



U.S. Citizenship
and Immigration
Services



FILE: WAC 03 225 50376 Office: CALIFORNIA SERVICE CENTER Date: JUN 10 2004

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

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invasion of personal privacy

DISCUSSION: The director 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 company providing after school and summer time educational programs directed at the Chinese community. It seeks to extend its authorization to employ the beneficiary as an art teacher. 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 he determined that the beneficiary is the sole owner of the petitioning entity, and as such, the petitioner had not established that it meets the definition of a U.S. employer, as required in the H-1B regulations. The director also denied the application for extension of stay filed on behalf of the beneficiary. On appeal, counsel asserts that the beneficiary is not the sole owner of the petitioning entity, that the petitioning entity is a U.S. employer, and further asserts that the beneficiary is eligible for an extension of stay. Counsel submits additional documentation.

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.

8 C.F.R. § 214.2(h)(4)(ii) states, in part, that, a 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 record of proceeding before the AAO contains: (1) the initial Form I-129 and supporting documentation; (2) the director's approval of the initial H-1B petition; (3) the director's motion to reopen/reconsider and its notice of intent to deny the initial H-1B petition, dated November 7, 2003; (4) the director's denial of the initial petition dated February 10, 2004; (5) the director's notice of intent to deny the instant I-129 extension petition, dated November 10, 2003; (6) counsel's response to the notice of intent to deny the instant I-129 extension petition, dated December 8, 2003; (7) the director's denial of the instant I-129 extension petition, dated February 10, 2004; and (8) Form I-290B and supporting documentation appealing the denial of the instant I-129 extension petition. The AAO reviewed the record in its entirety before issuing its decision.

First, it should be noted that the director found the beneficiary ineligible for an extension of stay as an H-1B nonimmigrant. Counsel also responded to issues of inadmissibility and the beneficiary's eligibility for an extension of stay on appeal. Pursuant to 8 C.F.R. § 214.1(c)(5), however, there is no appeal from the denial of an application for extension of stay filed on Form I-129 or I-539. Therefore the AAO does not have jurisdiction to review the issues relating to the denial of the application for extension of stay. Thus, this decision will only address the issues the director's finding that there is insufficient evidence to determine whether the petitioning entity and the beneficiary share an employer-employee relationship.

In his notice of intent to deny dated November 10, 2003, the director examined tax returns provided by the petitioning entity, including the year 2002 Internal Revenue Services (IRS) Form 1120, U.S. Corporation Income Tax Return, and the year 2002 Form 100, California Corporation Franchise or Income Tax Return. These documents both indicate that the beneficiary owns 100 percent of the voting stock of the petitioner. The director referenced a section from 53 *Am. Jur.* 2d, Master and Servant, S.2, that examines four elements to consider in determining the relationship between masters and servants, or, as relevant to this proceeding, employers and employees. *See Matter of Pozzoli*, 14 I&N Dec. 569 (Reg. Comm. 1974). In his determination, the director noted that the beneficiary owns 100 percent of the petitioner's voting stock and found that the petitioner had not established that an employer-employee relationship exists between the petitioning entity and the beneficiary.

On appeal, counsel states that the beneficiary, in fact, only possesses 20 percent of the petitioning entity's voting stock. Counsel further states that the petitioner's accountant mistakenly entered the information contained on the IRS 2002 tax form. Finally, counsel submits an amended Form 1120 for the tax year 2001 which shows that the beneficiary owned 20 percent of the petitioner, that an individual named Jing Tang Liu owned 40 percent of the petitioner, and that a third individual identified as Daw Shing Yang owned the remaining 30 percent of the petitioner's stock.

Upon a review of the documentation submitted on appeal, the exact nature of the employer-employee relationship between the beneficiary and the petitioner remains unclear. While a corporation is a separate and distinct legal entity from its owners or stockholders, as discussed in *Matter of Aphrodite Investments, Ltd.*, 17

I&N Dec. 530 (Comm. 1980), the petitioner must nevertheless establish that it has the ability to hire, pay, fire, supervise, or otherwise control the work of the employee. 8 C.F.R. § 214.2(h)(4)(ii). In this case, counsel merely addresses the director's finding that the petitioner has not demonstrated that it has this ability by stating that the beneficiary is not actually the sole owner of the petitioning entity, and submitting amended tax returns in support of this claim. Counsel's documentation is unpersuasive. For example, the amended IRS tax form submitted by counsel allegedly establishes that the beneficiary is not the only shareholder in the petitioner; however, the document submitted by counsel is for the previous tax year of 2001 and not for the tax year of 2002 originally referenced by counsel. Based on the documentation submitted, the beneficiary initially owned twenty percent of the petitioner's stock in the tax year 2001, and then she owned 100 percent of the stock shares in the tax year 2002. The beneficiary appears to have increased her ownership stake in the petitioner over these two tax years. Thus, contrary to counsel's assertions, this tax return does not establish that the beneficiary currently owns less than 100 percent of the petitioning entity's stock.

The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has submitted evidentiary documentation that further confuses the record, rather than clarifying the record. Furthermore, evidence that the petitioner creates after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice. Newly-created evidence may be given some evidentiary weight in these proceedings, but, by itself, it will not conclusively establish the truth of the matter asserted. *Cf. Matter of Ma*, 20 I&N Dec. 394 (BIA 1991). In this case, the petitioner has failed to establish that the petitioning entity is a United States employer within the meaning of 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the record is not clear as to whether the proffered position is a specialty occupation and whether the beneficiary is qualified to perform the duties. The position is a part-time teaching position for basic drawing skills for children five to seven years of age in a private company that may or may not be accredited by the State of California. As such, it does not appear analogous to teaching positions within the public or private school system in the State of California. As clearly outlined in the Department of Labor's (*DOL*) *Occupational Outlook Handbook (Handbook)*, all 50 states and the District of Columbia require public school teachers to be licensed, although licensure is not required for teachers in private schools. The Handbook further indicates that requirements for regular licenses to teach kindergarten through grade 12 vary by state. However, all states require general education teachers to have a bachelor's degree and to have completed an approved teacher-training program with a prescribed number of subject and education credits, as well as supervised practice teaching. The record is devoid of any information that the petitioner requires teacher training or specific education courses for entry into the proffered position. Thus, the record is not clear that the proffered position would be viewed as a specialty occupation. In addition, the record is not clear that the beneficiary's foreign studies in oil painting or work experiences in China are sufficient qualifications for her to perform the duties of a specialty occupation. For these additional reasons, the petition may not be approved.

Further, the petitioner has not established that there is actual employment for the beneficiary. Documentation submitted by the petitioner reveals the following:

- Line 3 of the first page of the amended Form 1120 tax return, and line 12 of the amended Form 100, California Corporation Franchise or Income Tax Return, both for the year ending on June 30, 2002, show that no salaries and wages were paid to any employees. It should be noted that the petitioner claims the beneficiary has been its employee since March 2001. Although Line 12 of the Form 1120 for this year does indicate that \$25,058 was paid in the form of officer compensation, if any of this was paid to the beneficiary, it was solely in her capacity as an officer of the petitioning entity rather than an employee. This would further undermine the claim that she is an employee of the petitioning entity within the meaning of 8 C.F.R. § 214.2(h)(4)(ii).
- Line 13 of the Form 1120 for the year ending on June 30, 2003, indicates that \$10,728 was paid in the form of salaries and wage. Forms 941, Employer's Quarterly Federal Tax Return, for the quarters ending on March 31, 2003 and June 30, 2003, show that the petitioner paid \$20,680 in wages to its employees, nearly double the amount stated on the Form 1120 for half of that stated period of employment. Based on this conflicting information, it is unclear how many employees the petitioner actually has.

The initial petition was approved based on the petitioner's request for authorization to employ the beneficiary on a full-time basis. The instant extension petition is also a request for authorization to continue to employ the beneficiary on a full-time basis. An H-1B nonimmigrant worker must be coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act. However, based on the above information, it does not appear that the beneficiary has been or will be a full-time employee of the petitioning entity. In fact, based on the discrepancies in the documents provided by the petitioner, it is unclear how many employees the petitioner has, if any, and whether the beneficiary has been and will be employed by the petitioner. For this additional reason, the petition may not be approved.

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.