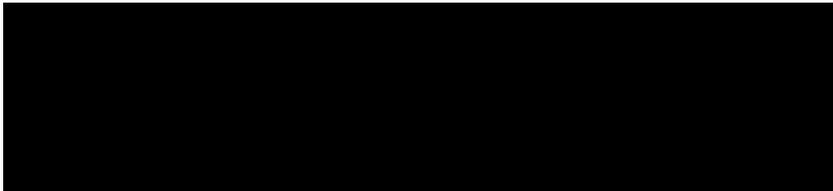




U.S. Citizenship
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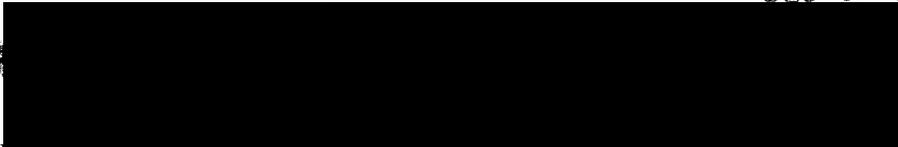
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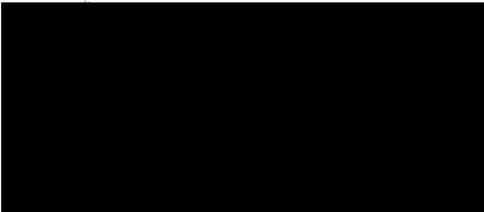
FILE: WAC 05 083 51188 Office: CALIFORNIA SERVICE CENTER Date: DEC 28 2005

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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.

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

DISCUSSION: The Director of the California Service denied the nonimmigrant visa petition and the matter was appealed to the Administrative Appeals Office (AAO). The appeal will be sustained. The petition will be approved.

The petitioner is a corporation, [REDACTED] MD, a Professional Corporation, d.b.a., Oncology and Hematology of Imperial Valley, that does business as a medical clinic. In order to hire the beneficiary as its medical oncologist/hematologist, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation 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).

The director cited two reasons for his denial of the petition. The director determined that many of the items in the record established that the alien was petitioning for himself in the instant proceeding. The director found that although the California DE 6 Forms show that the beneficiary is on the petitioner's payroll and was paid by the petitioner, the petitioner and the beneficiary were one and the same because the payor on the payroll records was listed as [REDACTED] MD APC and the employee was listed as [REDACTED]. The director also referred to the business certificate issued by the city of El Centro as indicating that the business owner of "Oncology and Hematology of Imperial Valley" is "[REDACTED]". The director determined that the record does not establish that the petitioner is a registered corporation, limited liability company, or other legally-recognized business entity that is separate and distinct from its owner – the beneficiary. The director determined that the evidence submitted demonstrates that the petitioner is organized as a sole proprietorship. The director therefore determined that the petition lacked the employer-employee relationship required by 8 C.F.R. §§ 214.2(h)(1)(i) and (h)(4)(ii).

On appeal, counsel files a Form I-290B with an attached brief, that contends that the director's findings were erroneous.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter, and (5) the Form I-290B and counsel's brief with its attachments. The AAO bases its decision in this proceeding upon the record in its entirety.

Counsel correctly asserts that the director erred in treating the petitioner as a sole proprietorship. The AAO finds in this case that the petitioner is a separate legal entity from the beneficiary, and the beneficiary would not be self-employed. Established tenets of corporate law, as well as precedent decisions such as *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958), state that a corporation is a separate and distinct legal entity from its owner. As such, a corporation, even if it is owned and operated by a single person, may hire that person, and the parties will be in an employer-employee relationship, as is the case in the instant matter. The beneficiary's relationship to the petitioner is not a proper basis for denying the petition.

On appeal, counsel noted that she had previously submitted copies of the Articles of Incorporation; a letter from the accounting firm [REDACTED] confirming the existence of the newly formed Corporation and that Dr. [REDACTED] would be drawing a salary; a copy of the employment contract between Oncology and Hematology of Imperial Valley and Dr. [REDACTED]; a copy of the City of El Centro business license application; a copy of the State of California Medical Board of California Fictitious Name Permit; a copy of the Business Certificate; a letter from the Federal Department of Treasury, Internal Revenue Service ("IRS"), showing

assignment of the EIN; copies of quarterly and withholding reports; and copies of paychex records and pay stubs. Additionally, counsel explains that the previously filed payroll information clearly show that state and federal taxes were withheld from the beneficiary's salary by the corporation, demonstrating that the petitioner is not a sole proprietor.

On appeal, counsel submits additional evidence including copies of the corporation's stock certificate; the corporation's bylaws; action of the sole incorporator; the IRS SS-4, showing the type of entity of the employer as a corporation; and copies of bank statements showing that the corporation has bank accounts separate from the beneficiary.

Based on the evidence in the record, the petitioner has established that it is a corporation and has an employer/employee relationship with the beneficiary pursuant to 8 C.F.R. §§ 214.2(h)(1)(i) and (h)(4)(ii).

The record reflects that the position is a specialty occupation, that beneficiary has a medical degree from an accredited university in the United States, that he has satisfactorily completed certification requirements of the Educational Commission for Foreign Medical Graduates, and that he is licensed by the State of California, indicating that he is qualified for this specialty occupation.

The petitioner has also requested J waiver transfer permission under Section 214(l)(1)(B) of the Act, 8 U.S.C. § 1184(l)(1)(B), as a result of extenuating circumstances. The record reflects that the beneficiary received a waiver of the two-year foreign residency requirement under Section 212(e) of the Act, 8 U.S.C. § 1182(e), based on a state application in order to work in the medically underserved area of Imperial Valley, California. The beneficiary seeks to terminate his employment with the health care facility named in the waiver application due to extenuating circumstances, i.e. the death of the owner of the facility. The petitioner sought to reorganize the corporate structure, and will remain in the medical practice at the same address in Imperial Valley, under the new corporate structure. The AAO finds that the petitioner has established extenuating circumstances, that the beneficiary may terminate the employment with the health care facility named in the waiver application, and that he may complete his three-year tenure under Section 214(l)(1)(C)(ii) of the Act, 8 U.S.C. § 1184 (l)(1)(C)(ii), for the reorganized corporate petitioner.

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 sustained that burden. Accordingly, the appeal will be sustained and the petition will be approved.

ORDER: The appeal is sustained. The director's order is withdrawn and the petition is approved.