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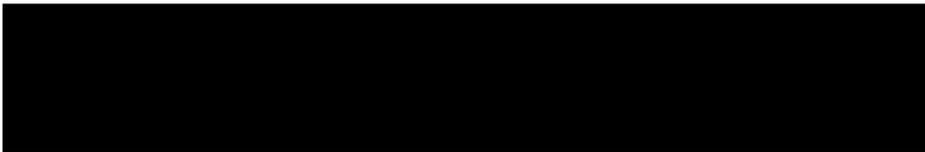
FILE: WAC 04 800 61829 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



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.

A handwritten signature in black ink that reads "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a company that provides construction and engineering services. The petitioner seeks to employ the beneficiary as a Mechanical Engineer, and endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation 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).

The director denied the petition on the basis that the petitioner had not proven that it met the regulatory definition of a "United States employer." On appeal, counsel contends that the petitioner does in fact meet this qualification. Counsel asserts further that the director violated 8 C.F.R. § 103.2(b)(8) by failing to request federal tax identification evidence before denying the Form I-129, Petition for Nonimmigrant Worker (Form I-129).

The AAO notes that 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* However, the director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. Furthermore, the AAO notes that even if the director committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. In the present matter, the petitioner has been given an opportunity to supplement the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B appeal and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

8 C.F.R. § 214.2(h)(1)(i) provides that:

Under Section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer.

The term "employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii):

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;

- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

In the present matter, the director determined that the petitioner failed to establish it has an Internal Revenue Service (IRS) Tax identification number. The AAO notes that no direct evidence of an IRS tax identification number was submitted on appeal. Instead, the petitioner asserts through counsel that it was not required to file Forms DE-6 because it was not profitable prior to March 2004. The petitioner asserts further that bank statement, California Articles of Incorporation and Certificate of Incorporation evidence establishes indirectly that the petitioner satisfies the IRS tax identification number requirements set forth in 8 C.F.R. § 214.2(h)(4)(ii)(3).

The petitioner's Form I-129 indicates that the petitioner has five employees and a gross annual income of \$2.5 million. In an RFE dated October 13, 2004, the director requested, amongst other things, copies of the petitioner's Form DE-6, Quarterly Wage Reports for all employees for the last four quarters, including the names, social security numbers, and number of weeks worked for all employees. In its response to the RFE, the petitioner indicated that it has two permanent positions (Executive and Managerial) under payroll. The petitioner indicated further that:

The Unicorn Group was officially established in March 2003, but was not profitable until March of 2004 when it signed its first large scale project . . . in March 2004. The Group has thus far used the services of subcontractors to complete the engineering portion of the assigned project while awaiting the arrival of [REDACTED] the beneficiary]. Two of the five individuals are officers of the company and have not yet received salaries from the company's current project. The company also uses the services of two part-time contractors and one subcontractor. Therefore, we do not need to file [Form DE-6] Wage Reports with the EDD to date because no wages have been disbursed.

The director asked for Form DE-6, Quarterly Wage Report evidence in a second RFE dated December 17, 2004. In response, the petitioner made reference to its previous RFE explanation on the matter. No further information was provided.

The petitioner submitted the following evidence relating to the petitioner's status as a business and employer: the petitioner's California Articles of Incorporation and Certificate of Incorporation; a January 2005 bank statement containing a "USATAXPYMT" date and number; the petitioner's Los Angeles, California contractor business license; the petitioner's Pasadena, California city business tax permit; the petitioner's insurance policy, lease and photos of its office; a list of construction projects the petitioner was involved in; and a construction subcontract agreement.

The record contains no federal tax information to reflect that the petitioner has ever paid federal taxes, or that the petitioner has a federal IRS tax identification number. The record also lacks an explanation from the petitioner as to why proof of its IRS tax identification number has not been provided. Additionally, the record lacks any wage payment evidence.

The AAO notes that the "USATAXPYMT" number contained on the bank statement submitted by the petitioner is without context or explanation, and none of the other evidence contained in the record contains any indication of an IRS tax ID number. Accordingly, the AAO finds that neither the bank statement evidence, nor any of the other evidence contained in the record establishes that the petitioner has an IRS tax identification number as required by 8 C.F.R. § 214.2(h)(4)(ii)(3).

A petitioning employer must meet all three criteria set forth at 8 C.F.R. § 214.2(h)(4)(ii). The burden is on the petitioner to establish that it meets the regulatory definition of a "United States employer." Section 291 of the Act, 8 U.S.C. § 1361. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In the present matter the petitioner has not established that it possesses an IRS tax identification number, that it engages or has engaged a person to work in the United States, and that it has an employer-employee relationship to any employees. Accordingly, the petitioner has failed to satisfy any of the criteria contained in 8 C.F.R. § 214.2(h)(4)(ii), and the petitioner does not qualify as a United States employer. Because the petitioner has not sustained its burden, the appeal will be dismissed and the petition denied.

ORDER: The appeal is dismissed. The petition is denied.