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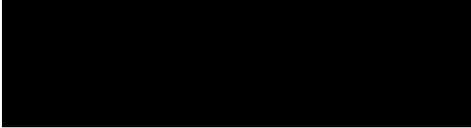
U.S. Department of Homeland Security

Citizenship and Immigration Services

D2

Identifying information used to  
prevent unauthorized entry  
invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 I Street, N.W.  
Washington, DC 20536



FILE: WAC-02-027-56743 OFFICE: CALIFORNIA SERVICE CENTER

DATE: DEC 03 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)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

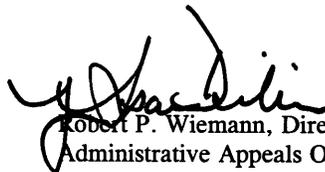
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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 Director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner provides independent contractors and consultants to companies on a project basis. It employs 110 persons and has a gross annual income of \$33 million. It seeks to employ the beneficiary as a telecommunications engineer. The director denied the petition because the petitioner failed to provide sufficient evidence to establish that it was an agent as defined at 8 C.F.R. § 214.2(h)(2)(i)(F).

On appeal, the petitioner submits additional evidence. The petitioner states, in part, that it established it was an agent at 8 C.F.R. § 214.2(h)(2)(i)(F).

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 for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

The issue to be discussed in this proceeding is whether the petitioning entity established that it qualifies as an agent.

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;
- (3) Has an Internal Revenue Service Tax identification number.

Further, under 8 C.F.R. § 214.2(h)(2)(i)(F) the term *agent* is discussed and the section 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, or 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 employment and to provide any required documentation.

The record shows that, along with the initial I-129 petition, the petitioner submitted a letter stating the beneficiary's duties as follows:

[The beneficiary will] provide design, testing[,] and development[,] specialized skills to our customers using multiple operating systems, web-based technologies[,] and electronic standards and protocols. He will work under the direct supervision of a project manager.

The letter stated that the minimum requirements for the job were a bachelor's degree or its equivalent in engineering, mathematics, or computer science, and prior experience in electronics, software design, and development/administration.

On December 13, 2001, the director requested that the petitioner submit a letter on company letterhead describing the nature and type of its business, the beneficiary's duties, and an explanation of why the petitioner requires the services of a person possessing a bachelor's degree or its equivalent. In

addition, the director requested contracts between the petitioner and the companies seeking to engage the beneficiary's services. The contracts were to state what the beneficiary's duties will be while working for the client and the dates of services, and the petitioner was requested to submit copies of statements of work, work orders, and any other documents or appendices. In addition, the director requested a contractual agreement between the petitioner and the beneficiary stating the beneficiary's terms of employment. Finally, the director requested an itinerary of definite employment indicating the location(s) and organization(s) where the beneficiary will provide services, and specifying the dates of each service or engagement, the names of the actual employers and the addresses of the establishment, venue, or locations where the beneficiary will perform the service, and if services would be performed onsite, indicate that in the itinerary. The director mentioned that the itinerary should state services planned until October 7, 2004.

In response, the petitioner provided contracts between the petitioner and its client, EXi-Parsons, and a contract between the petitioner and the beneficiary. In a letter, the petitioner explained that the beneficiary would be located at the client's site in Hayward, California, and that Exi-Parsons will install and test services for Ericsson, Inc. at different locations in the United States and overseas. The letter maintained that the petitioner's sub-contract with EXi-Parsons would be effective August 31, 2001, for an initial period of one year, with automatic extensions for an additional four years. The petitioner claimed that the beneficiary will work at the Hayward site for the period as indicated in the labor condition application (LCA).

The petitioner's letter described the following duties:

[The beneficiary's] duties will be divided equally to [sic] supervision of the implementation procedure and optimization of the implemented design; attending meetings, preparing schedules and reports on the progress of the project; performing site surveys and advising management on progress and requirements; providing support to other switch engineers; and, the training-up of permanent U.S. workers so that they can attain the knowledge and skill to perform the more complex engineering tasks required by Ericsson technology.

The letter further explained that the job is highly technical, requiring a bachelor's degree to competently perform it.

The petitioner also submitted a letter, dated January 18, 2002, stating that: (1) it was a division of S.Com Group Plc; (2) it had supplied telecommunications and information technology professionals for more than two decades; (3) the company was

founded in the United Kingdom in 1979; (4) its headquarters were in the United Kingdom; and (5) its offices in Munich, San Francisco, and Miami serve the telecom and information technology markets.

In addition, the petitioner submitted the following: a job description of a telecom engineer (based in Hayward, California), pages 19-24 of Schedule B-3, pages 45-50 of Schedule C, pages 1-10 of the Master Installation and Testing Services Agreement, and pages 1-4 of the S.COM Contractor Agreement.

On February 6, 2002, the Immigration and Naturalization Service (the Service), now Citizenship and Immigration Services (CIS), denied the petition. The Service determined that the offered position was a specialty occupation and that the petitioning entity was a contractor, not an employer. The Service stated that the petitioner located professionals with telecommunications backgrounds, negotiated contracts with companies to place professionals on projects, and received fees from companies for the placements. The Service stated that, although the petitioner paid the professional, the company retained full control of the professional and his or her job duties. Thus, the petitioner did not qualify as an employer as defined at 8 C.F.R. § 214.2(h)(4)(ii).

The Service stated that the petitioner also did not qualify to be an agent under the second prong at 8 C.F.R. § 214.2(h)(F) because it failed to provide evidence that would establish that it represented both the employer and the beneficiary. For example, the Service stated that the Master Installation and Testing Services Agreement (the "Prime Contract") between EXi Parsons and Ericsson Inc. indicated that EXi Parsons would perform the installation and testing services (the "Services") for Ericsson and that EXi Parsons desired S.Com Inc. ("Subcontractor") to perform certain portions of the Services as described in the Subcontract ("Subcontract"). The Service found that the Prime Contract was only a master agreement; as such, EXi Parsons was not obligated to purchase services from the petitioner. The Service stated that the Prime Contract's language indicated that the Subcontract Task Order was to set forth the Services to be performed by the petitioner, the price and the payment schedule for the Services, the delivery schedule, the acceptance criteria for the Services, and the detailed technical and administrative requirements. The Service stated that the petitioner did not submit a properly executed Subcontract Task Order as evidence and that EXi Parsons had not signed the Prime Contract. The Service concluded that without valid contracts, there would not be a telecommunications engineer position; the beneficiary would, in effect, be waiting to perform his duties because the petitioner had failed to secure a contract or contracts with companies that required the beneficiary's services.

Finally, the Service found that without valid contracts, it could

not determine the petitioner's compliance with the terms of the LCA or whether the LCA was valid as to the beneficiary's area of intended employment and the respective wage.

On appeal, the petitioner maintains that the documentary evidence in the record satisfies the conditions under the first prong at 8 C.F.R. § 214.2(h)(2)(i)(F); therefore, it qualifies as an agent.

The evidence in the record contains the following documentary evidence: (1) a contractual agreement, executed on October 1, 2001, between the petitioner and the beneficiary, stating that the petitioner will pay a specified salary to the beneficiary for his services as a switch test engineer, and that the services would be rendered at Hayward, California, the location of the petitioner's client, EXi Parsons; (2) timesheets from the week ending October 18, 2001 to February 1, 2002, which show the beneficiary performed services for EXi Parsons; (3) a document entitled "Request for Resources"; and (4) a document entitled "Master Installation and Testing Services Agreement" ("Prime Contract").

The petitioner claims that the Request for Resources and the Prime Contract evince an extant contract to provide the beneficiary's services as a switch test engineer.

The pertinent sections of the Prime Contract state the following:

EXi Parson's desires that S.Com, Inc. ("Subcontractor") perform certain portions of the Services and Subcontractor agrees to perform portions of the Services as described in this Subcontract (the "Subcontract"). In consideration of the mutual promises contained herein, Exi Parsons and Subcontractor agree as follows:

1. Subcontract Documents. This Subcontract shall consist of the following documents, as mended or supplemented from time to time:

This document  
Schedule A - Task Order Form (Sample)  
Schedule B - Contractor's Employee Classifications includes Schedules B-1 through 10)  
Schedule C - Hourly Rate Sheet  
Schedule D - Invoice Requirements  
Schedule E - Time Sheet Requirements

In the event of any conflicts between this Subcontract and a Task Order, the provisions of the Task Order shall control. This Subcontract shall govern Subcontractor's provision of services to EXi Parsons, notwithstanding any inconsistent terms or conditions contained in Subcontractor's quotation, acknowledgement, invoice or other sales documentation.

This agreement supercedes any and all previous agreements between the parties regarding services for Ericsson. The parties agree that all agreements regarding services to Ericsson that pre date this agreement shall be terminated on the effective date of this agreement, except that EXi Parsons shall pay all amounts due. . . .

2. Scope of Subcontract. From time to time EXi Parsons may request that Subcontractor provide services necessary for the installation and testing of Ericsson's equipment at various sites and locations within, and outside of the continental United States of America. The services requested will be described substantially in the format set out in Schedule A hereof (the "Task Order"). The services request described in the Task Order are referred to herein as the "Work." Subcontractor may accept an EXi Parsons Task Order by signing a copy and returning it to EXi Parsons. Upon acceptance, the work done pursuant to the Task Order shall be subject to the terms and conditions of this Subcontract, as may be modified or supplemented by the Task Order. This Subcontract, of itself, does not obligate EXi Parsons to extend to Subcontractor, or obligate Subcontractor to accept, any Task Order.

EXi Parsons will specify in each Task Order the basis on which the Work will be performed by Subcontractor. . . .

. . . .

28. Entire Agreement. This Subcontract sets forth the entire understanding of the parties as to the subject matter thereof and supercedes all prior and collateral representations. Any amendments or modifications hereto must be in writing and signed by Contractor and a duly authorized representative of EXi Parsons.

The document, Request for Resources, indicates October 1, 2001, as the project's start date and its end date as December 31, 2003; the site name is shown as Hayward; and the job description as GSM Switch (CMS40) testing. The document also indicates that the beneficiary is the contractor, his arrival date is shown as October 1, 2001, and the contract's end date as "upon completion of project."

The petitioner's statements are not persuasive: the document, Request for Resources, and the Prime Contract do not evince an extant contract to provide the beneficiary's services as a switch test engineer. The evidence contained in the record fails to establish that the petitioner has satisfied the first prong at 8 C.F.R. § 214.2(h)(2)(i)(F), namely, that it is an agent performing

the function of an employer, and it has guaranteed the wages and other terms and conditions of employment by contractual agreement with the beneficiary, and will provide an itinerary of definite employment and information on any other services planned for the period of time requested in the petition.

The petitioner alleges that its contract with the beneficiary guarantees the beneficiary's wages, and specifies his duties and worksite. However, the petitioner has not submitted an itinerary of definite employment and information on any other services planned for the period of time requested, namely until October 2007. The petitioner claims that the Request for Resources and the Prime Contract attest to the existence of a contract between the petitioner and EXi Parsons in which the petitioner will furnish the beneficiary's services to EXi Parsons for a certain length of time. The evidence in the record shows otherwise. For example, the Prime Contract cannot provide definite employment because it is invalid: EXi Parsons never signed the Prime Contract. Only the petitioner's signature appears on page 9, the signatory page. In addition, the Prime Contract's language explicitly states, under paragraph two, "the Subcontract, of itself, does not obligate EXi Parsons to extend to Subcontractor, or obligate Subcontractor to accept, any Task Order." Thus, the terms of the Prime Contract would not obligate EXi Parsons to retain the petitioner. In addition, the Request for Resources neither provides for definite employment nor establishes the existence of a contract between the petitioner and EXi Parsons. First, the Request for Resources is not a signed contract between the parties for services; as such, it does not obligate EXi Parsons to retain the beneficiary's services for a specific duration of time. Second, the Request for Resources demonstrates that there is no signed Prime Contract between the petitioner and EXi Parsons: the Prime Contract specifically states that the Task Order would be used to specify services requested, and the Request for Resources is not listed as one of the Prime Contract's Subcontract Documents. Finally, the timesheets do not aver to an itinerary of definite employment.

Based on the evidence in the record, the petitioner fails to provide sufficient evidence to establish that it qualifies as an agent as defined at the first prong at 8 C.F.R. § 214.2(h)(2)(i)(F).

To qualify as an agent under the second prong at 8 C.F.R. § 214.2(h)(2)(i)(F), the petitioner must furnish documentation that includes a complete itinerary of services or engagements, with the itinerary specifying the dates of each service or engagement, the names of the actual employers, and the addresses of the establishment, venues, or locations where the services will be performed. As previously discussed, the petitioner has not provided this kind of documentary evidence; thus, it fails to establish that it qualifies as an agent under the second prong at 8 C.F.R.

§ 214.2(h) (2) (i) (F) .

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.

**ORDER:** The appeal is dismissed. The petition is denied.