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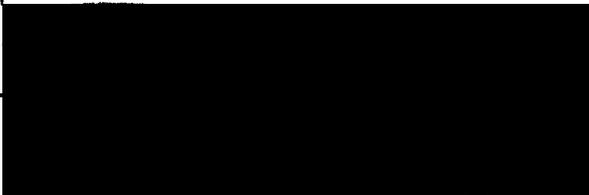
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FILE: WAC 03 238 52611 Office: CALIFORNIA SERVICE CENTER Date: **AUG 25 2005**

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 California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner states it is a provider of retail design services, with one employee. It seeks to hire the beneficiary as an interior designer 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 based on his determination that the petitioner had failed to establish itself as a viable business entity with operations that required the services of an interior designer.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's two requests for evidence; (3) the petitioner's responses to the director's requests for evidence; (3) the director's denial letter; (4) Form I-290B, with counsel's brief, and new and previously submitted documentation; and (5) a subsequent letter from counsel submitting additional evidence. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner, at the time of filing, established it was a design business offering employment to the beneficiary in a specialty occupation.

Under section 101(a)(15)(H) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H), an alien may be authorized to come to the United States temporarily to perform services in a specialty occupation for an employer if petitioned for by that employer. To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. It considers both the specific duties of the proffered position, as well as the nature of the petitioning entity's business operations. At the time of filing, the petitioner must establish that its offer of employment is consistent with the needs of its organization.

In the instant case, the petitioner's Form I-129 identified itself as an industrial design firm, seeking the services of an interior designer. The director, however, identified certain anomalies in the materials filed by the petitioner to establish its business operations, specifically that the petitioner's tax returns indicated its business as cosmetics and accessories merchandizing, and that it had reported no wages and salaries during the tax years 2000, 2001 and 2002. The director subsequently issued two requests for evidence, requesting additional evidence regarding the petitioner's business operations and employees. He specifically asked the petitioner to explain why an industrial design service required the services of an interior designer, why it had paid no wages and salaries in 2001 and 2002, and why its statements regarding its business operations on its tax forms differed from the information provided on the Form I-129. The director also requested copies of the petitioner's quarterly wage statements filed for its employees during the preceding four quarters and any 2002 tax returns filed in connection with independent contractors.

In response to the director's requests for evidence, the petitioner indicated that its business was in retail, rather than industrial, design, and also stated that the description of its business operations in its tax forms was incorrect. It asserted that its original cosmetics and accessories merchandizing business had evolved into a visual retail merchandizing operation in the 1990s and, finally, in July 2003, to a retail design business. The petitioner stated that it had failed to note these changes on its tax forms. The director found this explanation unconvincing, particularly when coupled with the petitioner's failure to explain why it had paid no wages and salaries during the years 2000-2002 or to submit the quarterly wage reports requested. Accordingly, he

concluded that the record before him raised serious doubts both as to the validity of the petitioner's design business and its need for an interior designer, and denied the petition.

On appeal, counsel responds to the concerns raised by the director and submits documentation to establish the *bona fides* of the petitioner's design business. He provides copies of letters and a contract indicating that, at the time of filing, the petitioner was in the process of assuming responsibility for completing the redesign of a Korean retail chain store. He also provides copies of statements from two individuals who indicate that they worked under the petitioner's direction on this project and a retail design firm that completed the project's interior architectural work for the petitioner. Counsel also states that the petitioner received more than \$136,000 for its design work on this project. While the AAO will accept the documentation provided by the petitioner, counsel's statement regarding the income generated by the project will be disregarded. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO notes that counsel also submits copies of design contracts signed in April 2004 with two additional stores in the same Korean retail chain and the petitioner's October 27, 2003 application for a right to transact business under the name of the retail design firm with which it was previously affiliated. However, these developments in the petitioner's design business occurred subsequent to the date of filing. Accordingly, they are not probative for the purposes of these proceedings, which focus only on whether the petitioner had a design business at the time of filing. Eligibility must be established at the time an application or petition is filed. *See* 8 C.F.R. § 103.2(b)(12). A visa petition may not be approved at a later date based on a set of facts not present at the time of filing. *See* 8 C.F.R. § 103.2(b)(12); *see also Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978); *see also Matter of Katigbak*, 14 I&N 45, 49 (Comm. 1971).

To explain why the petitioner's tax returns for 2000, 2001 and 2002 describe its business as cosmetics and accessories merchandizing, counsel, who notes he has prepared the petitioner's tax returns for the past 18 years, submits a statement. In that statement, he indicates that his focus, when preparing the petitioner's tax forms, was on reporting accurate figures on income and expenses, and that he failed to modify the computer program that included the outdated information concerning the petitioner's business activities. Counsel also notes that the petitioner failed to provide quarterly wage statements to the director for the year 2002 because it had no employees at that time. He states that the petitioner did not hire any employees until July 2003, when it shifted its business to providing retail design services, and submits the petitioner's 2003 quarterly wage and withholding reports for its single employee.

Counsel's explanation as to why the petitioner's business has continued to be characterized as a cosmetics and accessories provider on its tax forms is insufficient to overcome the concerns raised by the director regarding the nature of the petitioner's business. When there are inconsistencies in the record, the petitioner must resolve such inconsistencies through the submission of competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Counsel's statement does not constitute such evidence.

However, while the director's concerns regarding the nature of the petitioner's business prior to 2003 remain unresolved, the AAO does find the petitioner to have established that, in August 2003, it assumed

responsibility for the redesign of a Korean retail store and the design staff already working on the project. The contract submitted by counsel on appeal, which outlines the design tasks to be performed, and the corporate letters transferring contract responsibilities to the petitioner are sufficient to establish that at the time of filing, the petitioner was engaged in the business of retail design and was required to provide interior design services.

The petition may not be approved, however, as the director has not determined whether the petitioner will employ the beneficiary in a specialty occupation, and, if so, whether the beneficiary is qualified to perform such services.

Therefore, for the reasons related in the preceding discussion, the director's decision will be withdrawn and the case remanded to the director for his decision as to whether the proffered position is a specialty occupation and the beneficiary qualified to perform the duties of a specialty occupation. The director shall then issue a new decision based on the evidence of record, as it relates to the statutory and regulatory requirements for H-1B nonimmigrant visa eligibility.

In remanding the petition, the AAO notes that the petitioner is located in California, a state that does not require interior designers to be licensed or registered. Those individuals who wish to certify themselves as interior designers with the California Council for Interior Design Certification must have six to eight years of combined education and employment experience, and have successfully completed certain accrediting examinations. Accordingly, although the *Handbook* reports that design occupations usually impose a degree requirement, it appears that an individual in California may perform the duties of an interior designer without first acquiring a baccalaureate degree or its equivalent in the specialty.

With regard to the beneficiary's qualifications to perform the duties of the proffered position, the AAO's review of the record finds the beneficiary's education and employment experience to have been in the field of industrial, rather than interior, design. Further, the record contains no evidence that he has sought or received certification as an interior designer, nor that he has completed any of the interior design accrediting examinations through which the interior design profession recognizes competency.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision of February 5, 2004 is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, shall be certified to the AAO for review.