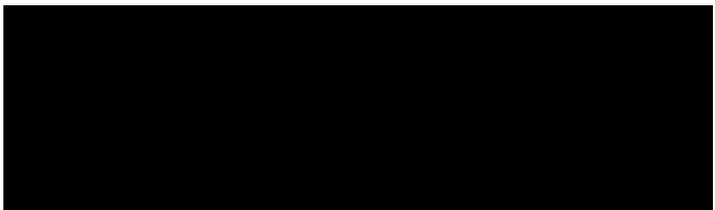




U.S. Citizenship
and Immigration
Services

D-2



FILE: WAC 01 063 53246 Office: CALIFORNIA SERVICE CENTER Date: 4/12/2011

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of privacy

DISCUSSION: The Director of the Vermont 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 petitioner is an employment agency that seeks to employ the beneficiary as an architect consultant. The director denied the petition on the basis that (1) the beneficiary does not possess proper licensure to perform the duties of the proffered position; and (2) the petitioner failed to provide sufficient evidence to establish that it would be the employer or agent of the beneficiary.

Counsel submitted a timely Form I-290B on September 26, 2001 and indicated that a brief and/or evidence would be submitted to the AAO within 30 days. As of this date, however, the AAO has not received any additional evidence into the record. Therefore, the record is complete.

On appeal, counsel states that the beneficiary will work under the supervision of a licensed architect; that determinations of prevailing wage are consistent throughout Los Angeles County; and that all contracts between the petitioner and contracting parties are specific as to duties, itineraries, and control of the beneficiary. Counsel also states that there is a proper employee relationship.

The first issue to be discussed in this proceeding is whether the petitioner established that the beneficiary is qualified to perform the duties of the proffered position.

Section 214(i)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the

specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record of proceeding before the AAO contains, in part: (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. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an architect consultant. The petitioner's October 2, 2000 letter indicated that a candidate must possess a bachelor's degree in architecture.

The director stated that the petitioner seeks to employ the beneficiary as an architect consultant, a specialty occupation. According to the director, because the beneficiary does not hold a license to provide services as an architect from the state of California, the petitioner failed to establish that he is eligible to fully practice the specialty occupation. On appeal, counsel states that a licensed architect will supervise the beneficiary's work.

Upon review of the record, the petitioner has failed to establish that the beneficiary is qualified to perform the proffered position.

The petitioner's October 2, 2000 letter stated that the beneficiary would be contracted out as an architect consultant to various engineering and construction firms in the Los Angeles area, and the petitioner alleged that the beneficiary's work would be performed under the supervision of the supervising architect on the project. Furthermore, the petitioner claimed that the beneficiary will:

[R]eport to the supervising [a]rchitect all the results of the aforesaid work and observations and will be subject to the approval of such supervising [a]rchitect.

The petitioner stated that state law requires that the supervising architect perform the work personally or employ skilled staff for architectural tasks. According to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), all states and the District of Columbia require individuals to be licensed (registered) before they may call themselves architects or contract to provide architectural services. Nevertheless, many architecture school graduates work in the field while they are in the process of becoming licensed. However, a licensed architect is required to take legal responsibility for all work.

No evidence in the record indicates that the beneficiary possesses a license to practice architecture in the state of California. Nonetheless, the beneficiary may work in the field while he is in the process of becoming licensed, though a licensed architect is required to take legal responsibility for all work. The record contains a contract entitled "California Subscriber Service Agreement." This contract stated that the petitioner was to furnish an architect consultant to Premier Properties Realty Professionals Inc. However, the contract never described the duties of the architect consultant position nor did it specifically identify the beneficiary as the person who would occupy the position. Equally important, the contract was not signed by the parties; only exhibit B, a payroll schedule and payment agreement, was signed. Thus, this contract does not demonstrate

that the beneficiary would actually occupy the proffered position and work under the supervision of a licensed architect. Nor is there other evidence in the record that established this. Consequently, the petitioner fails to establish that the beneficiary satisfied one of the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C).

The next issue to be discussed is whether the petitioning entity established that it qualifies as a U.S. employer within the meaning of 8 C.F.R. § 214.2(h)(4)(ii).

Section 101(a)(15)(H)(i)(b) of 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.

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.

According to the director, the petitioner failed to establish that it would be the beneficiary's actual employer. The director stated that the petitioner is a contractor who enters into agreements with various firms in order to place aliens with architectural backgrounds with the firms. The director further stated that the contracting firms would retain full control of the alien and his job duties. The director found that the petitioner's submitted contract with Premier Properties Realty Professionals Inc supported his statements. A provision in the contract clearly stated that the petitioner and Premier Properties Realty Professionals Inc would be co-employers of the beneficiary. The director mentioned that the contract is silent about the duties of the architect consultant position and that it never explained how Premier Properties Realty Professionals Inc, a real estate company, would use a full-time architect. Absent valid detailed contracts, the director stated that the evidence did not establish there would be an architectural position for the beneficiary to occupy upon entry into the United States. The director was not persuaded that the petitioner would be the beneficiary's employer even though it would directly pay his wage. According to the director, the essential element of the employer-employee relationship is the right of control of the employee. Citing the contract, the director stated that it showed that the contracting firm and the petitioner would be co-employers; therefore, the petitioner would not exercise sole control over the beneficiary. Finally, the director stated that there was insufficient evidence to determine whether the petitioner qualified as the beneficiary's agent.

On appeal, counsel maintains that all contracts between the petitioner and contracting parties were specific as to duties, itineraries, and control of the beneficiary. Counsel further states that there is a proper employer-employee relationship.

The AAO finds that the evidence in the record fails to establish that the petitioner is an employer in accordance with the regulatory definition 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 "California Subscriber Service Agreement." The AAO has already described the deficiencies in the unsigned contract. In addition, the director correctly pointed out that the contract clearly described the petitioner and the contracting party as co-employers of the beneficiary. Paragraph six of the contract narrates in detail their joint duties and control. Consequently, the contract fails to establish that the petitioner would be the beneficiary's sole 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 a contractual agreement between the petitioner and the beneficiary contained in the record. However, the record does not 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 California Subscriber Service Agreement. 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 AAO notes that in the denial letter the director had mentioned that the petitioner sought to place aliens in positions involving computer programming work or with computer companies. None of the evidence in the record indicated that the petitioner sought to place aliens with computer companies or in computer programming jobs. Nevertheless, the director elsewhere properly referenced the proffered employment and evidence in reaching his decision.

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.