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FURTHER AAO SUPPORT FOR THE RIGHT OF A CORPORATION TO PETITION FOR ITS OWNER FOR AN H-1B VISA

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by
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Although an owner of a sponsoring employer may be barred from obtaining a labor certification, nonprecedent decisions of the Administrative Appeals Office (AAO) have upheld the ability of a corporation to petition for its owner for an H-1B if the owner is qualified for the visa[1] . In yet another *non-precedent decision*, the AAO upheld the appeal of petitioner, a graphic design firm, which sought to employ the beneficiary/owner in H-1B status as a graphic designer.

The H-1B petition was denied by the Vermont Service Center on the grounds that (1) as a start-up company without employees, the petitioner did not establish that it had sufficient H-1B caliber work to keep the beneficiary employed on a full-time basis for three years; (2) as a one-person business, the beneficiary would be responsible for administrative and clerical duties, which are not specialty occupations; and (3) the beneficiary could not assume the role of a graphic designer without having the clientele established, work contracts in place and expectations of the position defined.

In overturning the USCIS decision, the AAO found that petitioner, a limited liability corporation established under the laws of the State of New York, qualified as a U.S. employer under applicable federal regulations[2] because the petitioner is able to "engage a person to work within the United States." Although the beneficiary is the company's sole employee, as petitioner is a separate legal entity from the beneficiary/owner, the beneficiary is not considered self-employed. The AAO cited *Matter of Aphrodite Investments Limited*

[3] and stated:

> Established tenets of corporate law, as well as cases such as *Matter of Aphrodite,* state that a corporation has a separate legal identity from its owner. As such, a corporation, even if it is owned and operated by a single person, may hire that same individual and the parties will be in an employer-employee relationship, as is the case in the instant matter.

In finding that the proffered position is a specialty occupation as defined in the regulations,[4] despite the fact that the beneficiary may undertake administrative tasks as the sole proprietor, the AAO consulted the Department of Labor's *Occupational Outlook Handbook* for information about the duties and educational requirements of a graphic designer and determined that:

> ***ost*** of the duties of the position include those of a graphic designer, which the Handbook indicates could not be performed without the training and education that are included in a bachelor's degree in graphic design. (emphasis added)

The AAO also considered whether the particular industry's professional association made a degree a minimum entry requirement and whether letters or affidavits from firms of individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals."Petitioner provided the AAO with additional documentation regarding its clients, work product and the beneficiary's duties.

In similar cases where the owner and beneficiary are one and the same, this decision can serve as persuasive authority provided the petitioner can prove (1) the legal separation between the petitioning entity and the beneficiary/owner; (2) the existence of a bona fide job opportunity in a *specialty occupation;* and (3) provide extensive documentation of work product and clientele to prove that the petitioning entity is not a shell.

On the other hand, the legacy INS has indicated that it is not possible for a solo practitioner, operating as a law firm, to accord himself H-1B status as a lawyer[5]. But, with respect to law partnerships, the Service, in denying an employment preference petition for lack of a labor certification, held that the petition was

properly filed by the law partnership for law partner[6] .

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[1] *See Matter of X,* File No. SRC 98 101 50785 (AAO Aug. 9, 1999), 21 *Immigr. Rep.* B2-6 [Following Matter of *Aphrodite Investments, Ltd.* (17 I&N Dec. 530 (Comm'r 1980), a sole owner and sole employee of the petitioning company is not precluded form receiving an H-1B.)

[2] *See* 8 C.F.R. § 214.2(h)(4)(ii).

[3] 17 I&N Dec. 530 (Comm'r 1980)

[4] *See* 8 C.F.R. § 214.2(h)(4)(iii)(A).

[5] *See* letter from Jacquelyn A. Bednarz, Chief, Nonimmigrant Branch, Adjudications, INS Central Office (June 14, 1993), file CO 214h-C, *reproduced in* 70 Interpreter Releases 1318 (Oct. 4, 1993).

[6] *See* Matter of Zang, 13 I. & N. Dec. 290 (D.D. 1969).