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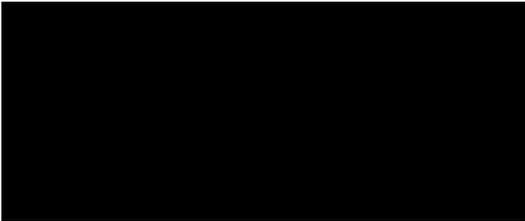
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FILE: SRC 03 012 50574 Office: TEXAS SERVICE CENTER Date: SEP 02 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center 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 bakery franchise that seeks to employ the beneficiary as a marketing director. The petitioner, therefore, 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 because the petitioner failed to establish that: (1) there is an employee/employer relationship; and (2) the beneficiary is qualified to perform the duties of a specialty occupation. On appeal, counsel submits additional evidence.

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), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

The first issue to be discussed is whether the petitioner can be considered the beneficiary's employer. According to evidence in the record, the beneficiary owns 50 percent of the petitioning entity.

Pursuant to 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;
- (3) Has an Internal Revenue Service Tax identification number.

Along with the initial I-129 petition, the petitioner submitted a copy of a certification from the State of Florida. The certification states that the petitioning entity, a limited liability company, was organized under the laws of the State of Florida on August 30, 2001.

On November 6, 2002, the director denied the petition. The director found that the petitioner failed to establish that the employee/employer relationship existed as defined under the regulations. The director stated that because the beneficiary is the owner and sole employee of the petitioning entity, the ability to hire, fire, supervise, and otherwise control the work of the employee cannot exist where the employee is also the employer. With respect to the AAO decision on case number SRC-02-048-50531, the director found that that the AAO had agreed that the beneficiary qualifies as a U.S. employer. However, the director stated that the AAO did not establish that a qualified employer/employee relationship could exist as set forth in 8 C.F.R.

§ 214.2(h). In addition, the director found that the beneficiary is not qualified to perform the duties of the proffered position. The director stated that the AAO's decision in the case concluded that the petitioner did not establish that the beneficiary qualified for the offered position. The director found that it appeared that the petitioner filed the instant petition - changing the job title from the title in the SRC-02-048-50531 case - in order to claim that the beneficiary is qualified to perform the proffered position. The AAO's decision stated that in order to qualify for the proffered position of market research analyst the beneficiary must hold a graduate degree, or its equivalent, in economics, business administration, marketing statistics, or a closely related discipline; and the AAO had remanded the case to the director to determine whether the beneficiary qualified for the proposed position of market research analyst.

On appeal, counsel states that the AAO's decision in case number SRC-02-048-50531, filed by the petitioner on behalf of the beneficiary, establishes that the petitioner is an employer under the regulation at 8 C.F.R. § 214.2(h)(4)(ii). Counsel asserts that the beneficiary is qualified for the proposed position, and submits additional evidence to substantiate this.

The petitioner has established that Llad, a limited liability company (LLC), qualifies under 8 C.F.R. § 214.2(h)(4)(ii) as a United States employer. In the cases of *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958), *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980) the Board of Immigration Appeals found that an employer/employee relationship existed because a corporation is considered a separate legal entity from its shareholders. Here, the petitioner is a LLC and not a corporation; however, under Florida's statutory law a LLC is considered a separate legal entity from its members. As such, the petitioner has an employer-employee relationship with the beneficiary as described under 8 C.F.R. § 214.2(h)(4)(ii)(2) even though the beneficiary possesses a 50 percent membership in the LLC. Thus, the petitioning entity qualifies as a United States employer under 8 C.F.R. § 214.2(h)(4)(ii).

The AAO will now address whether the beneficiary is qualified to perform the proffered position.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The petitioner seeks the beneficiary's services as a marketing director, which is an occupation that the director determined requires at least a bachelor's degree in marketing. The director stated that the beneficiary's work experience was not in marketing, and that holding the educational equivalent (based on education and work experience) to a bachelor's degree in business administration does not qualify the beneficiary for the proposed position.

Upon review of the record, the petitioner has failed to establish that the beneficiary is qualified to perform the proposed position.

The beneficiary does not hold a baccalaureate degree from an accredited U.S. college or university in any field of study. According to the Global Education Group, Inc. and FIS, the beneficiary holds a foreign degree determined to be equivalent to a baccalaureate degree in electrical engineering from an accredited college or university in the United States. Therefore, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials; or
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

FIS' educational evaluation states that the beneficiary holds the educational equivalent, based on his education and work experience, to a master's degree in business administration. However, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(3) provides that a credentials evaluation service must base its evaluation on a person's educational credentials; it cannot include work experience in the evaluation. Thus, the FIS evaluation carries little weight in establishing that the beneficiary holds the educational equivalent to a master's degree in business administration.

To satisfy the beneficiary's qualification under the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), the record contains an educational evaluation from [REDACTED] of Seattle Pacific University, which states that the beneficiary possesses the educational equivalent to a master's degree in business administration based on the beneficiary's education and work experience. On appeal, counsel submits an educational evaluation from [REDACTED] of Mercy College attesting that the beneficiary holds the educational equivalent to a bachelor's degree in business administration based on the beneficiary's education and work experience.

The evaluations are not persuasive. In the evaluation [REDACTED] not indicate that he has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience and no independent evidence from the university corroborates that it has such a program. [REDACTED] avers that he has authority, based on positions that he holds at various universities, to evaluate foreign educational credits, experience, training, and/or courses take at international universities, and "to determine whether credit would be awarded to a student by the University"; however, no independent evidence substantiates [REDACTED] authority. 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)). Thus, the beneficiary's qualifications are not established pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

The AAO notes that the educational evaluations are inconsistent. [REDACTED] concludes that the beneficiary holds the equivalent of a bachelor's degree in business administration based on the beneficiary's education and work experience. [REDACTED] concludes that he has the equivalent of a master's degree in business administration based on his evaluation of the same evidence. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). No evidence in the record reconciles or explains this inconsistency.

CIS will now consider the beneficiary's qualifications under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. The instant petition requires a master's degree; for equivalence to a master's degree, the regulation requires that the alien have a baccalaureate degree followed by at least five years of experience in the specialty. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation¹;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The record contains the beneficiary's resume, employment letters, educational evaluations, diploma, transcripts, and certificates. The diploma, transcripts, and one of the certificates are translated into the English language. The educational evaluations indicate that the beneficiary's diploma is equivalent to a bachelor's degree in electrical engineering from an accredited college or university in the United States. The March 4, 2002 employment letter from Vedemeca states that the beneficiary worked there from 1988 to 1991 as an operations manager, and from 1991 to 1994 as a director general. The February 27, 2002 letter from Sadeven Industries, C.A. certifies the beneficiary's employment there as a transmission systems manager since 1991; however, the letter does not state the beneficiary's ending date of employment. Both letters indicate that the beneficiary's employment included, to a limited degree, the theoretical and practical application of specialized knowledge required by the specialty, which in this case is marketing. Neither letter indicates that the alien's experience in marketing was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in marketing or a related field.

¹ Recognized authority means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

██████████ qualifies as a recognized authority in marketing based on his resume, which depicts his extensive experience in marketing and related areas. The evidence in the record is insufficient to establish that ██████████ is a recognized authority in marketing, however. ██████████ resume shows that he is an assistant professor of business administration with Mercy College, and is a professor at various universities, but his resume does not show extensive experience in the field of marketing. Thus, the beneficiary cannot establish that he has recognition of expertise in the specialty from two recognized authorities in marketing.

Accordingly, the petitioner cannot establish the fifth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5): that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty.

As related in the discussion above, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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