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USCIS GRAPPLING WITH THE RIGHT OF A CORPORATION TO PETITION FOR ITS OWNER FOR AN H-1B VISA

Posted on December 13, 2009 by Cyrus Mehta

by

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I previously wrote an article, **FURTHER AAO SUPPORT FOR THE RIGHT OF A CORPORATION TO PETITION FOR ITS OWNER FOR AN H-1B VISA,** expressing optimism for then new persuasive authority in the form a non-precedent decision from the Administrative Appeals Office ("AAO") that highlighted the legal separation between a petitioning entity, a graphic design firm, and the beneficiary/owner, which sought to employ the beneficiary/owner in H-1B status as a graphic designer. It seemed that such clear and logical guidance would provide a smoother path toward future H-1B approvals where the beneficiary owns the petitioning entity. Despite this AAO decision and a few sporadic approvals, we have been hearing from others that the USCIS has begun to routinely deny these types of cases with a great deal of vigor citing the lack of an employer-employee relationship.

It is well established that a corporation is a separate and distinct legal entity from its owners and 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.1980); and *Matter of Tessel,* 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). 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. The beneficiary will not be self-employed, but rather, will be employed by the corporation, a separate legal entity from the beneficiary. Additional support for the premise that a Petitioner's sole owner can be the same person as the

Beneficiary can be found in *Matter of X,* File No. SRC 98 101 50785, (AAO, August 1999), *reported in* 5:2 immigration Bulletin, 89-90 (Matthew Bender Jan. 15, 2000) *citing Matter of Aphrodite*.

The regulations define a U.S. employer at 8 C.F.R. §214.2(h)(4)(ii) as 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.

In its denials of cases involving a beneficiary/owner, the USCIS conveniently disregards AAO decisions by stating that it is not bound by such unpublished decisions. While the USCIS acknowledges the regulation at 8 C.F.R. §214.2(h)(4)(ii), it states that the term "employee" is not specifically defined by statute or regulations for purposes of the H-1B classification. The typical H-1B denial will go on to state that the U.S. Supreme Court has determined that where a federal statute fails to clearly define the term "employee, " courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *See Nationwide Mutual Ins. Co. v Darden*, 503 U.S. 318, 322 – 323 (1992).

Following *Darden*, the USCIS will consider Petitioner's right to control the manner and means by which the product is accomplished; the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has a right to assign additional work to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and firing assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

In *Darden,* the Supreme Court considered the distinction between an employee and an independent contractor within the context of a dispute concerning eligibility for retirement benefits under ERISA. *Darden* dealt specifically with the ERISA statute's circular definition of the term "employee" defining it as "any individual employed by an employer." Because this definition was unhelpful,

the Supreme Court construed the term "employee" in the ERISA context to incorporate common law agency criteria. The H-1B statute at INA § 101(a)(15)(H)(i)(b) does not include the term "employee." The term "employee" appears in the H-1B regulations. The regulations, at 8 C.F.R. § 214.2(h)(4)(ii) clearly define the necessary employer-employee relationship for the admission of a temporary employee in H-1B status. Hence, the holding of *Darden* is not applicable to H-1B adjudications.

Moreover, despite our disagreement with the USCIS' reliance on *Darden*, the U.S. Supreme Court explicitly directs lower courts to use common law principles in defining statutory terms where federal statutes have failed to clearly do so. A corporate entity established under state law, such as New York, would look to New York law, which has long recognized the basic proposition that corporations are legal entities that exist separate and apart from the members who actually participate in them. *See* *Retopolis, Inc. v. 14th St. Dev. LLC.,* 17 AD3d 209, 797 N.Y.S.2d 1 ; *Island Seafood Co. v. Golub Corp.,* 303 A.D.2d 892, 759 N.Y.S.2d 768 ; and *Stern v. Stern,* 799 N.Y.S.2d 164 .

In response to the routine USCIS Requests for Evidence ("RFE") questioning the existence of an employer-employee relationship, our colleagues in the immigration bar have also argued, pursuant to *Matter of Tong*, 16 I&N Dec. 593 (BIA 1978), that since self-employment is a violation of INA §245's prohibition of unauthorized employment, then, logically, one who is self-employed is an "employee." In *Matter of Tong*, a noncitizen's unauthorized self-employment was held to preclude his adjustment of status because INA §245 provides in pertinent part that "the provisions of this section shall not be applicable to an alien…who hereinafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status…" Further logical guidance exists under *Matter of Smith*, 12 I&N Dec. 772 (BIA 1968) which held, "In view of the fact that the petitioner has guaranteed the beneficiary full-time permanent employment for 52 weeks a year with a two week paid vacation and other fringe benefits and that the beneficiary will be paid directly by the petitioner who is responsible for all payroll deductions and contributions, it is concluded that the petitioner qualifies as the actual employer of the beneficiary within the meaning and requirements of the Immigration and Nationality Act, as amended." So far, USCIS has refused to give weight to these arguments.

If there are approvals, they are rare and a result of the petitioner's ability to establish that the beneficiary will, despite petitioner's size, perform specialized

duties consistent with the H-1B and to demonstrate that the beneficiary's employment will be *controlled* by the petitioner. Also, the chance of an approval is greater if others are also involved in the management of the entity. Petitioners must endeavor to establish the power to make final decisions and to terminate the beneficiary's employment. For example, the employer-employee relationship might be satisfactorily illustrated where petitioner's bylaws clearly dictate how the corporation will be managed. Petitioner may be able to show, through its bylaws, that its business and property will be managed by a Board of Directors and that a majority vote of this Board will govern the employment, compensation and discharge of all employees of the corporation. A Board of no fewer than three Directors, including the beneficiary, would mean that the majority vote belonged to Directors other than the beneficiary and essentially, that petitioner held the power to make decisions for the company and to terminate the beneficiary's employment. As a result, the employer-employee relationship is less likely to be questioned.

Because few beneficiaries also own the petitioner, it is difficult to identify a corporate structure that would satisfy a USCIS adjudicator. Despite the occasional success story, the trend continues to be toward routine denials of these cases. These denials are regularly issued outside of the H-1B context as well (e.g. L-1) on any petition where the beneficiary owns the petitioner. While the USCIS's fear of foreign nationals setting up U.S. corporations solely as a vehicle for self-sponsorship is certainly legitimate, the government cannot let this concern override all reason. In order to make an accurate assessment of these types of petitions, adjudicators ought to examine the entire petitioner-beneficiary relationship on a case by case basis, and to determine whether the beneficiary will indeed be working in the H-1B specialty occupation.

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