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U.S. Citizenship
and Immigration
Services

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Dr

FILE: EAC 06 181 52952 Office: VERMONT SERVICE CENTER Date: JUN 04 2007

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:

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.

per Michael F. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, is recommending the nonimmigrant visa petition be denied. The director certified his recommendation to the Administrative Appeals Office (AAO) for review. The AAO concurs with the director's recommendation. The petition will be denied.

The petitioner is a contract management company organized in the State of Oklahoma. It seeks to place the beneficiary as a pharmacist intern in Nashville, Tennessee. Accordingly, 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).

On January 25, 2007, the director recommended the petition be denied and based his recommendation on three grounds: (1) that the petitioner did not qualify as a United States employer; (2) that the proffered position did not qualify as a specialty occupation; and (3) that the beneficiary was not qualified to perform the duties of a specialty occupation.

The record of proceeding before the AAO contains: (1) the May 25, 2006 Form I-129 and supporting documentation; (2) the director's August 17, 2006 request for further evidence (RFE); (3) the petitioner's October 30, 2006 response to the director's RFE and documentation; and, (4) the director's January 25, 2007 recommended denial decision and certification to the AAO. The AAO reviewed the record in its entirety before rendering its decision.

Preliminarily, the AAO observes that the petitioner submitted a Form G-28, Notice of Entry of Appearance as Attorney or Representative, identifying [REDACTED], of Immigration Specialties, Inc., located at the petitioner's offices in Oklahoma, as "other" on the Form G-28. The G-28 contained the notation that [REDACTED] had been named to ensure that all documentation would come directly to the petitioner, the administrative processor for the employment of the beneficiary pursuant to the nonimmigrant visa and that "Immigration Specialties is not a law firm, owners and staff are non-attorneys. We specialize in administrative document processing for routine employment and non-immigrant visas only, at the request of the foreign national and the employer." The AAO finds the petitioner's use of the Form G-28 improper and accords it no weight. See 8 C.F.R. §§ 292.1 and 292.4. The petitioner is considered self-represented.

The first issue in this matter is whether the record establishes the petitioner as a U.S. employer or agent, the entities authorized by regulation to file a Form I-129 to classify a beneficiary as an H-1B worker.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), a petitioner qualifies as a U.S. employer, if it:

- (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.

With regard to U.S. agents, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) establishes that:

A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as it[s] agent. A petition filed by a United States agent is subject to the following conditions;

- (1) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.
- (2) A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed . . .

On this issue, the record contains: (1) the petitioner's undated letter appended to the petition indicating that [REDACTED] is offering temporary employment to the beneficiary; (2) the March 20, 2006 offer letter and employment agreement between the beneficiary and [REDACTED] an affiliate of [REDACTED] indicating that [REDACTED] is in a position to contract the beneficiary to its clients throughout the United States, that the beneficiary would be responsible for the processing fees associated with the H-1B visa, and that [REDACTED] as the beneficiary's employer would withhold state and federal taxes and pay federal, state, and Medicare taxes; (3) a revised offer letter and employment agreement completed on October 10, 2006, between [REDACTED] and the beneficiary deleting [REDACTED] indication that it was in a position to contract the beneficiary to clients throughout the United States and that the beneficiary would be responsible for the H-1B processing fees; (4) the petitioner's October 26, 2006 response to the director's RFE; and (5) an August 12, 2003 agreement between [REDACTED] and [REDACTED] indicating that [REDACTED] will provide the services of a licensed professional, be responsible for all payroll, benefits, and applicable liability insurance for the professional, provide and collect time sheets for the professional, and submit bi-weekly invoices based on pay periods and that [REDACTED] will provide general or clinical supervision necessary within the standards applicable to the professional.

The petitioner's October 26, 2006 response to the director's RFE indicated that it was not an agent, but was providing healthcare workers to its clients. The petitioner stated: "[the beneficiary] will work for [REDACTED] and Associates at the [REDACTED] location listed in the I-129 application, and will work under a fully licensed pharmacist, [REDACTED] J." The petitioner provided its certificate of incorporation in the State of Oklahoma in

February 1994 and an amended certificate of incorporation for [REDACTED] changing its name to [REDACTED] in July 2003. The petitioner also provided copies of [REDACTED]'s 2005 Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation. The IRS Form 1120S, Schedules K-1 identify five individual shareholders for [REDACTED] and lists its Tax Identification Number, a Tax Identification Number different than the petitioner's reported Tax Identification Number. The petitioner also submits several of its unaudited accountant's compilation reports for February 6, 2006, July 5, 2006, and October 25, 2006.

In an October 27, 2006 letter attached to the petitioner's response, the petitioner's director of finance indicates that [REDACTED] is our trade name," and that "[w]e changed our name from [REDACTED] to [REDACTED] in 2003, but have kept [REDACTED] on 'front' of many things, including contracts because many of our clients still know us as [REDACTED]. The finance director continues by stating that [REDACTED] is the parent company of [REDACTED] and [REDACTED] is a trade name within [REDACTED]. The petitioner also provides a corporate organizational chart showing [REDACTED] as the parent company of [REDACTED] and [REDACTED]. The organizational chart shows [REDACTED] as over [REDACTED] and [REDACTED] Staffing and [REDACTED] as over Immigration Specialties and ImmQuest USA.

In the director's January 25, 2007 recommendation, the director determined, as The Kroger Company would be responsible for the general or clinical supervision of the beneficiary's work, the petitioner had failed to meet the regulatory definition of a United States employer at 8 C.F.R. § 214.2(h)(4)(ii).

The AAO concurs with the director's determination that the petitioner has failed to establish that it is a United States employer as defined in the regulation. However, the AAO's determination is based on the lack of substantiating information in the record regarding the petitioner and its claimed affiliates and the lack of information regarding the pharmacy intern's supervisor.

The record in this matter is unclear as to what entity will hire, pay, fire, supervise, or otherwise control the work of the beneficiary. The petitioner states that it will hire, pay, fire, supervise, and control the work of the beneficiary. However, the agreement setting forth the responsibilities of the beneficiary's supervision is between [REDACTED] and [REDACTED]. The AAO finds that the record does not substantiate the claimed relationship between the petitioner and [REDACTED] doing business as [REDACTED]. Although the petitioner's director of finance claims that [REDACTED] is essentially the business name of [REDACTED], the petitioner does not provide documentation establishing that it is the parent company of [REDACTED] or [REDACTED] rather the record shows that five individuals own [REDACTED]. The record does not include documentation demonstrating that [REDACTED] c. and [REDACTED] share the same corporate identity. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm.

¹ The AAO observes that the record contains an amended certificate of incorporation for [REDACTED] changing its name to [REDACTED], but the record does not contain similar documentation regarding [REDACTED], or any other documentation showing [REDACTED] has been registered to do business as [REDACTED].

1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Thus, the petitioner has not established that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.

Moreover, the State of Tennessee requires that a pharmacist supervise the individual in the position of a pharmacy intern. The petitioner indicates that [REDACTED] licensed pharmacist in Tennessee will supervise the beneficiary. As the director observed, the record shows that [REDACTED] employed [REDACTED] in 2005. However, the record does not reveal [REDACTED] employer when the petition was filed and does not establish that the petitioner, a distinct and separate entity from [REDACTED], ever employed [REDACTED]. Thus, the petitioner cannot establish that it employs the necessary personnel to supervise the beneficiary as a pharmacy intern. This issue is further confused by the agreement between [REDACTED] and The [REDACTED] [REDACTED] at references T [REDACTED] responsibility for the general or clinical supervision of the beneficiary's work. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In this matter, the AAO does not find that the petitioner is an agent but is also unable to conclude that the petitioner is a United States employer based on the information in the current record. The record does not contain documentary evidence establishing that the petitioner is the same entity as [REDACTED] or [REDACTED] or that it employs the required personnel to supervise a pharmacy intern in the State of Tennessee. The record is deficient in establishing that the petitioner will hire, pay, fire, supervise, or otherwise control the work of the beneficiary. Going on record without supporting documentation is not sufficient to meet the burden of proof in this proceeding. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The AAO determines that the record lacks sufficient evidence to establish the petitioner as the beneficiary's United States employer.

The second issue in this matter is whether the petitioner has established that the proffered position of pharmacy intern is a specialty occupation.

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)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the

attainment of a bachelor's degree or higher in a 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The Rules of the Tennessee Board of Pharmacy at Chapter 1140-1-.04 requires:

1. An applicant for an initial pharmacist license by examination must show, on affidavit forms prescribed by the board, that the applicant has acquired a minimum of one thousand five hundred (1,500) hours of pharmacy internship (practical pharmacy experience) under the instruction of a pharmacist in good standing, subject to all of the following conditions.
 - a. The one thousand five hundred (1,500) hours must be acquired after enrollment in a recognized college or school of pharmacy; one thousand one hundred (1,100) of these hours may be acquired in pharmacy programs or demonstration projects structured by the college or school of pharmacy.
 - b. Pharmacy internship may be acquired in another state, provided that the preceptor's [supervisory pharmacist] qualifications are certified by the appropriate authorities of such state.
 - c. Four hundred (400) of these hours may be acquired in non-traditional pharmacy internship programs which have received prior approval of the board.
 - d. Foreign pharmacy graduates shall complete five hundred (500) hours of pharmacy internship in Tennessee within a period of six (6) consecutive months.

The director noted that in the State of Tennessee, a pharmacy intern could begin his/her internship while enrolled in a recognized college or school of pharmacy; thus, the director determined that a student enrolled in pharmacy

who has yet to earn a degree could perform the duties of the proffered position. The director concluded, as the duties of the proffered position were no different than those of any other pharmacy intern, the proffered position did not require the holder to possess the minimum of at least a baccalaureate degree in a related field. The director also noted that he had requested evidence regarding the petitioner's employment of other pharmacy interns with at least baccalaureate degrees and had asked that the petitioner indicate the particular discipline these individuals studied, as well as documentary evidence substantiating these employees' credentials. The director observed that the petitioner had submitted a list of its claimed employees and had noted that 16 of the 53 employees were employed as pharmacy interns, but that the petitioner had not provided evidence that any of the 16 individuals possessed the minimum of a baccalaureate or higher degree in pharmacy or a related field. The director concluded that the record did not include evidence demonstrating that the petitioner had satisfied any of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO concurs with the director's reasoning on this issue. The record does not establish that the proffered position is a specialty occupation.

The third issue in this proceeding is whether the beneficiary is qualified to perform the duties of the proffered position.

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:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C)
 - (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) 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, the 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 record before the AAO does not contain an evaluation of the beneficiary's foreign education or evidence that the beneficiary holds an unrestricted State license, registration, or certification to practice the specialty occupation. The record contains evidence of the beneficiary's foreign education but does not contain an evaluation of the foreign education. The AAO observes that the State of Tennessee does not require full state licensure to practice as a pharmacy intern.

On August 17, 2006, the director advised the petitioner that the National Association of Boards of Pharmacy had partnered with Educational Credential Evaluator's Inc. for evaluations of new applications to the Foreign Pharmacy Graduate Examination Committee² and that foreign-educated pharmacists awarded Foreign Pharmacy Graduate Examination Committee certification are considered to have partially fulfilled the eligibility requirements for licensure in those states that accept the certification. The director requested that the petitioner provide an Educational Credential Evaluator's evaluation of the beneficiary's foreign degree. In its October 26, 2006 response, the petitioner noted that the beneficiary had passing scores for the Foreign Pharmacy Graduate Equivalency Examination Score Report, Test for Spoken English, and Test of English as a Foreign Language. The petitioner indicated that the Foreign Pharmacy Graduate Examination Committee and the National Association of Boards of Pharmacy had evaluated the beneficiary's credentials and that an evaluation by Educational Credential Evaluators would not be submitted.

As noted above, the record does not contain an evaluation of the beneficiary's foreign credentials from the Foreign Pharmacy Graduate Examination Equivalency Committee or the National Association of Boards of Pharmacy. The record contains the beneficiary's score report of his Foreign Pharmacy Graduate Equivalency Examination that shows the beneficiary's passing score but states that the score report is not a notice of Foreign Pharmacy Graduate Examination Committee Certification. Thus, the record in this matter is insufficient to establish that the beneficiary's foreign degree is equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. The record does not include sufficient evidence to enable the AAO to conclude that the beneficiary has 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, as well as has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. The petitioner has not provided sufficient evidence to establish that the beneficiary is qualified to perform the duties of the specialty occupation as required by 8 C.F.R.

² The Rules of the Tennessee Board of Pharmacy at Chapter 1140-1-01 define "foreign pharmacy graduate" as a person whose undergraduate pharmacy degree was conferred by any college or school of pharmacy not accredited by the ACPE [American Council on Pharmaceutical Education] but which is listed in the World Health Organization World Directory of Colleges and Schools of Pharmacy, or otherwise approved by the Foreign Pharmacy Graduate Examination Committee certification program as established by the National Association of Boards of Pharmacy.

§ 214.2(h)(4)(iii)(C). For this additional reason, the AAO concurs with the director's recommendation to deny the petition.

The AAO concurs with the director's recommendation to deny the petition based upon the reasoning discussed above. The petition will be denied. As always, 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 met that burden.

ORDER: The AAO concurs with the director's recommendation to deny the petition based upon the reasoning discussed above.