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U.S. Citizenship  
and Immigration  
Services

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FILE: WAC 00 185 53405 Office: CALIFORNIA SERVICE CENTER Date: SEP 02 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:

SELF-REPRESENTED

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a California company that seeks to employ the beneficiary as a software engineer. The petitioner 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).

The director denied the petition because the petitioner failed to establish that: (1) the petitioner met the definition of "agent" at 8 C.F.R. § 214.2(h)(2)(i)(F), or the definition of "United States employer" at § 214.2(h)(4)(ii); and (2) the beneficiary's employment would comply with the terms of the Labor Condition Application (LCA).

On appeal, the petitioner submits a statement, a contract with one of its clients, a job proposal, and a new LCA. The petitioner states, in part, that it will employ, supervise, and control the beneficiary's day-to-day activities.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

*Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

When filing the I-129 petition, the petitioner averred that it employed five persons, and was engaged in "human resources network[ing], software development, and consulting." To describe its business operations in more detail, the petitioner submitted a printout from its Internet web page, which stated, in part:

[The petitioner] provides candidates with professional career planning and placement in a variety of industries. . . . We are a full service staffing and consulting company . . . .

Along with the I-129 petition and information from its Internet web page, the petitioner submitted a letter of support, an Offer of Employment, an LCA, and evidence of the beneficiary's academic and employment credentials.

The Offer of Employment set forth the terms of the beneficiary's employment, and described the beneficiary's duties as follows:

As a Software System Engineer, you will be responsible for the fulfillment of various project tasks. You will use your best energies and abilities in the performance of your duties assigned to you from time to time. You agree to be a loyal employee of the Company. You agree that during the term of this agreement you shall not, directly or indirectly, engage in any business that would detract from your ability to apply your best efforts to the performance of your duties. During the term of this agreement you will devote your full abilities to the performance of your duties, and agree to comply with [the petitioner's] reasonable policies and standards. Your responsibilities may vary depending upon the project. Also, you must be willing to travel on short notice as and when required.

The LCA that the petitioner filed with the Department of Labor (DOL) listed the beneficiary's place of work as Los Angeles, California. In its letter of support, the petitioner expanded upon the job description that was provided in the Offer of Employment. The petitioner stated in its letter that it required a software engineer to:

[D]evelop Relational Database Management Systems in addition to designing and implementing Client/Server applications for the [sic] and Windows platforms, as well as the Oracle environment; develop and integrate operational information system using Oracle system; develop and maintain RDBMS tables, indexes, clusters, [and] optimize database performance. Troubles [sic] shoot [sic] the software products and test for problem areas. Suggest possible remedies. Install and maintain the software. Serve as a software technical consultant.

The petitioner indicated further in its letter that a qualified candidate for the position of software engineer would need to possess "at least a Bachelor's Degree in Engineering or a related field and experience in the field."

On November 1, 2000, the director requested additional evidence from the petitioner. In addition to asking for evidence of the petitioner's ongoing viability, the request for evidence (RFE) stated:

**Consultants:** Please submit copies of contracts between the petitioner and the beneficiary. Also, submit copies of contracts between the petitioner and the clients where the beneficiary will perform services. Additionally, include a complete itinerary of services or engagements where the beneficiary will perform those services. The itinerary should specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment[s], venue[s], or locations where the service will be

performed by the beneficiary. The itinerary should include all service planned for the period of time requested – in this case October 1, 2003.

In response, the petitioner submitted an expanded job description for the beneficiary and a copy of the previously submitted Offer of Employment. The petitioner did not submit any contracts between it and its client(s). The petitioner noted in its response, "Please be advised that [the] beneficiary will only be working with the petitioner."

Regarding the expanded job description, the petitioner indicated that the beneficiary would be "the technical consultant for our internal and external projects as a Web and Software System Analyst and Programmer." The petitioner claimed that it was currently partnered with several companies for client orders, and that the beneficiary would be employed at its primary business location. The petitioner indicated further that it would pay the beneficiary's salary; provide him with company benefits, such as health insurance; and control his employment. In particular, the petitioner listed the beneficiary's daily responsibilities as:

- Client Development: [The beneficiary] will begin the development process at the very first meeting with the client. He will interpret the customer's needs into a usable flow chart to begin the actual work . . . .
- Staff Supervision: Along with his other duties he will be responsible for making sure our staff of web developers are all performing their jobs and that the tasks being worked on are being done correctly for the internal consultant and as well as for the external consultant on [sic] [the] customer's site.
- Web Staff Orientation: When new members join the team, [the beneficiary] will be spending a few days of [sic] orientation and helping the [sic] to get adjusted to our day-to-day operations.
- Up Date Reports to General Manager: On a weekly basis [the beneficiary] is responsible for written and oral reports on job completion, new jobs, current status on jobs in development, as well as monthly budget reports for his department.
- Final Web Site Editing: After his department has completed a project, before we release it to the customer [the beneficiary] is responsible for making sure every aspect of the site is in order and working. He is also responsible for the conclusion interview with the client and the finishing report.

The director denied the petition on October 3, 2001. The director conceded that the proffered position met the definition of a specialty occupation. The director noted, however, that the petitioner is a contractor because it "is in the business of locating aliens with computer backgrounds and placing these aliens in positions with firms that use software engineers to complete their projects." The director concluded that, because the petitioner was a contractor, it was required to submit the requested contracts and itinerary, and without this documentation, the petitioner could not establish that it met the definition of United States employer or agent.

When concluding that the petitioner did not meet the definition of a United States employer, the director stated, "The rule for determining whether an individual is employed by an employer is stated in 53 Am.Jur.2d, Master and Servant, S.2." The director stated further that, according to the Master and Servant definition, the most important factor is not which entity pays the alien's wages, but which entity controls the alien's work.<sup>1</sup> The director concluded that, as a contractor, the petitioner will not exercise control over the beneficiary and, therefore, cannot be considered a United States employer.

When discussing whether the petitioner was an agent, the director stated that the definition of agent at 8 C.F.R. § 214.2(h)(2)(i)(F) provides for two types of agents: (1) "an agent performing the function of an employer"; and (2) "a company in the business as an agent involving multiple employers as the representative of both the employers and the beneficiary." The director stated that, because the petitioner functioned as the second type of agent, the petitioner "would need to provide contracts showing any arrangements and including [sic] a complete itinerary of services." The director concluded that, because the petitioner failed to submit the requested contracts and itinerary, its status as an agent could not be determined.

Finally, the director stated that the absence of contracts and an itinerary rendered it impossible to determine that a specialty occupation will exist if the beneficiary should enter the United States in H-1B status. The director determined further that, without contracts, Citizenship and Immigration Services (CIS) was unable to determine whether the petitioner had complied with the terms of the LCA.

On appeal, the petitioner submits a letter, in which it reiterates the terms and conditions of the beneficiary's employment. The petitioner emphasizes that the beneficiary will be employed within its office and that it will control all aspects of the beneficiary's work. The petitioner also submits a contract between it and one of its clients, a project proposal, and a new LCA.

Based upon the evidence in the record at the present time, the AAO cannot affirm the director's denial of the petition. As shall be discussed, the director failed to adequately determine the most critical factor in the adjudication of this petition: whether the beneficiary's ultimate job responsibilities involve the theoretical and practical application of a body of highly specialized knowledge.

The AAO first turns to the director's conclusion that the petitioner could not be considered a United States employer or an agent under U.S. immigration law because the petitioner failed to submit contracts between it and its clients, as well as an itinerary of the beneficiary's employment.

Pursuant to 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;

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<sup>1</sup> Although not stated in the denial letter, it appears that the director's discussion of the Master and Servant definition was taken from *Matter of Pozzoli*, 14 I&N Dec. 569 (Reg. Comm. 1974) and *Matter of Allan Gée, Inc.*, 17 I&N Dec. 296 (Acting Reg. Comm. 1979).

- (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.

Pursuant to 8 C.F.R. § 214.2(h)(2)(i)(F):

A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, in place of, the employer as its agent. A petition filed by a United States agent is subject to the following conditions;

- (1) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.
- (2) A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.
- (3) A foreign employer who, through a United States agent, files a petition for an H nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274a.

The petitioner in this matter is an employment contractor and a direct employer. The petitioner locates individuals for placement in a variety of industries for a fee, and maintains a staff on its premises to work on projects that it contracts with clients.

The regulations governing the H-1B classification state that a petitioner may be either a United States employer or an agent. 8 C.F.R. §§ 214.2(h)(2)(i)(A) and (F). The regulations do not mention employment contractors specifically, although employment contractors are increasingly petitioning for alien workers in the H-1B classification. CIS has traditionally categorized employment contractors as agents, and required employment contractors to comply with the evidentiary standards required of agents as outlined at 8 C.F.R. § 214.2(h)(2)(i)(F).<sup>2</sup> In reviewing certain provisions in Titles 8 and 20 of the Code of Federal Regulations, however, it is apparent that ambiguities exist among the terms “agent,” “employment contractor” and “employer” as they apply to the H-1B classification.

For example, “United States employer” at 8 C.F.R. § 214.2(h)(4)(ii) is defined, in part, as a “contractor.” In addition, according to 8 C.F.R. § 274a.1(g), which governs the control of employment of aliens:

*The term employer means a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. In the case of an independent contractor or contract labor or services, the term employer shall mean the independent contractor or contractor and not the person or entity using the contract labor.*

(Emphasis added.) In reviewing Title 20, Code of Federal Regulations at section 655.715, which governs LCAs in the H-1B petition adjudication process, the Department of Labor provides the following definitions:

Employed, employed by the employer, or employment relationship means the employment relationship as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, “no shorthand formula or magic phrase . . . can be applied to find the answer . . . . [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968).

Employer means a person, firm, corporation, contractor, or other association or organization in the United States which has an employment relationship with H-1B nonimmigrants and/or U.S. worker(s). *The person, firm, contractor, or other association or organization in the United States which files a petition on behalf of an H-1B nonimmigrant is deemed to be the employer of that H-1B nonimmigrant.*

(Emphasis added.) An employment contractor does not need to meet the evidentiary standards required of agents at 8 C.F.R. § 214.2(h)(2)(i)(F). CIS will consider the employment contractor to be the beneficiary's

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<sup>2</sup> Memorandum from [REDACTED] Chief, Nonimmigrant Branch, INS Office of Adjudications, *Petitions for H-1a, H-1b, O and P Temporary Workers Filed by Agents and Contractors*, CO 214h-C (May 5, 1993).

employer, because the employment contractor hires, fires, and pays the alien a salary, and ultimately controls the alien's work.<sup>3</sup>

However, as noted by the court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000), a petitioner that is an employment contractor is merely a "token employer." The entity ultimately employing the alien or using the alien's services is the "more relevant employer." *Defensor v. Meissner*, *id* at 4.<sup>4</sup> In other words, the employment contractor's client is the "more relevant employment," whether the alien will be working within the employment contractor's operations on projects for the client or whether the alien will work at the client's place of business.

Thus, when a petitioner is an employment contractor, the entity ultimately employing the alien or using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, CIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.<sup>5</sup>

As the director focused his denial of the petition on whether the petitioner was an agent or a United States employer, his decision will be withdrawn. The petition may not, however, be approved at the present time. Although the director conceded in the denial letter that the proffered position was a specialty occupation, there is insufficient evidence to support the director's conclusion.

Before turning to whether the proffered position is a specialty occupation, the AAO will address the director's comments regarding the petitioner's failure to comply with the terms of the LCA. The director determined that the petitioner did not comply with the terms stipulated on the LCA because he believed that the beneficiary would be employed at a location other than the petitioner's place of business. The director stated:

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<sup>3</sup> Memorandum from [REDACTED], Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary Found in 8 C.F.R. 214.2(h)(2)(i)(B) As It Relates To The H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

<sup>4</sup> In the denial letter, the director implied that a hierarchy of factors exists when determining whether there is an employer-employee relationship, with a petitioner's status as the payer of the alien the least important factor, and its ability to control the alien's work the most important factor. However, the court in *Defensor v. Meissner* commented that the definition of United States employer did not state clearly how the factors are to be interpreted when determining an employer-employee relationship.

<sup>5</sup> The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

[W]ithout contracts the Service is unable to determine whether the petitioner has complied with the terms of the LCA nor can the Service determine if the LCA is proper in relationship to the area of employment or the wage offered the beneficiary. Since a determination cannot be made as to the working conditions of the beneficiary as listed on the LCA, the LCA cannot be considered to be in compliance.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), a petitioner must submit a statement that it will comply with the terms of the LCA for the duration of the alien's period of authorized stay. According to 20 C.F.R. § 655.705(b):

[T]he Department of Justice administers the system for the enforcement and disposition of complaints regarding an H-1B-dependent employer's or willful violator employer's failure to offer a position filled by an H-1B nonimmigrant to an equally or better qualified United States worker (8 U.S.C. §§ 1182(n)(1)(E), 1182(n)(5)), or such employer's willful misrepresentation of material facts relating to this obligation. The Department of Justice, through the INS, is responsible for disapproving H-1B and other petitions filed by an employer found to have engaged in misrepresentation or failed to meet certain conditions of the labor condition application (8 U.S.C. §§ 1182(n)(2)(C)(i)-(iii); 1182(n)(5)(E)).

Although the director had the authority to review the petitioner's compliance with the LCA, the record indicates that the beneficiary will work on the petitioner's premises in the Los Angeles, California area. The LCA that was certified prior to filing the I-129 petition, as required by 8 C.F.R. § 214.2(h)(4)(i)(B)(1) and 20 C.F.R. § 655.700(b), is valid for the location of Los Angeles, California. Accordingly, the petitioner has complied with the terms of the LCA and the director's comments concerning this issue are withdrawn.

The AAO will now discuss its finding that, based upon the evidence in the record at the present time, the proffered position is not a specialty occupation.

In his November 1, 2000 request for evidence, the director asked the petitioner to submit, in part, "copies of contracts between the petitioner and the clients where the beneficiary will perform services." Contracts between the petitioner and its client(s) are critical to the adjudication of this petition because they form the basis of the petitioner's need to hire the beneficiary. Similarly, a contract between a petitioner and an alien indicates the terms of the alien's employment. The submission of a contract between the petitioner and the alien is provided for at 8 C.F.R. § 214.2(h)(4)(iv)(B), which states that an H-1B petition involving a specialty occupation shall be accompanied by "copies of any written contracts between the petitioner and beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract." In addition, a director maintains the discretion to request any evidence that he or she independently requires in order to adjudicate an H-1B petition, which may include contracts between a petitioner and its client(s). See 8 C.F.R. § 214.2(h)(9)(i).

During the processing of this petition, the petitioner submitted three separate job descriptions for the beneficiary. The first job description is the Offer of Employment that the petitioner submitted when filing the I-129 petition, and which states, "As a Software System Engineer, you will be responsible for the fulfillment of various project tasks." Along with the Offer of Employment is a letter from the petitioner, which lists the

beneficiary's duties as: developing Relational Database Management Systems; designing and implementing Client/Server applications; developing and integrating operational information systems; developing and maintaining RDBMS tables, indexes, and clusters; troubleshooting software products; testing for problem areas; suggesting possible remedies; installing and maintaining software; and serving as a software technical consultant.

The second job description is the petitioner's response to the director's request for evidence. In this response, the petitioner titles the beneficiary's job as "Web and Software System Analyst and Programmer." The petitioner also delineates the beneficiary's responsibilities, in part, as client development, staff supervision, and web staff orientation.

The third job description is contained in the petitioner's appellate letter, in which the petitioner states that the beneficiary "will perform the services on software programming projects as a software engineer . . . ."

When comparing the three job descriptions, it is apparent that the petitioner has never submitted a consistent description of the beneficiary's proposed duties. This is particularly evident when comparing the petitioner's initial description of the beneficiary's job to the job description that the petitioner submitted in response to the director's request for evidence.

The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot materially change a position's title, its associated job responsibilities, or its level of authority within an organizational hierarchy. A petitioner may also not change the proffered position in material ways at the time of the appeal. CIS may not approve a petition if the facts that existed when the petition was filed have materially changed. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12).

The AAO cannot find that the beneficiary would be coming to the United States to perform a specialty occupation. The petitioner has not resolved the issue of why it has submitted three different job titles and job descriptions for the beneficiary. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The submission of such different job descriptions at various times indicates to the AAO that no defined job existed for the beneficiary when the petitioner filed the I-129 petition, and that a defined job does not exist at the present time. The petitioner merely speculates on the types of duties that the beneficiary would perform upon his employment with the company. Although the beneficiary's duties appear to involve some type of programming work, only a detailed job description from the entity that requires the alien's services will suffice to meet the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

To establish that it has work for the beneficiary to perform, the petitioner submits, on appeal, a copy of a contract between it and one of its clients, as well as a project proposal that the petitioner prepared for another client. The client contract was entered into on May 4, 2001; the project proposal was prepared on May 5, 2001. The petitioner, however, filed the I-129 petition with the California Service Center on June 5, 2000.

Neither the contract nor the project proposal existed when the petition was filed and, therefore, neither document demonstrates that the petitioner was offering a specialty occupation to the beneficiary when it filed the petition. *See* 8 C.F.R. § 103.2(b)(12). Even if the contract and the project proposal had been valid prior to the filing of the petition, neither document contains the name of the beneficiary as the client's consultant, indicates the types of duties that the beneficiary would be required to perform, or stipulates the qualifications that the client requires the beneficiary to possess. Therefore, the documents would not demonstrate that the beneficiary's duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty. For the reasons discussed herein, there is insufficient evidence upon which to approve the petition at the present time.

As stated previously, although the AAO is withdrawing the director's decision, the petition may not be approved without further evidence relating to the beneficiary's job duties in the United States. The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of the beneficiary's employment in the United States, and any other evidence the director may deem necessary. 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 remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision of October 3, 2001 is withdrawn. The matter 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.