



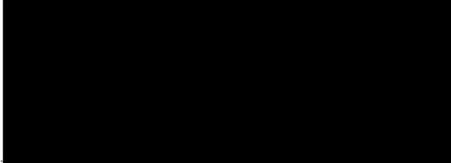
DA

U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: WAC-00-271-50140 Office: California Service Center

Date: APR 30 2002

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)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is engaged in the research, design, sales, and marketing of high technology products and services. It has no employees and no gross annual income. It seeks to employ the beneficiary as a financial strategist and analyst for a period of three years. The director determined the petitioner had not established that it will be the beneficiary's employer.

On appeal, counsel submits a brief.

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 in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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 section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have 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.

8 C.F.R. 214.2(h)(4)(ii) defines a United States employer to mean:

. . . 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.

The director denied the petition because it was not clear that the petitioner would be the beneficiary's employer. The director also found the consulting agreement submitted by the petitioner does not establish that the contractor in such agreement is authorized to act in the capacity of agent for the foreign corporation. The director further found that the beneficiary wrote the business plan, signed and submitted the Statement and Designation by a Foreign Corporation with the State of California in June of 2000 and established the office's bank accounts. On appeal, counsel states, in part, that the petitioner was officially and lawfully registered as a U.S. branch office of a Korean corporation under the name of SmartDisplay Co. Ltd. Counsel also states that the U.S. branch office was formally incorporated in California under the name of OptraWave, Inc. (a wholly owned subsidiary of the parent company), and that [REDACTED] served as the incorporator and was later hired as the C.E.O. Counsel further states that the beneficiary, an employee of the parent company, was hand-picked by the board of the parent company to help establish the new U.S. entity, and he will report to the C.E.O.

The record contains the following:

- \* Articles of Incorporation of OptraWave, Inc. endorsed-filed in the office of the Secretary of State of the State of California on November 27, 2000;
- \* A bank Advice of Credit/Incoming Wire indicating that \$849,985 had been credited to OptraWave's checking account on January 22, 2001;
- \* A State of California's Statement by Domestic Stock Corporation for OptraWave, Inc., signed by Young Kang as the "CEO/President" on December 26, 2000;
- \* Statement and Designation by Foreign Corporation for SmartDisplay Co., Ltd., endorsed-filed in the Office of the Secretary of State of the State of California on June 20, 2000;
- \* A bank Advice of Credit/Incoming Wire indicating that \$204,985 had been credited to SmartDisplay Co., Ltd.'s checking account on August 11, 2000;
- \* Certificate of Qualification executed on June 21, 2000, by the Secretary of State of the State of California, indicating, in part, that SmartDisplay Co., Ltd., is qualified to transact intrastate business in the State of California;

\* Lease agreement dated March 27, 2000, between i.Park Venture Campus and Smart Display Co., Ltd., to commence on May 20, 2000, and end on May 19, 2001;

\* Consulting Agreement dated June 1, 2000, between SmartDisplay Co., Ltd. and Young Kang ("Contractor"), appointing the contractor as a consultant in establishing U.S. operation and purchasing/marketing the business products of SmartDisplay;

\* Certificate of Employment indicating that the beneficiary has been employed by SmartDisplay Co., Ltd., since April 4, 2000, to the present.

Counsel's statement that the beneficiary will report directly to C.E.O. Young Kang is noted. Counsel indicates that the petitioner's Statement by Domestic Stock Corporation, signed by [REDACTED] on December 26, 2000, is proof of [REDACTED] C.E.O. status. The record, however, contains a letter dated February 23, 2001, from the petitioner's former counsel indicating that the president of the foreign company will have control over the beneficiary's work. The petitioner's former counsel further refers to [REDACTED] a management consultant only. It is also noted that the consulting agreement listed above indicates that [REDACTED] is a management consultant. As such, the information provided by the petitioner's former counsel conflicts with the information provided by the petitioner's current counsel. Likewise, the information reflected on the petitioner's Statement by Domestic Stock Corporation conflicts with the information reflected in the petitioner's consulting agreement. As the employer-employee relationship is not clear, the petitioner has not persuasively demonstrated that it meets the definition of *employer* pursuant to 8 C.F.R. 214.2(h)(4)(ii). In view of the foregoing, the petitioner has not overcome the objection of the director.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on 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. (Comm. 1988).

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. Accordingly, the decision of the director will not be disturbed.

**ORDER:** The appeal is dismissed.