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**U.S. Citizenship
and Immigration
Services**

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FILE: WAC 04 259 50388 Office: CALIFORNIA SERVICE CENTER Date: MAY 24 2006

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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the 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 The director's decision will be withdrawn. The petition will be remanded for the entry of a new decision.

The petitioner is a corporation that operates retail businesses, chain coffee shops management, real estate investments and education programs that seeks to employ the beneficiary as a training and development specialist. 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 the evidence does not establish that the petitioner qualifies as a United States employer or agent. On appeal, the petitioner submits a brief.

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; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(1) of 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 petitioner is seeking the beneficiary's services as a training and development specialist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company

support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail planning, designing and carrying out policies on the training programs of Berkley English Language Program (BELP), including intensive English program, university placement program, and teacher training program (English teacher training from K-12 and teacher training for younger children – Montessori program); evaluating the programs' needs to develop professional training plans for the new and existing students; implementing the training programs for BELP, including course design, speaker selection, and result analysis & evaluation. The petitioner stated that the proffered position requires at least a B.A. in education or a closely related major.

The director issued a request for evidence including evidence to substantiate the information provided on the Form I-129. The director requested copies of the Form DE-6, quarterly wage reports, the petitioner's organizational chart, including all the divisions of the company with any identification of the proffered position in the chart, federal income tax returns for the year 2003, certified by the Internal Revenue Service, and company profile. The director noted that the petitioner claimed it recently established the Berkeley English Language Program (BELP) and requested evidence to support this association. The director requested a more detailed explanation of the petitioner's business association including copies of company brochures, website or other printed work published by the petitioner.

In response, the petitioner provided copies of the Form DE-6 quarterly wage report for the third quarter of tax year 2004 indicating approximately 220 employees. The petitioner provided a list of its businesses and its organizational chart. The petitioner provided an organization chart for BELP including the proffered position. The petitioner provided a copy of its federal income tax return Form 1120 for tax year 2003. The petitioner provided a brochure and other information describing the services of BELP.

The director found that the evidence did not clearly explain the relationship between the petitioner and the entity for which the beneficiary would actually be working, BELP. The director found it unclear why BELP did not directly petitioner for the beneficiary if BELP is to be the actual employer and control the hiring, firing and supervision of the beneficiary. The director found that the petitioner does not qualify as an employer in the instant case.

The AAO first turns to the director's conclusion that the petitioner could not be considered a United States employer or an agent under U.S. immigration law because the director found the relationship unclear between Espresso Roma Corp. and Berkley English Language Institute (BELP).

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *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.

On appeal, the president of the petitioner states that he owns 100% of the petitioner¹. He explains that the petitioner operates many businesses including coffee shops, restaurants, real estate and an English language program (BELP). The petitioner explains that it entered into a contract with Saint Mary's college to house and provide English training for students. The petitioner notes that it is a California corporation established on June 20, 1980 and was formed to engage in any legal business not limited to food or restaurants. The petitioner included a phone list of all businesses that are currently owned by the petitioner including cafes, a candy shop, hotel, apartment buildings, dormitories and Berkeley ELP. The petitioner notes that the real estate is either owned in the name of the petitioner, Espresso Roma Corp, or its president, personally. The petitioner explains that the payroll for each business is run through a payroll service and all of the payroll checks have the name Espresso Roma Corp. on them because that is the entity that owns all of the different businesses. The petitioner explains that each payroll check has a division code on the pay stubs and they are tracked as separate divisions within the petitioner. The petitioner notes that BELP is located at 2425 Prospect Street in Berkeley and is in the same division as another Espresso Roma Corp. business, Hillside Residence. The president of the petitioner states that he and his staff are responsible for all hiring, supervision and promotion of Hillside Residence Hall and BELP employees.

The petitioner notes that it has one taxpayer ID for all of its businesses. As an explanation, the petitioner submitted the resume and cancelled payroll check of one the employees at BELP. The petitioner included the payroll register with that specific payroll check showing that it is an Espresso Roma Corp. check, Hillside Residence Division along with a bank statement showing the check as being cashed. The petitioner states that the other employees of BELP can be seen on the payroll register. The petitioner submits an internet page of fictitious business names indicating that [REDACTED] is the owner of the Berkeley English Language Program. The record reflects that [REDACTED] is the president of the petitioner.

Upon review of the record, the AAO finds that the petitioner satisfactorily explained that it is the owner of Berkley English Language Program and that the petitioner is found to be an employer pursuant to 8 C.F.R. § 214.2(h)(4)(ii).

However, the petition may still not be approved. Upon review of the record, there is insufficient evidence in the record to determine whether the petitioner has established that the proffered position is a specialty occupation and whether the beneficiary is qualified to perform the services of a specialty occupation.

The director's decision will be withdrawn and the matter remanded for entry of a new decision. The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the proffered position is a specialty occupation and whether the beneficiary is qualified to perform the duties of the specialty occupation. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's December 14, 2004 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.

¹ The 2003 federal income tax return indicates that [REDACTED] owns 50% of the petitioner.