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

PUBLIC COPY

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



File: WAC 01 238 52600

Office: CALIFORNIA SERVICE CENTER

Date: MAR 11 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:



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

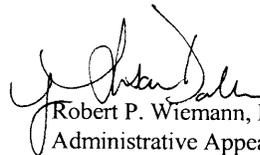
INSTRUCTIONS:

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 dismissed.

The petitioner is a California software and development consulting firm that has two employees and a gross annual income of \$600,000. It seeks to temporarily employ the beneficiary as a systems analyst for a period of three years.

The director determined that the petitioner had not provided sufficient evidence to establish that it was either the employer or agent of the beneficiary. As such the petitioner had not established that the beneficiary would be employed in a specialty occupation. In addition, the director determined that the Labor Condition Applications (LCA) submitted by the petitioner did not cover the Dublin, California work site, and as such were invalid.

On appeal, the petitioner asserts that the petitioner is the employer of the beneficiary and that the petitioner is not required to submit an additional LCA for the Dublin, California work site.

Section 214(i)(1) of 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 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), the employer of a beneficiary is defined as follows:

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.

Furthermore, 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. . . .

In addition, 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.

With regard to agents, 8 C.F.R. § 214.2(h) (2) (i) (F) states the following:

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 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 first issue in this proceeding is whether the petitioner has established that it is either the actual employer of the beneficiary, or a United States agent who is contracting with the beneficiary on behalf of various clients. In the original petition received by the California Service Center on July 19, 2001, the petitioner stated that the beneficiary would work as a systems analyst for the petitioner. The petitioner described the beneficiary's duties as follows:

Software development using languages like Visual Basic and database functions in MS SQL Server, Oracle; implementing software in customer sites and customizing the software to suite customer needs; administrating the internal networks and maintaining the servers and applications in-house.

On August 1, 2001, the director requested further information with regard to the original petition. In particular, the director requested more evidence that focused primarily on whether the beneficiary was qualified to perform the duties of the proffered position. In an additional section entitled "consultants", the director also requested copies of contracts between the petitioner and the beneficiary, as well as contracts between the petitioner and the clients where the beneficiary will perform services. The director also requested a complete itinerary of

services where the beneficiary will perform her work for the period of time requested on the petition.

In response, the petitioner submitted further documentation with regard to the beneficiary's educational and work experience equivalencies. With regard to the requests for copies of contracts, the petitioner stated the following:

[REDACTED] intends to utilize the service of the beneficiary, for in-house technical support. She will also be responsible for maintaining the internal Network, e-mail and Intranet environments, which are running on three (3) servers - one (1) Unix Server and two (2) Windows NT Servers. [The beneficiary] will be responsible for maintaining all the web applications developed on SQL S4erver and Oracle. In the future the petitioner may get a software consultancy contract for the beneficiary to perform services, however presently there is no such contract and as stated above the beneficiary will work in-house with the petitioner.

The petitioner submitted no contracts between itself and the beneficiary, or between itself and any clients where the beneficiary will perform services.

On September 5, 2001, the director reviewed the materials submitted by the petitioner and stated the following:

[I]t is not clear that the petitioner will be the beneficiary's employer. 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 systems analysts. 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. In order to clarify this issue, the Service sent a request for evidence on August 1, 2001.

The director further stated:

If the beneficiary is paid, not by the petitioner, but is paid directly by the company with which the petitioner has contracted with [sic], then the petitioner would be classified as an agent. If this were the case the petitioner, again, would have to provide contracts showing any arrangement including a complete itinerary of services. Since the petitioner did not provide an itinerary, the Service is unable to distinguish the relationship between the petitioner, the beneficiary and any other entities contracting with the petitioner.

On appeal, counsel asserts that the petitioner has already stated that the petitioner is the beneficiary's employer. Counsel further states that:

In the event the petitioner were to get a software consultancy contract for the beneficiary in the future at a client site in San Jose and/or Sacramento area to perform services, the petitioner would still be the employer as the petitioner would pay, supervise, have the power to hire and fire, and otherwise control the work of the beneficiary.

The petitioner submits the U.S. Federal Income Tax Form 1120 for the tax year 2000 with regard to the petitioner's ability to pay the beneficiary.

Upon review of the record, the initial materials submitted by the petitioner do not clarify the issue of whether the petitioner is the employer of the beneficiary or, as described by the director, simply functions as an employment agency or agent that subcontracts computer services consultants to various clients. Prior to the submission by counsel of the petitioner's tax records, the record was devoid of any information with regard to the petitioner's business activities other than the brief description of the company contained in the I-129.

The U.S. IRS Tax Form 1120, Schedule A, "Costs of Goods Sold-Other Costs" submitted by counsel indicates that the beneficiary paid some \$156,691 in subcontractor costs. Although the I-129 petition submitted by the petitioner indicated it has two employees, the 2000 tax forms shows no wages paid to any employees, although one officer of the petitioner's corporation received some \$26,500 during the 2000 tax year. With regard to any previous H-1B employees, although the petitioner indicated that it had received H-1-B approval for [REDACTED] the petitioner's 2000 tax records do not indicate any direct wages being paid by the petitioner to this individual. Beyond the subcontractor costs identified in the petitioner's U.S. tax records, the record contains no contracts, and no substantive job descriptions that would help to establish the employer/employee relationship. The request by the director for copies of contracts to establish the precise nature of the employment of the beneficiary appears to be reasonable.

Counsel asserts that the petitioner would be both a direct employer of the beneficiary for in-house work responsibilities and that the petitioner could also contract out the services of the beneficiary. Thus counsel maintains that the petitioner is both the employer and agent of the beneficiary. Neither assertion is supported by evidence, such as contracts or substantive job descriptions that identify the duties and responsibilities of the beneficiary. For example, if the petitioner is an agent who will contract out the beneficiary's services, there is no itinerary of

services to be provided. If the petitioner is the actual employer of the beneficiary, there is no job description or employment contract provided to establish this fact. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The Immigration and the Naturalization Service, now the Bureau of Citizenship and Immigration Services (Bureau) 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). In addition the actual employer of the beneficiary, as opposed to the entity that hires the beneficiary, needs to establish that a degree or its equivalent is required for the proffered position.¹ Without more persuasive evidence, the petitioner has not established the actual employer of the beneficiary. Without the establishment of this relationship, it is not possible to evaluate whether the beneficiary will be performing a specialty occupation.

The second issue in this proceeding is whether the petitioner was required to submit a Labor Condition Application (LCA) for the petitioner's office located in Dublin, California.

In the original petition, the petitioner submitted a Labor Condition Application (LCA) for both Sacramento, California, and San Jose, California. In the request for further evidence, the petitioner asserted that the beneficiary would be working initially in Dublin, California, in the petitioner's office. Although not addressed in the request for further evidence, the director noted in the denial of the instant petition, that the record contained no valid LCA for Dublin, California.

The director determined that Part 5 of the I-129 petition which listed San Jose and Sacramento as the beneficiary's workplaces and the Labor Condition Applications which listed San Jose and Sacramento as workplaces appeared to be in conflict with the information provided by counsel with regard to the beneficiary working in Dublin, California. As a consequence, the director found the evidence with regard to LCAs to lack credibility. Based

¹ In *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), 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 *Defensor v. Meissner* involved the hiring of nurses, the reasoning of the court would appear applicable to the hiring of any individuals for contract services.

on the lack of a LCA for Dublin, California, and by extension, the working conditions of the beneficiary in that work site, the director denied the petition.

On appeal, counsel asserts that the submission of a LCA for Dublin, California is not required. Counsel states that Dublin, California, is 31.1 miles from San Jose, California, and is within the area of intended employment which means the area within the normal commuting area of the area of intended employment. Counsel submits a third LCA for the Dublin, California area.

Upon review of the general guidelines for submission of LCAs to the Department of Labor as contained in the *H-1B Handbook*, it appears that the employer must obtain a prevailing wage determination for the occupation for each location where the H-1B worker will be employed. In most cases, the term location can be equated to the area of intended employment which is considered the area within normal commuting distance to the job site. The *H-1B Handbook* also mentions that locations can cover an entire metropolitan statistical area (MSA).² While Dublin, California is located within the Alameda County Metropolitan Statistical Area, (MSA) and the San Jose, California work site is located within the Santa Clara MSA, they are geographically close and within normal commuting distance within the same area of intended employment. As such the director's decision to deny the instant petition on the additional ground that the petitioner failed to submit a LCA for the Dublin, California, work site does not appear to be well-founded. This part of the director's decision is reversed.

Beyond the decision of the director, the petitioner has not placed sufficient evidence on the record with regard to the proffered position to establish that the position offered to the beneficiary at the Dublin, California office is of sufficient complexity or specialization as to require a baccalaureate or higher degree. The generic description of this position indicates job duties that include maintaining several networks, which suggest a technical support or technician position as opposed to a systems design and development position. As the appeal will be dismissed on other grounds, this issue need not be examined further.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. With regard to the submission of a LCA for Dublin, California, the director's decision is reversed. With regard to the identification of the beneficiary's actual employer, and the evaluation of the specialty occupation based on this identification, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

² Austin T. Fragomen, Jr., Steven C. Bell, *H-1B Handbook*, 2-20 (2002).

ORDER: The decision of the director is reversed in part. The appeal is dismissed.