



*DA*

U.S. Department of Justice

Immigration and Naturalization Service

**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

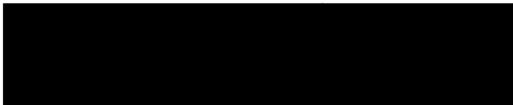
OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: WAC-01-100-55705 Office: California Service Center

Date: **SEP 24 2002**

IN RE: Petitioner:  
Beneficiary:



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)

IN BEHALF OF PETITIONER:



**PUBLIC COPY**

**INSTRUCTIONS:**

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

*Robert P. Wiemann*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a software consulting business with eight employees and an estimated gross annual income of \$500,000. It seeks to employ the beneficiary as a programmer analyst for a period of two years and nine months. The director determined the petitioner, as the beneficiary's agent, had not provided employment contracts including a complete itinerary of services to be performed by the beneficiary. The director also determined that, without such contracts, the Service was unable to determine whether the petitioner had complied with the terms of the labor condition application.

On appeal, counsel submits a brief.

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), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation . . .

The petitioner has provided a certified labor condition application and a statement that it will comply with the terms of the labor condition application.

8 C.F.R. 214.2(h)(2)(i)(F), *Agents as petitioners*, states:

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.

8 C.F.R. 214.2(h)(4)(ii) states, in part, that:

*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.

8 C.F.R. 214.2(h)(2)(i)(B) states, in part, as follows:

A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training . . .

8 C.F.R. 214.2(h)(4)(iv)(B) states, in part, 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.

8 C.F.R. 214.2(h)(9)(i) states in part that the director shall consider all the evidence submitted *and such other evidence as he or she may independently require to assist his or her adjudication.* (Emphasis added.)

Further, in a Service memorandum entitled "Supporting Documentation for H-1B Petitions," dated November 13, 1995, it states as follows:

Requests for contracts should be made only in those cases where the officer can articulate a specific need for such documentation."

On appeal, counsel states, in part, that the petitioner is not required to submit contracts in support of the beneficiary's potential worksites. Counsel further states that the petitioner has complied with the terms of the labor condition application. Counsel additionally states that:

In this matter, the petitioner has guaranteed employment to the beneficiary for three years, and primarily requires the beneficiary to work at his location. The petitioner also undertakes to pay the beneficiary and provide benefits. Agents, on the other hand, do not pay their clients directly, rather earn a fee for placement or a portion of their client's earnings. Finally, an agent does not have an employer-employee relationship with his clients. Here the facts are quite different. The petitioner has all the indicia of an employer-employee relationship with the beneficiary, the employment is more than short-term, and the petitioner determines what work

the beneficiary will perform or with which client the beneficiary will work during those times when he is not working in the offices of the petitioner.

Indisputably, we have established that the petitioner not only pays the beneficiary's wages, but also has the power to hire, fire, supervise, and control the work of the beneficiary.

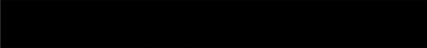
The record contains the following:

- \* Purchase Order dated March 6, 2001, addressed to the petitioner from The Sharper Image for "QA Consulting";

- \* Contractor Agreement made on February 7, 2000, between the petitioner and Ballantyne Computer Service, Inc. ("BCSI"), indicating that "BCSI" desires to fill the temporary staffing needs of its customer Winston Tires. (Contract is not signed by "BCSI");

- \* Subcontractor Agreement made effective on March 31, 1999, between the petitioner and Buxton Consulting (BC).

In a letter dated January 29, 2001, the petitioner's vice president stated, in part, as follows:

 is engaged in the recruiting, hiring, supervising and managing specialized professionals for employment in various industries . . . The company has an opportunity to serve the growing defense and civilian industry needs for temporary short-term or long-term engineering and/or technical assistance.

In a Notice of Action dated April 26, 2001, the director requested the following:

- \* Contractual agreements between you and the companies for which your organization (the beneficiary) will be providing services. Contracts should specify the duties contracted to be performed by the "consultant" while working for the client. Include copies of statements of work, work orders and any other documents or appendices. Documentation should specify duties, dates of services requested specific duties to be performed.

- \* A legal binding contractual agreement between you and the beneficiary under the terms which the beneficiary will be employed.

- \* An itinerary of definite employment, listing the location(s) and organization(s) where the beneficiary will be providing 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, venue, or location where the service will be performed by the beneficiary. If services will be performed on site, specify that in the itinerary. The itinerary should include all service planned for the period of time requested--in this case until October 31, 2003.

Although the record contains a "Conditional offer of Employment" letter, the petitioner has provided no contract or summary of terms describing the terms of the beneficiary's employment. Despite counsel's argument that the petitioner and beneficiary share an employer-employee relationship, it was held in Matter of Obaiqbena, 19 I&N Dec. 533, 534 (BIA 1988) and Matter of Ramirez-Sanchez, 17 I&N Dec. (BIA 1980) that the assertions of counsel do not constitute evidence.

Furthermore, even if the Service were to conclude that the petitioner and beneficiary share an employer-employee relationship, as with employment agencies as petitioners, the Service must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Cf. Defensor v. Meissner, 201 F.3d 384 (5th Cir. 2000). The critical element is not whether the petitioner is an employer or an agent, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.<sup>1</sup> To interpret the regulations any other way would lead to absurd results: if the Service was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id. at 388.

In this case, although the record contains two contracts and a purchase order (listed above), such documents do not contain specifics related to the beneficiary's intended employment. Counsel argues that the beneficiary will be employed at the petitioner's worksite; the record, however, contains no specific information regarding what projects the beneficiary will be working on. Moreover, in a letter dated January 29, 2001, the petitioner's vice

---

<sup>1</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." Supra at 387.

president states that the petitioner "is engaged in the recruiting, hiring, supervising and managing specialized professionals for employment in various industries..." Although not explicitly stated, this suggests that the beneficiary would be performing duties at worksites other than the petitioner's premises.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies will not suffice. Matter of Ho, 19 I&N Dec. 582. (Comm. 1988).

In order to make a determination whether a specialty occupation position exists for the beneficiary, the director properly requested the above listed documents. Absent such supporting documentation, the petitioner has not persuasively demonstrated that a specialty occupation exists for the beneficiary, or that it has complied with the terms of the labor condition application. For this reason the petition may not be approved.

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 not sustained that burden. Accordingly, the decision of the director will not be disturbed.

**ORDER:** The appeal is dismissed.