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U.S. Citizenship
and Immigration
Services

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FILE: LIN 02 115 53487 Office: NEBRASKA SERVICE CENTER

Date: AUG 16 2005

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:

SELF-REPRESENTED

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 service center director denied the nonimmigrant visa petition and certified his decision to the Administrative Appeals Office (AAO) for review. The appeal will be sustained. The petition will be approved.

The petitioner is a medical clinic that seeks to employ the beneficiary as a physician. The petitioner 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 did not establish that an employer-employee relationship existed. The director determined that the petition and labor condition application (LCA) are invalid since they were not signed by the recognized employer of the beneficiary.

In response to the director's notice of certification, petitioner's former counsel submits a brief stating that Citizenship and Immigration Services (CIS) has "ignored settled precedent and disregarded legal authority regarding corporate law." Counsel also states that the director's negative finding that the beneficiary is the only director of the corporation and the only individual with voting rights is actually a result of the state law which requires that only an individual or group of individuals licensed to render the same or allied professional services may organize and become shareholders of a professional corporation. Counsel asserts that a previous AAO decision and case law support the petitioner's claim that its sole shareholder may be the same individual as the beneficiary.

The regulations define a U.S. employer at 8 C.F.R. § 214.2(h)(4)(ii) as 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.

The petitioner is a corporation incorporated under the laws of the State of Idaho and has engaged the beneficiary to work in his individual capacity as a psychiatrist. The beneficiary established the corporation, and is the sole member of the board of directors. The beneficiary owns 100 percent of the stock of the corporation and is its president and treasurer.

The director found that the relationship between the petitioner and the beneficiary is less than arms length, and that the petitioner does not meet the definition of a U.S. employer.

In response to the director's request for evidence, counsel submitted an employment agreement between the petitioner and the beneficiary, which includes grounds for terminating the beneficiary. Counsel stated that a previous AAO decision supported the premise that a petitioner's sole owner can be the same person as the sole beneficiary. *Matter of X*, File No. SRC 98 101 50785, August 1999, reported in 5:2 immigration Bulletin, 89-90 (Matthew Bender Jan. 15, 2000). In that case, the AAO cited *Matter of Aphrodite*, 17 I&N Dec. 530 (Comm'r 1980), to support its position. The AAO finds in this case that the petitioner is a separate legal entity from the beneficiary, and the beneficiary would not be self-employed.

Established tenets of corporate law, as well as cases such as *Matter of Aphrodite*, state that a corporation has a separate legal identity from its owner. As such, a corporation, even if it is owned and operated by a single person, may hire that same individual and the parties will be in an employer-employee relationship, as is the case in the instant matter.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; (5) the director's certification to the AAO for review; and (6) the petitioner's response to the director's certification. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a psychiatrist. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's February 14, 2002 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: providing assessment, evaluation and treatment of clinic clients, inpatients, and

outpatient clients at Intermountain Hospital. The petitioner indicated that a qualified candidate for the job would possess a medical degree and must have completed training in psychiatry.

The director did not address whether the proffered position was a specialty occupation.

Upon review of the record, the petitioner has established one of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook) Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The *Handbook* states that a medical degree is required to perform the duties of a psychiatrist; therefore, the position is a specialty occupation.

The AAO now turns to the beneficiary's qualifications. 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 director did not address the issue of whether the beneficiary was qualified for the proffered position.

The beneficiary has a bachelor's and a medical degree, as well as certification of specialization in psychiatry from universities in his home country. He also possesses a license to practice medicine in his home country, and in the State of Idaho. The beneficiary meets the terms of 8 C.F.R. § 214.2(h)(4)(iii)(C)(3) and is qualified to perform the duties of the specialty occupation.

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 sustained that burden.

ORDER: The director's April 4, 2002 decision is withdrawn. The petition is approved.