Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Room 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

D2

FILE: WAC 04 084 50363 Office: CALIFORNIA SERVICE CENTER Date: JAN 08 2007

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR), and ultimately did revoke, approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded to the director for entry of a new decision.

The petitioner is a film and television production company with four employees and estimated gross annual income of $1.5 million that seeks to employ the beneficiary as an executive producer. 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).

After finding that the petitioner's proposed position qualified for classification as a specialty occupation and that the beneficiary qualified to perform the duties of that specialty occupation, the director approved the petition on February 10, 2004. The duties of the position are contained in the record of proceeding and need not be repeated here.

On April 11, 2005, the director issued a NOIR. The cited two reasons for his intention to revoke the approval of the petition: (1) that the beneficiary was no longer employed by the petitioner; and (2) that the petitioner "violated H-1B requirements by petitioning for himself" and, as such, there was no qualifying employer-employee relationship.

In his May 12, 2005 response to the director's NOIR, counsel submitted evidence to overcome the director's concern that the beneficiary was no longer employed by the petitioner and, in his May 25, 2005 revocation, the director found that "the petitioner has satisfied this issue." However, the director found that the second issue had not been overcome, and the director revoked the approval of the petition.

Any petitioner requesting H-1B classification for a proposed petition and beneficiary must first meet the threshold requirement that it meets the regulatory definition of an "employer." The term "employer" is defined at 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.

Whether the petitioner satisfies subsections (*1*) and (*3*) is not at issue here. The issue before the AAO on appeal is whether the petitioner satisfies subsection (*2*). In his NOIR, the director acknowledged that being the sole owner of a corporation does not preclude the filing of an H-1B petition. However, the director then stated that because the beneficiary is the sole owner of the corporation, there could be no employer-employee relationship.

In his response to the director's NOIR, counsel cited *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980), and argued that while the owner of a petitioning entity may be barred from obtaining a labor certification, no such bar to obtaining H-1B status exists. That decision is a precedent decision within the meaning of 8 C.F.R. § 103.3(c) (Service precedent decisions) and, as such, must be followed by the AAO. Counsel also cited to an unpublished AAO decision.

In his revocation, the director found counsel's contentions unconvincing. The director stated that that petitioner had "violated H-1B requirements by petitioning for himself." The director acknowledged *Matter of Aphrodite Investments Limited* and stated that

> [I]f the beneficiary were the sole owner of the corporation, that fact would not preclude the petitioner from filing an H-1B petition on behalf of the beneficiary.

The director then stated the following:

> It appears that although the petitioner is a corporation, the beneficiary is the sole owner of the firm. Therefore, there can be no employer-employee relationship since the beneficiary, as owner, is not hired, paid, fired, supervised, or otherwise controlled by any other employee.

On appeal, counsel submits the Form I-290B and supporting evidence.

The AAO finds that the petitioner has overcome the concerns of the director regarding whether an employer-employee relationship with respect to employees exists, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee.

At page 531, *Matter of Aphrodite Investments Limited* unequivocally states the following:

> In *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958), precedent was established which held that the sole stockholder of a corporation was able to be employed by that corporation as the corporation has a separate legal entity from its owners or even its sole owner. While that case concerned a visa petition for preference classification, I find conclusions are equally valid in other areas of concern where an employer/employee relationship needs to be examined by the Service.

The AAO will not overturn or disregard clear and established precedent. Accordingly, it has concluded that the petitioner has overcome the director's concern regarding a bona fide employer-employee relationship.

However, the petition may not be approved at this time, as the California Secretary of State has once again suspended the petitioner.[1] As the petitioner has been suspended as a corporate entity, the AAO finds that the petitioner has not established that it will employ the beneficiary in a specialty occupation.

As the petitioner's most recent suspension occurred subsequent to the director's decision, the director did not address this issue. Accordingly, the director's decision will be withdrawn and the matter remanded

[1] *See* http://kepler.ss.ca.gov/corpdata/ShowAllList?QueryCorpNumber=C1789213&printer=yes (accessed December 1, 2006).

for the entry of a new decision. The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the petitioner will employ the beneficiary in a specialty occupation through the issuance of a new NOIR. 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 rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's May 25, 2005 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.