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

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



File: WAC 01 151 52740

Office: CALIFORNIA SERVICE CENTER

Date: APR 02 2003

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)

ON BEHALF OF PETITIONER:



**PUBLIC COPY**

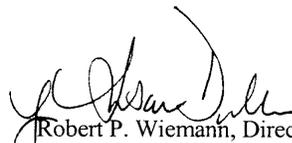
INSTRUCTIONS:

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 Bureau of Citizenship and Immigration Services (Bureau) 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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, California Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a California company that engages in research and development and sales of internet communications products and services. It was established in 1999 and has 35 employees with a gross capitalization of 6.5 million dollars. It seeks to temporarily employ the beneficiary as a network engineer for a period of three years. The director determined that the petitioner had not established whether it was the employer or the agent of the beneficiary.

On appeal, counsel asserts that the decision of the Immigration and Naturalization Service, now the Bureau of Citizenship and Immigration Services (Bureau) which determined that the petitioner was a consulting firm and an agent of the beneficiary was contrary to the evidence submitted.

With regard to the definition of employer, 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.

In defining situations in which an agent acts as a petitioner, 8 C.F.R. § 214.2(h)(2)(i)(F), 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 C.F.R. part 274a.

The issue in this proceeding is whether the petitioner is the employer or the agent of the beneficiary. The petitioner submitted the original petition to the California Service Center on March 23, 2001. The petitioner described its business as internal protocol (IP) telephony. As such the petitioner claimed it provided a cost effective, competitive, technology based telecommunication solution through the Internet for voice, facsimiles and data transmission over existing telecommunications networks. The petitioner submitted the following documentation with regard to the business operations of the petitioner:

Quarterly Wage and Withholding Report (DE-6) for the periods ending, March 31, 2000, June 30, 2000, September 30, 2000, and December 31, 2000;

Financial statement for 2000;

U.S. Corporation Income Tax Return (Form 1120) for 1999;

Bank statement for business accounts with Citibank and Bank of America for the period January 10, 2000 to October 31, 2000;

Confidential Business Plan, dated August 1999;

Print-outs of company website, overview and brochure of CCL products to be marketed exclusively by OPENPOP;

Articles of Incorporation filed on July 7, 1999 by the Secretary of State of the State of California, and

Copy of lease of office premises at [REDACTED]

The petitioner also submitted documentation with regard to the beneficiary's qualifications and job responsibilities for the proffered position. Finally the petitioner submitted Labor Condition Applications (LCA) for the San Jose, California; Los Angeles, California; Irvine, California; Seattle, Washington; Chicago, Illinois; Washington, D.C.; and New York City work sites.

On June 21, 2001, the director requested that the petitioner provide the following documentation:

Contractual agreements between the petitioner and the companies for the petitioning 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, and specific duties to be performed.

A legal binding contractual agreement between the petitioner 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 March 15, 2004.

In response, on June 29, 2001, the petitioner stated that no contracts existed between the petitioner, the beneficiary and other parties. The petitioner further stated that the petitioner had two business locations, the head office located in San Jose, California and one branch office in Los Angeles, California. The petitioner stated that the work to be performed by the beneficiary will always be directly controlled and supervised by

the petitioner. The petitioner further stated that it provided telecommunication services based on a proprietary network system to service subscribers throughout the United States and Canada. The underlying LCA included multiple work sites for potential assignments where the beneficiary would be sent to a subscriber of the petitioner or network locations for technical support and troubleshooting on behalf of the petitioner. The petitioner stated that the beneficiary may be a member of a team of engineers that may be sent to subscribers for follow-up technical support after the petitioner's services have been installed and engaged, and that the beneficiary was not being sent to client companies to perform duties independent of the petitioner. Finally, the petitioner stated that the employment relationship between the petitioner and beneficiary is contingent upon approval of the petition. The petitioner stated that for this reason, there existed no legally binding contractual agreement.

On August 16, 2001, the director denied the petition. In doing so, the director stated the following:

It appears that the petitioner's business consists of locating aliens with computer backgrounds and subsequently placing these aliens in companies that require the services of computer programmers. The petitioner negotiates contracts with various computer companies and in turn these companies pay the petitioner for this service. The petitioner will then pay the respective beneficiaries. . . . Without evidence of contracts/itinerary, the petitioner has not met the burden in proving that the petitioning entity is in fact the beneficiary's employer. There may be no computer programming position for the beneficiary when he enters the United States. In effect, the beneficiary may be coming to the United States and be waiting (not employed in a specialty occupation) until the petitioner secures such employment.

The director also determined that without contracts and an itinerary, the Bureau was unable to determine if the LCAs were valid in regard to the areas of employment and wages for the beneficiary.

On appeal, counsel submits the following documentation, in part, with regard to the petitioner's business:

- Memorandum discussing the issue of whether the petitioner is an agent for the beneficiary per 8 C.F.R. 214.2 (h) (4) (ii);
- Public Notice issued by the Federal Communications Commission (FCC) dated November 12, 1999 granting international authorization of the appellant's applications; (emphasis in original);

- Certificate of public convenience dated December 20, 1999 issued by the executive director, [REDACTED] of the Public Utilities Commission of the State of California that authorized the petitioner to operate as a carrier of inter- and intra-local access and transport area telecommunication services in California;
- Carrier services contract between Qwest Communications Corporation, and the petitioner. The petitioner notes that Qwest maintains and operates switch and POP sites throughout the United States;
- Reciprocal agreement between DACOM America, Inc. and the petitioner for purchase of telecommunications services from each other;
- State of California DE-6 reports filed for the first and second quarters of the year 2001.

Counsel states the Bureau made an erroneous assessment of the nature of the business of the petitioner. Counsel also notes that the LCAs submitted with the petition included multiple work sites to facilitate plans to expand operations to cover the critical locations in the United States within the next few years. Counsel states that the petition listed these multiple work sites because these cities have been targeted as critical locations under the petitioner's business expansion plan.

Upon review of the materials on the record, the petitioner appears to have presented a persuasive argument that it is a company that will employ the beneficiary as opposed to being an agent for the beneficiary. A review of the State of California Form DE-6 indicates that during the first quarter of 2001 the petitioner listed an average of 23 employees with indicated wages for each month of the first quarter. The DE-6 form for the second quarter of 2001 showed an average of 16 employees being paid wages. The statement of wages submitted to the record on appeal indicates some \$377,613.56 spent in salaries and wages from January to December 2000. The documents submitted in support of the petitioner's business activities and partners appear to support the operation of a telecommunications business that specializes in using the internet for telecommunications transmissions.

Although not addressed in the Bureau's decision, the proffered position of network engineer appears to be a specialty occupation. The duties of the position include "VoIP [voice over internet protocol] network design and development, both in-house and for subscribers," as well as "testing of new IP telephony software and hardware, upgrading of all systems and monitoring of existing networks." As such the proffered position appears analogous to the

Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) classifications of computer software engineer, and to a lesser degree, computer hardware engineers. Based on the duties of the position and the nature of the petitioner's business, namely, internet protocol telephony systems and operations, the proffered position appears to require both theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's or higher degree in a specific specialty. In addition, the petitioner presented sufficient evidence to establish that the beneficiary is qualified to perform the position.

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 sustained that burden. Accordingly, the appeal will be sustained and the petition will be approved.

**ORDER:** The appeal is sustained. The director's order is withdrawn and the petition is approved.