



U.S. Citizenship
and Immigration
Services

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FILE: WAC 02 179 52960 Office: CALIFORNIA SERVICE CENTER Date: **AUG 03 2004**

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 of the Administrative Appeals Office 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.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The director of the 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 temporary and permanent staffing services. It seeks to employ the beneficiary as a civil engineer. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to 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).

The director denied the petition because the petitioner failed to provide sufficient evidence to establish that it would be the employer of the beneficiary as defined at 8 C.F.R. § 214.2(h)(4)(ii). On appeal, counsel submits a brief and previously submitted evidence.

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 employer.

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 that:

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 of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a civil engineer. Evidence of the beneficiary's duties includes: the Form I-129; the March 27, 2002 letter accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary will perform duties that entail assessing and analyzing reports about soil compositions, hydrological characteristics, and geologic data to plan and construct civil engineering projects; reviewing and calculating costs to determine a project's feasibility; inspecting and monitoring work performed at the construction site and comparing it with engineering plans and specifications; and designing software and equipment to prepare engineering and design documents. The letter stated that candidates for the offered position must possess a bachelor's degree in civil or structural engineering and have two years of experience.

The director denied the petition. According to the director, the petitioner failed to establish that it would be the beneficiary's actual employer. The director pointed out the discrepancy in the evidence regarding the number of the petitioner's employees. The petition indicated that the petitioner employed 20 persons; the list of approved petitions, submitted by the petitioner, showed that 12 persons held approved H-1B petitions; and the most recent quarterly wage reports for the quarter ended September 30, 2002 listed only 1 employee. The director stated that based on this evidence, the petitioner is not the actual employer of the 11 persons holding approved petitions. Consequently, the director stated that he was not convinced that the petitioner will be the actual employer of the beneficiary in the immediate petition.

On appeal, counsel maintains that the petitioner's contract with Reliance Development required three civil engineers; thus, the need for the beneficiary's services had been established. Counsel avers that the contract with Reliance Development indicated that the petitioner will employ and pay the civil engineer. Counsel emphasized that the contract does not contain provisions or penalties that prohibit Reliance Development

from directly employing the civil engineer. Counsel states that employees who left the petitioner to work directly for Reliance Development are no longer paid by the petitioner. Therefore, they do not appear on the petitioner's current payroll records. Counsel maintains that persons who are not yet authorized to work are absent from payroll records. According to counsel, the petitioner has established not only the existence of the civil engineer position, but that it will be the beneficiary's employer.

The AAO finds that the evidence in the record fails to establish that the petitioner is an employer in accordance with the regulatory definition set forth at 8 C.F.R. § 214.2(h)(4)(ii).

Section 8 C.F.R. § 214.2(h)(4)(ii) defines the term "United States employer." The passage states that a "United States employer" engages a person to work within the United States; has an employer-employee relationship with respect to employees as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and has an Internal Revenue Service Tax identification number.

The record contains the document entitled "Contract for Services" which is the agreement entered into by the petitioner (the Employer) and Reliance Development (the Contractor) on January 7, 2002. Key information is absent in the contract. Paragraph six of the contract stated the "Employer will provide said employee subject to reasonable approval of Contractor." Nowhere in the contract is the beneficiary explicitly or implicitly referred to as the "said employee." Nor is an agreed upon fee for hourly services indicated in the contract. These critical missing provisions seriously undermine counsel's claim that a position actually existed for the beneficiary and that the petitioner would have been the beneficiary's employer.

The petitioner claims that it is the beneficiary's employer and points to the terms of the contract such as that it will pay the beneficiary's salary. As previously discussed, the contract never mentioned that the beneficiary would be provided by the petitioner to the Contractor. Moreover, paragraph eight of the contract clearly indicated that the petitioner would not supervise or control the work of the employee who is provided to the Contractor. Paragraph eight read:

It is understood that while the employee is under the management and control of the Contractor for the services to be rendered to the Contractor, the employee is employed by the Employer. The Employer is therefore responsible for [the] employee's federal and state withholding, payroll taxes, etc.

Consequently, the contract fails to establish that the petitioner would be the beneficiary's employer as defined at section 8 C.F.R. § 214.2(h)(4)(ii), and furthermore, it fails to evince that a position would be available for the beneficiary to occupy upon entry into the United States.

The AAO finds that the evidence in the record also fails to establish that the petitioner is an agent in accordance with the regulatory definition set forth at 8 C.F.R. § 214.2(h)(2)(i)(F).

Under the regulations, an agent may be the actual employer of the beneficiary and therefore may file a petition on behalf of a beneficiary. A petition filed by a United States agent requires that the agent performing the

function of an employer 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.

There is no contractual agreement between the petitioner and the beneficiary contained in the record. Nor does the record contain evidence that would establish definite employment of the beneficiary for the period of time requested. The AAO has already expounded on the deficiencies in the contract with Reliance Development. Accordingly, the petitioner fails to qualify as an agent/employer under 8 C.F.R. § 214.2(h)(2)(i)(F).

As related in the discussion above, the petitioner has failed to establish that it qualifies as employer or agent/employer. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.