

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: **MAY 19 2014** OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

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.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter will be remanded for further action and entry of a new decision.

The petitioner is a branch office of a foreign organization, which is headquartered in South Korea. The U.S. branch office where the beneficiary is currently employed and where he seeks continued employment was authorized to transact business in the State of Florida on May 6, 1999. It seeks to employ the beneficiary as its managing director. 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 denied the petition on two separate grounds, concluding that the petitioner did not establish: (1) that it is doing business as defined in the regulations; and (2) that it has the ability to pay the beneficiary's proffered wage.

On appeal, counsel for the petitioner asserts that the director's decision was made in error and that all eligibility requirements for the requested classification have been met. The appeal consists of counsel's brief and additional documentary evidence.

I. Procedural History

The record shows that the Form I-140 was filed on February 25, 2013. The petitioner provided evidence in the form of a supporting statement dated February 12, 2013 along with corporate, tax, and financial documents.

On April 3, 2013, the petitioner issued a request for evidence (RFE) instructing the petitioner to provide evidence that the petitioner has been doing business for at least one year and that the petitioner has the ability to pay the beneficiary's proffered wage of \$80,000 per year. With regard to the latter, the director requested wage and tax documentation for 2012.

In response, the petitioner resubmitted evidence showing that the branch office located in Florida has been authorized to do business in the United States as a foreign corporation. The petitioner also provided evidence consisting of invoices and shipping documents, some of which indicate that copies were being sent to the beneficiary at the Miami office. The petitioner also provided evidence of the beneficiary's wages paid in February 2013 as well as the petitioner's audited consolidated financial statements showing the financial status of the foreign entity and its subsidiaries.

Despite the evidence submitted, the director denied the petition on June 1, 2013 citing the following two grounds as bases for denial: (1) the petitioner failed to establish that it had been doing business for one year prior to filing the instant Form I-140; and (2) the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage. In reaching these conclusions, the director relied heavily on invoices, which named the petitioner's foreign headquarters location as one party to the transaction, as well as the beneficiary's salary of \$63,960, which the beneficiary is receiving at the present time in his current position as "market manager." While the director also considered evidence of wages paid by the foreign entity, to

which the director referred as the petitioner's "parent company," the director determined that the foreign entity's assets cannot be considered in determining the U.S. petitioner's ability to pay. The director did not acknowledge the petitioner's status as the branch office, rather than the subsidiary, of the head foreign office where the beneficiary was previously employed.

The petitioner filed an appeal with a supporting brief from counsel, who points out that while the beneficiary was employed overseas, the U.S. office where he currently seeks employment is not a separate business entity, but rather is a branch of the foreign entity whose headquarters is located abroad. Counsel also points to emails submitted in support of the appeal showing ongoing correspondence between the beneficiary and client companies as evidence of the U.S. branch office's business transactions. Additionally, the petitioner provided evidence of payroll records, quarterly tax returns, and bank statements.

II. The Law

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 or 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.

Additionally, 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) further requires the petitioner to establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) defines the term “doing business” as 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. According to the regulatory definition, a determination of whether or not an entity is doing business must focus on that entity’s provision of goods and/or services, i.e., its business transactions.

III. The Issues on Appeal

As previously indicated, the primary issues to be addressed in the present matter are whether the petitioner has established that it has the ability to pay the beneficiary’s proffered wage and whether it provided sufficient evidence to establish that it has been doing business for at least one year prior to filing the instant petition.

A. Doing Business

The regulation at 8 C.F.R. 204.5(j)(2) defines “doing business” as “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.”

In concluding that the petitioner is not doing business, the director focused on evidence of business transactions, such as invoices and bills of lading, which document business transactions between the petitioner’s headquarters in Korea and its customers in Mexico, Central America and the Caribbean. The director concluded that these documents establish that “the parent organization” is doing business, but do not establish that the U.S. branch office is doing business.

On appeal, counsel emphasizes that the petitioner was established in Florida as a branch office of the Korean headquarters for the purpose of managing operations, international trade, and sales and marketing activities of company’s products in Latin America. Counsel emphasizes that the petitioning branch office submitted evidence that it has 15 employees with annual payroll expenses of over \$1 million, and provided substantial evidence of its interactions with partners and customers in South America, including business correspondence, memoranda of understanding, and letters of intent executed by the branch office.

Upon review, the petitioner has established that it is doing business as defined in the regulations and the director’s decision will be withdrawn.

The record includes extensive evidence of email correspondence between the beneficiary and various other parties, which depict the U.S. branch’s role in marketing the Korean entity’s products and expanding its operations. Although the director observed that the petitioner was not named as a party on commercial invoices, there is ample evidence that the petitioner is providing marketing, sales, management and other critical services to the Korean headquarters. This evidence, which includes the aforementioned business correspondence, memoranda of understanding, etc., preceded and continued throughout the requisite one-year time period and thus

show that the petitioning branch office that seeks to hire the beneficiary in the United States has been and continues to do business since prior to the commencement of the time period in question. As the director failed to consider relevant evidence, which serves as an appropriate indicator of whether or not the petitioning entity is doing business, the director's conclusion must be withdrawn.

B. Ability to Pay

Next, in 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'r 1977).

In the present matter, a review of the record shows that the director observed that the beneficiary's salary of \$63,960, which he received in 2012 and which falls short of the proffered wage of \$80,000 annually. The director further noted that the petitioner's finances were not included in the 2011 and 2012 consolidated financial statements for the Korean headquarters and was not listed among the company's consolidated subsidiaries.

Upon review, the director failed to note the distinction between a subsidiary and a branch office. Given that the petitioner falls within the latter category, there would be no reason to expect a branch office to be included in a list of the foreign entity's consolidated subsidiaries. Further, in noting the beneficiary's salary for 2012, the director appears to have overlooked the fact that the beneficiary currently serves in the position of marketing manager, and has been offered a salary of \$80,000 upon his promotion to the proffered position of managing director.

While it is true that establishing the beneficiary's compensation of the proffered wage at the time of filing can serve as *prima facie* evidence of the petitioner's ability to pay, there is no statutory or regulatory provision requiring the petitioner to actually pay the beneficiary the proffered wage at the time the petition is filed. Here, the record shows that not only was the beneficiary compensated \$63,960 at the time of filing, but the petitioner's payroll documents further show that the petitioner paid \$311,715.00 in wages to fourteen other employees during the 2013 first quarter during which the instant Form I-140 was filed.

Thus, despite the beneficiary's current compensation, the evidence provided demonstrates that the petitioner's offer of employment was realistic. Given the evidence showing the petitioner's ability to consistently pay employee salaries, we find that the petitioner more likely than not has a sustainable ability to pay the beneficiary's proffered wage commencing on the date the petition was filed and going forward and in light of this finding the director's decision must be withdrawn.

IV. Issues on Remand

Notwithstanding the withdrawal of the director's decision, the record lacks sufficient evidence to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity for the requisite one year period prior to his admission to the United States on an L-1nonimmigrant visa. Specifically, while the petitioner's February 12, 2013 supporting statement indicates that the beneficiary held the position of "Market Manager of Global Business Division" directly prior to coming to the United States to work for the U.S. branch office, the record indicates that the beneficiary held this position for a period of less than five months –

commencing in January 2009 and ending in May 2009. The petitioner indicated that prior to assuming this position, the beneficiary worked abroad in the position of “Market Assistant Manager of Global Business Division.” As the petitioner did not provide a detailed list of the job duties the beneficiary performed in the assistant manager position, we cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity for the full one-year time period as statutorily required.

In the present matter, the record requires additional evidence in order to determine whether the petitioner and beneficiary are eligible for the immigration benefit sought. As such, the matter will be remanded to the director, who is instructed to request that the additional evidence be submitted in order to make a final determination as to the petitioner’s eligibility.

ORDER: The decision of the director dated June 1, 2013 is hereby withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision, which, if adverse, shall be certified to the AAO for review.