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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 131 51555 Office: CALIFORNIA SERVICE CENTER Date: OCT 17 2008

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

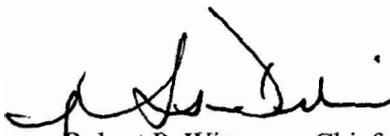
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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, Chief
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 The director's decision will be withdrawn. The petition will be remanded to the director for entry of a new decision.

The petitioner is a software development and consulting firm that seeks to employ the beneficiary as a systems analyst. 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 finding that the petitioner did not qualify as a United States employer, and as such, was not qualified to file an H-1B petition on behalf of the beneficiary.

The issue to be determined is whether the petitioner qualifies as a United States employer.

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;
- (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.

The petitioner provided copies of sample contracts that it maintains with companies which enable the petitioner to provide its employees for completion of various work projects on behalf of the contracting company's clients. Under the terms of these contracts, the petitioner acts as an independent contractor in providing services. The performance of the services to be provided are performed by employees of the petitioner. The petitioner will hire the beneficiary, will pay the beneficiary, has the right to fire the beneficiary and will otherwise have control over the beneficiary's work. The fact that the beneficiary may perform services at a client facility and is subject to that client's work rules and regulations does not change the employer/employee relationship existing between the petitioner and beneficiary. The petitioner will engage the beneficiary to work in the United States, has an employer-employee relationship with the beneficiary, and has an Internal Revenue Service Tax identification number. The petitioner qualifies as a United States employer in this instance, and the director's decision to the contrary is withdrawn.

As the director did not determine whether the proffered position qualifies as a specialty occupation, the petition will be remanded for the director to make that determination. If it is determined that the position qualifies as a specialty occupation, the director shall determine whether the beneficiary is qualified to perform the duties of that position. The director may request such additional evidence as she deems necessary in rendering her opinion.

As always, the burden of proof in these proceedings rests solely with the petitioner. The petitioner has sustained that burden. Section 291 of the Act, 8 U.S.C. § 1361.

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ORDER: The director's decision is withdrawn. The petition is remanded to the director for entry of a new decision commensurate with the directives of this opinion, which, if adverse to the petitioner, is to be certified to the AAO for review.