

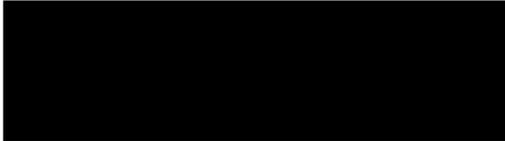
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U.S. Department of Homeland Security

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Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE  
425 E Street, N.W.  
BCIS, AAO, 20 MASS, 3/F  
Washington, DC 20536



File: WAC 02 120 52967 Office: CALIFORNIA SERVICE CENTER

Date:

**JUL 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:



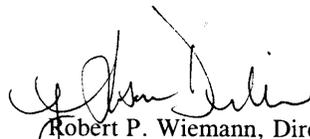
INSTRUCTIONS:

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 decision by the director will be withdrawn and the matter remanded to the director for further consideration.

The petitioner is a California job placement agency. It has four employees and a gross annual income of \$430,000. It seeks to temporarily employ the beneficiary as a management analyst for a period of three years. The director determined that the petitioner had not submitted evidence of complete and valid contracts between the petitioner and a firm requiring management analyst employees.

On appeal, counsel asserts that the contracts entered into among the petitioner, the firm requiring a management analyst employee, and the beneficiary that were previously submitted to the Bureau are legally binding, specific, signed, and valid.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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.

In addition, 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 C.F.R. part 274a.

With regard to the definition of employers in H-1B petitions, 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.

With regard to multiple work sites, 8 C.F.R. § 214.2(h)(2)(i)(B) states, in part, the following:

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 . . .

With regard to requirements for contracts between the petitioner and the beneficiary, 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.

In addition, 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.)

Finally, in a Bureau memorandum entitled "Supporting Documentation for H-1B Petitions," dated November 13, 1995, it states: "Requests for contracts should be made only in those cases where the officer can articulate a specific need for such documentation."

The issue in this proceeding is whether the petitioner established that it submitted valid contracts between itself and a firm with which the beneficiary would perform the duties of a management analyst. In the original petition received by the California Service Center on February 26, 2002, the petitioner stated that it would be employing the beneficiary directly and that the beneficiary would receive her salary from the petitioner. The petitioner described its relationship with the beneficiary in the following terms:

Our company is continuing to expand its services and finds that it is to our advantage to temporarily employ [the beneficiary] as a management analyst to be assigned to various clients withing [sic] the Los Angeles areas[sic] who are in need of management analyst services and which requires [sic] an individual who is fully educated or experienced.

The petitioner described the job responsibilities of the beneficiary as follows:

We anticipate that [the beneficiary] will devise methods to increase profitability, manage expenses and reduce department overhead. She will analyze statistics, and other types of data, such as annual

revenues, and expenditures so as to develop solutions to decrease the overhead expenses for the managing of the company. [The beneficiary] will conduct a study of the procedures such as organizational changes, communications, information on problems and procedures. She will analyze data gathered, develop information and consider available solutions or alternate methods of proceeding. [The beneficiary] will take into account the general nature of the business, the companies [sic] internal organization, as well as data gained through data collection and analysis. She will organize and document findings of studies and prepare recommendations for implementation of new systems, procedures and organizational changes.

The petitioner further stated it would comply with all labor conditions statements and pay the reasonable cost of the beneficiary's return transportation to the Philippines, if her employment was terminated prior to the expiration of the H-1B visa.

On March 4, 2002, the director requested further evidence with regard to the instant petition. In particular, she requested:

- o A legally binding contractual agreement between the petitioner and the beneficiary that states the terms under which the beneficiary will be employed.
- o Contractual agreements between the petitioner and the organization where the beneficiary would be providing services. Copies of statements of work, work orders and any other documents or appendixes that specified work duties, dates of services and the specific duties to be performed.
- o Evidence provided showed that the petitioner's business was to outsource personnel to clients outside the petitioner's work site. If any of the beneficiary's management analyst services were to be performed at the petitioner's address, the director requested evidence to show that the petitioner, as part of its business, required personnel with the same management analyst skills as provided in outsourced computer consulting services.
- o An itinerary of definite employment that specified 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 locations where the service would be performed by the beneficiary. The itinerary should include

all service planned for the period of time requested, namely, March 1, 2005.

In response, the petitioner submitted the following documents for the record:

- o A document entitled "Commitment to Hire" dated January 15, 2002, and signed by [REDACTED] representative, Job Seekers International, Inc. and the beneficiary. The document is on Job Seekers International, Inc. letterhead and indicates that the beneficiary will work for the American Loan Warehouse Corporation in Walnut, California, from March 1, 2002 to March 1, 2005 as a management analyst.
- o A document entitled "Agreement" dated December 14, 2001 on Job Seekers, Inc. letterhead. This document is described as a binding agreement to have the petitioner process the application of the beneficiary, while the American Loan Warehouse Corporation agrees to hire the beneficiary from March 1, 2002 to March 1, 2005. This document is signed by [REDACTED] president, Job Seekers International Inc., and [REDACTED] president, American Loan Warehouse Corporation.
- o A document entitled "California Subscriber Service Agreement" signed on December 14, 2001 by [REDACTED] president, American Loan Warehouse Corporation and [REDACTED] president, Job Seekers International, Inc. This document breaks down the duties of both Job Seekers International, Inc., described as "JSI," and the duties of American Loan Warehouse Corporation, described as "subscriber." It also had two exhibits attached and incorporated into the agreement. Exhibit A listed job employment classifications and employee benefits, while Exhibit B described the method of paying the beneficiary. A final page entitled "Addendum" described the relationship between the petitioner and the beneficiary and also provided a job description similar to the one submitted in the initial petition. This page was undated and unsigned.

On March 21, 2002, the director denied the petition. The director stated that the petitioner was a consultant contractor. The director further stated that when the Bureau requested additional evidence to clarify whether the petitioner had contracts with firms requiring management analyst services, the petitioner submitted contracts that were open ended, undated, and contained no signature or company letterhead. The director concluded that the petitioner was not the employer of the beneficiary as

outlined in 8 C.F.R. § 214.2(h)(4)(ii). The director further stated that without complete and valid contracts between the petitioner and a firm involved with management analyst work, the evidence did not establish that there would be a specialty occupation position available for the beneficiary upon entry into the United States.

On appeal, counsel maintains that the petitioner already has submitted the valid contracts and documents that the director requested. In addition, counsel states that based on the terms of the agreement between the petitioner and the American Loan Warehouse Corporation, the beneficiary will be "leased" to the American Loan Warehouse Corporation.

With regard to the petitioner's status as a United States employer, counsel states that the petitioner has a primary employer-employee relationship with the beneficiary that is outlined in various sections of the Subscriber Service Agreement. Based on this agreement, the duties of the petitioner include paying, supervising and discharging the beneficiary. Counsel also maintains that section V(C) of the agreement makes the petitioner responsible for all claims arising from the beneficiary's work product and responsible to indemnify with respect to any claims. Finally, in case of health problems, the beneficiary is required to visit the petitioner's company doctor in the subscriber's geographic area.

Upon review of the record, the petitioner appears to have fulfilled the requests of the director for further evidence with regard to contracts between the petitioner and the beneficiary and with regard to contracts between the petitioner and firms where the beneficiary would be working. The petitioner submitted various documents that provide specific details on job offers, and are dated, signed and on letterhead. With regard to documents not on letterhead, the two attachments and one addendum to the California Subscriber Service Agreement are not on letterhead stationery, although both attachments are signed and dated and specifically identified as attachments throughout the subscriber service document and in the document's Section N entitled "Attachments."

The addendum page that restates the job duties along with additional information on the relationship between the petitioner and the beneficiary is neither dated, signed, nor on letterhead stationery. The status or validity of this page as part of a contract is not clear, as there is no reference to it in the text of the subscriber service agreement, and Section VIIB of the same document states that changes cannot be made to the document without the consent of both parties. The contents of the page have been iterated in other documents, with the exception of additional details of petitioner's relationship to the beneficiary.

In sum the record contains documents that appear to be valid contracts between an employment agency and subscribers to the services of a contract or leasing employment agency. The director's denial of the petition based on the petitioner's failure to provide valid contracts does not appear to be an appropriate basis for the denial of the petition.

Beyond the decision of the director, the director's limited comments on whether the petitioner is the actual employer of the beneficiary are much more pivotal to the final determination of this proceeding. On appeal, counsel extrapolates from the Subscriber Agreement several responsibilities of the petitioner that it claims establishes that the petitioner is the actual employer of the beneficiary; however, the Bureau does not view these responsibilities as probative that the petitioner is the actual employer of the beneficiary.

In addition, in order to meet the criteria of 8 C.F.R. § 214.2 (h)(4)(iii)(A), the actual employer of the beneficiary, as opposed to the entity that may recruit, select, and even handle the payment of the beneficiary, needs to establish that a degree or its equivalent is required for the proffered position. See *Defensor v. Meissner*, 201 F.3d 384 (5<sup>th</sup> Cir. 2000).<sup>1</sup> To date there is no evidence on the record with regard to the American Loan Warehouse Corporation's job duty requirements for new management analyst hires. The only evidence on the record with regard to the job duties for the proffered position is the generic job description provided by the petitioner in its cover letter and then in the addendum to the Subscriber Services Agreement. Without more substantive information on this issue, it is not possible to evaluate whether the actual position meets the first criterion of the criteria 8 C.F.R. § 214.2 (h)(4)(iii)(A), namely, a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

In addition, the record is devoid of information on the nature of the actual employer's business, the precise duties of the job to be performed by the beneficiary with American Loan Warehouse Corporation, or the company's previous use of individuals with baccalaureate degrees for its management analyst positions. Such

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<sup>1</sup> In *Defensor v. Meissner*, the court held that the Bureau reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing foreign nurses require a bachelor's degree for employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the nurses to the United States for employment with the agency's clients. While this decision was directed at nurses, it can be applied to other employment classifications.

information is utilized to establish other criteria of 8 C.F.R. § 214.2(h) (4) (iii) (A) .

Without information on the actual job to be performed at American Loan Wholesale Corporation, it is not possible to determine whether the beneficiary will be performing a specialty occupation pursuant to 8 C.F.R. § 214.2 (h) (4) (iii) (A) .

The burden of proof in this proceeding rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden with regard to valid contracts. However, the record remains incomplete with regard to whether the proffered position is a specialty occupation. Accordingly, the decision of the director will be withdrawn and the matter remanded to the director for further consideration of the proffered position. The director may request any additional evidence deemed necessary to assist her with her determination.

**ORDER:** The decision of the director is withdrawn. The matter is remanded to the director for further consideration of whether the proffered position is a specialty occupation, and entry of a new decision, which if adverse to the petitioner, shall be certified to the AAO for review.