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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: SRC-02-017-57385 Office: Texas Service Center Date: DEC 27 2002

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)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision 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.

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 that 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 that 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, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The decision of the director will be withdrawn and the petition will be remanded for further consideration and action.

The petitioner is a commercial real estate development company with one employee. Its total assets are valued at \$2,539,397. The petitioner seeks to employ the beneficiary as its vice president for a period of three years. The director noted that the sole employee of the petitioning company appeared to be the beneficiary and denied the petition based on a conclusion that the petitioner was not a "United States employer" at the time of filing of the petition.

On appeal, counsel asserts that the Service erroneously denied the petition. Counsel states that, under well-established law, the beneficiary of an H-1B petition can be the sole employee of the petitioner, and that an employer-employee relationship exists in such situations. In support of his assertion, counsel cites Matter of Allen Gee, Inc. 17 I&N 296 (Act. Reg. Comm. 1979); Matter of Aphrodite Investments Limited, 17 I&N 530 (Comm. 1980); and several unpublished decisions of the Administrative Appeals Office (AAO).

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 the term "United States employer" as follows:

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

The director's finding that the petitioner did not meet the definition of "United States employer" at the time of filing of the petition is erroneous. A corporation is a separate and distinct legal entity from its owners or stockholders, able to employ them and petition on their behalf. Matter of M, 8 I&N Dec. 24 (B.I.A. 1958; A.G. 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). In this case, the petitioner, Brickell Village Land Company, has an Internal Revenue Service Tax identification number and has engaged the beneficiary to work in the United States. There is no evidence in the record to indicate that the petitioner does not have the right to hire, pay, fire, supervise, or otherwise control the work of the beneficiary. As such, it is concluded that the petitioner may qualify as the United States employer of the beneficiary.

The record shows that the Service previously approved an H-1B petition filed on behalf of the beneficiary by a different petitioner, Grand City Development Corporation, on March 29, 2001. The approval of that petition was valid for the period from March 27, 2001 to December 30, 2003. In response to a Service request for additional evidence in this proceeding, counsel stated in a letter dated October 15, 2001:

[The beneficiary] is currently in H-1B status under her approved H-1B employer, Grand City Development Corporation, where she has been employed as Vice President in charge of Operations and Strategic Planning since March of this year (the year 2001).

Grand City is dissolving. With her renewed availability, the Petitioner is seeking [the beneficiary's] services (also as Vice-President) based upon her talent and seasoned experience in the field. . . .

Upon further review of the evidence contained in the record of proceedings, the AAO notes the following inconsistencies: First, although the beneficiary had purportedly been working for Grand City Development Corporation since March 27, 2001, the petitioner's U.S. Corporate Income Tax Return for the year 2000 was signed by the beneficiary, who is identified as "President" of Brickell Village Land Company, on March 14, 2001. Additionally, the business license renewal form for [REDACTED] which acknowledges payments received as of September 17, 2001, indicates that Brickell has one employee and identifies the beneficiary as "President" of that company. Furthermore, a real estate sales contract between the petitioner [REDACTED] as seller and "1000 Brickell, Ltd." as purchaser, was signed by the beneficiary as "President" of Brickell on August 30, 2001.

As early as March of 2001, when the beneficiary was supposedly working for the previous petitioner, Grand City Development Corporation, she was apparently actually working for the current petitioner, [REDACTED]. She signed various documents identifying her as "President" of Brickell in August and September of 2001. Curiously, the petitioner has also submitted two pay statements issued by Grand City Development Corporation, the previous petitioner, for salary purportedly paid to the beneficiary as "Vice President" of that company in August and September of 2001. If Grand City Development Corporation went out of business and the beneficiary accepted employment with Brickell during the approval period of the previous petition, the new employer, Brickell, should have filed a new H-1B petition on behalf of the beneficiary, accompanied by a new Form ETA 9035 Labor Condition Application, when the beneficiary began employment with that company - in this case, apparently, as early as March of 2001.

Additionally, although several documents contained in the record of proceeding identify the beneficiary as the "President" of Brickell, the petitioner states in the current petition that it wishes to employ the beneficiary as its "Vice President." It is not clear from examination of the record of proceeding when the beneficiary has worked for either Grand City Development Corporation or Brickell Village Land Company, or what duties she has performed for either employer. 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). In view of the inconsistencies contained in this record of proceeding, it is not possible to determine what the actual duties

of the proffered position entail or whether the position qualifies as a specialty occupation.

Accordingly, the matter will be remanded to the director to make such a determination and to review all relevant issues. The director will provide the petitioner with an opportunity to provide an explanation for the inconsistencies noted above and to provide additional documentation to corroborate such explanation within a reasonable time. Upon receipt of all evidence and representations, the director will make a determination as to whether the proffered position qualifies as a specialty occupation and enter a new decision. The AAO also recommends that the director review the previous petition for consideration of possible revocation of the approval of that petition pursuant to 8 C.F.R. 214.2(h)(11)(iii). As noted at 8 C.F.R. 214.2(h)(11)(i)(B), the director may revoke a petition at any time, even after the expiration of the petition.

ORDER: The decision of the director is withdrawn. The matter is remanded to her for further action and consideration consistent with the above discussion and entry of a new decision which is to be certified to the AAO for review.