to August 2003 and from January 2004 to May 2004. Counsel contends that the documentation submitted is sufficient to establish that the petitioner has the ability to pay the beneficiary the proffered wage.

Counsel's contention is not persuasive. When determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. As the director observed, the petitioner did not employ the beneficiary prior to filing the petition.

As an alternate means of determining the petitioner's ability to pay, the AAO will examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. If the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

As the petition's priority date falls on April 22, 2005, the most pertinent tax return would be the petitioner's tax return for 2005. However, the petitioner's 2005 IRS Form 1120, U.S. Corporate Income Tax Return, was not yet due when the response to the director's request for evidence was submitted or when the appeal was filed. The petitioner, for whatever reason, has not submitted its IRS Form 1120 for calendar year 2004, although the tax return should have been completed and filed even when acknowledging the extension request, when the response to the director's request for further evidence was due.

When analyzing a petitioner's ability to pay the proffered wage, the fundamental focus is whether the employer is making a "realistic" or credible job offer and has the financial ability to satisfy the proffered

wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). In this matter, the petitioner could not have submitted the primary evidence used to establish the petitioner's ability to pay, the petitioner's 2005 certified IRS Form 1120. For whatever reason, the petitioner has elected to not submit its 2004 IRS Form 1120. The petitioner has not submitted an audited financial statement or an annual report, in all probability because it is not the norm to prepare these documents. Although, the record on appeal suggests that the petitioner is a viable company, there is insufficient secondary evidence in the record to establish that the petitioner can support another employee making \$75,000 per year.

The petitioner has not provided sufficient evidence to establish its ability to pay the beneficiary the proffered annual wage. For this additional reason, the petition will not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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, that burden has not been met.

ORDER: The appeal is dismissed.