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



U.S. Citizenship  
and Immigration  
Services

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**PUBLIC COPY**

[REDACTED]

FILE:

[REDACTED]

Office: MIAMI, FL

Date:

JUL 06 2006

IN RE:

[REDACTED]

APPLICATION:

Application for Permanent Residence Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

ON BEHALF OF APPLICANT:

[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.

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

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the District Director, Miami, FL. The matter is now before the Administrative Appeals Office (AAO) on certification. The district director's decision will be affirmed.

The record reflects that the applicant is a native and citizen of Argentina who was found to be ineligible to adjust her status to lawful permanent resident status pursuant to section 245 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255, based on a finding of inadmissibility pursuant to section 212(a)(4) of the Act, 8 U.S.C. § 1182(a)(4).

The district director concluded that the applicant's spouse is required to file an affidavit of support for the applicant as he owns more than five percent of the petitioning company, however, because he is neither a U.S. citizen or lawful permanent resident, he does not qualify as a sponsor and cannot seek a joint sponsor. *Decision of the District Director*, at 4, dated May 12, 2005.

In response to the notice of certification, counsel asserts that the district director's interpretation of the relevant regulation was invalid and CIS acted ultra vires in promulgating the relevant regulation. *Attorney's Brief*, at 2, dated April 5, 2006.

The record includes, but is not limited to, the applicant's labor certification, employment-based immigrant petition and adjustment of status application. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that Unicenter, Inc. aka Unicenter Corp. (Unicenter) was incorporated in the state of Florida on May 8, 1997 and the issuance of 7,500 shares of common stock was authorized. On November 21, 1997, Unicenter issued 51 shares of stock to the applicant's spouse and 49 shares to another owner. There is no indication that any other shares were issued since then.<sup>1</sup> Unicenter filed ETA Form 750, Application for Alien Employment Certification, on October 4, 1999 and it was certified by the Department of Labor on March 27, 2001. On May 21, 2001, the applicant married her current spouse. On September 14, 2001, Unicenter filed Form I-140, Immigrant Petition for Alien Worker, on behalf of the applicant. The I-140 petition was approved on February 27, 2002. On October 8, 2002, the applicant filed Form I-485, Application to Register Permanent Resident of Adjust Status, and her spouse filed a derivative I-485 application.

Section 212(a)(4) of the Act states, in pertinent part:

(D) Certain employment-based immigrants. -Any alien who seeks admission or adjustment of status under a visa number issued under section 203(b) by virtue of a classification petition filed by a relative of the alien (**or by an entity in which such relative has a significant ownership interest**) is excludable under this paragraph unless such relative has executed an affidavit of support described in section 213A with respect to such alien.

Title 8, Code of Federal Regulations (CFR), section 213a.2 states, in pertinent part:

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<sup>1</sup> The record reflects that the applicant's spouse had one hundred percent stock ownership of Unicenter in 2002(as opposed to fifty-one percent ownership).

(b) Affidavit of Support Sponsors. The following individuals must execute Form I-864 on behalf of the intending immigrant in order for the intending immigrant to be found admissible on public charge grounds:

(2) For employment-based immigrants. A relative of an intending immigrant seeking an immigrant visa under section 203(b) of the Act who . . . **owns a significant ownership interest in an entity** that filed an immigrant visa petition on behalf of the intending immigrant.

(c) Sponsorship requirements.

(1) General. A sponsor must:

(iii) (B) **Be a citizen or national of the United States or an alien lawfully admitted for permanent residence** in the case described in paragraph (a)(2)(i)(C) of this section or if the individual is a joint sponsor.

The instructions for Form I-864, Affidavit of Support under Section 213A of the Act, state, in pertinent part:

*“Who Completes an Affidavit of Support under Section 213A?”*

For employment-based immigrants, the petitioning relative or relative with a significant ownership interest (5 percent or more) in the petitioning entity must be a sponsor. The term, “relative,” for these purposes, is defined as **husband**, wife, father, mother, child, adult son or daughter, brother, or sister.”

Therefore, the district director found that as the applicant’s spouse owns more than five percent of Unicenter, he is required to file an I-864 on behalf of the applicant and as he is not a citizen of the United States or an alien lawfully admitted for permanent residence, the applicant’s spouse does not qualify as an I-864 sponsor and he cannot seek a joint sponsor.<sup>2</sup>

Counsel’s first assertion is that the AAO should invalidate the district director’s interpretation of 8 C.F.R. § 213a.2(b)(2) as contrary to the plain language, structure and legislative history of sections 212(a)(4) and 213A(f) of the Act. *Attorney Brief*, at 5.

Counsel cites section 213A(f) of the Act, which states, in pertinent part:

(1) For purposes of this section the term “sponsor” in relation to a sponsored alien means an individual who executes an affidavit of support with respect to the sponsored alien and who-

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<sup>2</sup> The AAO notes that the district director failed to mention that the applicant’s spouse is also not a U.S. national, in addition to not being a U.S. citizen or an alien lawfully admitted for permanent residence.

(A) is a **citizen or national of the United States or an alien who is lawfully admitted to the United States for permanent residence;**

Counsel refers to case law in asserting that regulations which are manifestly contrary to the statute are invalid and when an administrative agency alters the basic coverage provisions written into law by Congress, it has gone too far. *Supra.* at 6. Counsel states that analysis of the statute reveals a clear Congressional intent and agency interpretation of the statute contrary to that intent is not entitled to deference. *Id.* Counsel notes that the intent of Congress was to render inadmissible any alien likely to become primarily dependent on the U.S. government for subsistence. *Id.* at 4.

Counsel asserts that a “sponsor” is someone who executes the affidavit of support and who is a citizen, national or lawful permanent resident of the United States, therefore, someone who is not a citizen, national or lawful permanent resident of the United States is not properly defined as a “sponsor” for purposes of section 213A of the Act and is not subject to the requirements of this section with regard to filing an affidavit of support. *Id.* at 8. Counsel argues that as such person is not subject to the requirements of filing an affidavit of support by not being defined as a “sponsor,” such person is not required to file an affidavit of support pursuant to section 212(a)(4) of the Act. *Id.*

Counsel cites the CIS website which states:

You must complete an affidavit of support if you are a U.S. citizen or lawful permanent resident and filed an employment-based immigration petition (USCIS Form I-140) for a relative or if you have a significant ownership interest (5 percent or more) in a business that filed an employment-based immigration petition for your relative.

Counsel cites the U.S. Department of States Foreign Affairs Manual, which states at 9 FAM 40.41 N3.2:

(b) Beneficiary of a petition filed by an entity in which a U.S. citizen or LPR relative of the alien has a 5 percent or more greater ownership interest...The citizen or LPR relative of the applicant to be employed by the petitioning entity must file the Form I-864 on behalf of the applicant.

9 FAM 40.41 N5.3 states:

When the petitioner is a business entity, a U.S. citizen or lawful permanent resident (LPR) relative who has a significant ownership interest in the petitioning business, the petitioner must submit Form I-864, Affidavit of Support Under Section 213A of the Act.

Based on these provisions, counsel contends that only a U.S. citizen or LPR relative with a significant ownership interest in the petitioning business is required to file an affidavit of support in employment-based cases. *Id.* at 10. Counsel states that Congress’s clear intent is reinforced by the design of the statute as a whole. *Id.* at 11. Counsel states that the district director’s interpretation is that the non-U.S. Citizen/non-LPR relative must execute an affidavit of support, but they are specifically prohibited from filing one by the same statutory scheme. *Id.* at 12.

Counsel contends that application of the district director's interpretation would result in the denial of the applicant's case and her husband's derivative adjustment application. *Id.*

Counsel states that in assessing the intent of Congress, the plain meaning of the statute should be looked at. *Id.* at 6. The AAO notes that section 213A(f) of the Act and 8 C.F.R. § 213a.2(b)(2) are consistent in defining a sponsor as a citizen, national or lawful permanent resident of the United States. It appears that counsel is finding a lack of inclusion within the definition of sponsor under section 213A(f) of the Act as means to negate the requirement of filing an affidavit under section 212(a)(4) of the Act. The AAO finds that a clear reading of both statutes in conjunction with the regulation indicates that the applicant's spouse is required to file an I-864 on behalf of the applicant, but as he is not a citizen, national or lawful permanent resident of the United States, the applicant's spouse does not qualify as a sponsor. As he cannot file an I-864, the applicant is inadmissible by default under section 212(a)(4) of the Act. Counsel does not provide any legislative history which would contradict this plain reading of the law.

In the alternative, counsel contends that even if the language, structure and legislative history of sections 212(a)(4) and 213A(f) of the Act are properly considered to be ambiguous, the AAO should invalidate 8 C.F.R. § 213a.2(b)(2) because it reverses the statute's incontrovertible intent by rendering inadmissible as a public charge every alien beneficiary of an I-140 with a non-U.S. Citizen/non-LPR relative with significant ownership interest in the petitioning entity. *Id.* at 13.

The AAO notes that immigration law is based on eligibility for benefits and that each benefit has specific criteria, often resulting in applicants failing to meet those criteria. In the instant case, the plain language of the relevant law, and hence the intent of the law, will render inadmissible as a public charge an alien beneficiary of an I-140 with a non-U.S. Citizen/National/non-LPR relative having significant ownership interest in the petitioning entity.

Lastly, counsel contends that the AAO should invalidate 8 C.F.R. § 213a.2(b)(2) as ultra vires as the district director exceeded the authority conferred by Congress. *Id.* at 14. He states that the challenged regulation creates a new categorical bar which is not authorized by Congress and the Attorney General may not use discretionary authority to create unauthorized categorical bars. *Id.* at 15. The AAO does not find that the district director has exceeded the authority conferred by Congress as he applied the relevant law based on the clear language of the statutes and regulation. Counsel's claim that Congress has not authorized this categorical bar is unfounded and not supported by the record.

Based on a review of the record, the AAO finds that the district director's decision is correct as the law cited in this decision clearly established that the applicant's spouse is required to file an affidavit of support, but he does not qualify as a sponsor.

Therefore, the applicant's adjustment of status application was properly denied under section 212(a)(4)(D) of the Act.

**ORDER:** The district director's decision is affirmed.