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**U.S. Citizenship
and Immigration
Services**



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FILE: WAC 01 199 55809 Office: CALIFORNIA SERVICE CENTER Date: JUN 30 2012

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

for Robert P. Wiemann, Director
Administrative Appeals Office

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 is a software developer, distributor, and provider of Internet technology services that seeks to employ the beneficiary as a project manager. 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). On appeal, counsel submits a brief and additional evidence.

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. Moreover, the regulation at 8 C.F.R. § 214.2(h)(1)(ii)(B)(I) states that the H-1B classification applies to an alien who is 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 the beneficiary will be coming 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.

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 project manager. Evidence of the beneficiary's duties includes: the Form I-129; the May 25, 2001 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, in part: managing a project and preparing its plan; ensuring the project is completed timely and within budget; gathering and creating technical documentation of client requirements; preparing the user's guide and test plan; managing a team of architects, programmers, and testers; leading project team meetings; and preparing weekly project reports for management. The letter stated that candidates for the offered position must possess either a bachelor of science degree in computer science with five years of progressive experience or a master of science degree in computer science.

The director denied the petition. The director found that the petitioner was an agent and it had failed to submit sufficient evidence of contracts that would demonstrate that the beneficiary would come to the United States to be employed in a specialty occupation.

On appeal, counsel maintains that the petitioner does not place employees in companies that require the services of its employees. Counsel states that the petitioner is the American subsidiary of the KFKI Computer Systems Group. Referring to the petitioner's August 6, 2001 letter, counsel states that once the beneficiary is admitted to the United States in H-1B status, he will perform services in the petitioner's San Francisco office and will make brief trips to meet with clients. The petitioner's July 2, 2001 offer of employment letter, counsel states, reflects that the beneficiary will report to the petitioning entity; it does not reflect his placement in other companies. The petitioner, according to counsel, is in the process of securing contracts; however, counsel stresses that the petitioner is not a placement agency and that its fee structure demonstrates this. Citing a November 13, 1995 memorandum issued from the Office of Examinations, counsel claims that submitting contracts is not a normal requirement for the approval of an H-1B petition filed by an employment contractor, and that a request for contracts should be made only if the officer can articulate a specific need for such documentation. Counsel states that the petitioner will pay, hire, fire, and provide health insurance and

other benefits to the beneficiary, and that the beneficiary's supervisor will be an employee of the petitioner. Counsel refers to, and submits on appeal, an AAO case that is allegedly similar to the instant petition. Counsel claims that the petitioner is able to pay the beneficiary's salary. Furthermore, counsel for the petitioner explained that the beneficiary would answer technical questions prior to formalizing client contracts, and after contract ratification he would then manage the contract's technical aspects. Counsel claims that the director's conclusion is tautological given that it needs the beneficiary's services to successfully launch its operations. Counsel submits a signed letter of intent with MicroTeams and states that the petitioner has several other partnering agreements in progress and each requires the beneficiary's active involvement; counsel also submits a synopsis of the beneficiary's prospective role.

The AAO finds that the evidence in the record establishes that the petitioner is the actual employer rather than an agent as defined at 8 C.F.R. § 214.2(h)(2)(i)(F), and furthermore finds that the petitioner has submitted insufficient evidence to show that the beneficiary is coming to perform temporary services in a specialty occupation.

Section 8 C.F.R. § 214.2(h)(2)(i)(F) defines the term "agent" and the passage states that, in part, an "agent" may be the actual employer of the 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.

Contained in the evidentiary record is a July 2, 2001 offer letter from the petitioner to the beneficiary that indicates the salary and other terms and conditions of employment. Absent from the record are signed contracts to engage the beneficiary's services as a project manager upon the beneficiary's arrival in the United States. The petitioner concedes that it has no signed contracts to engage the beneficiary's services. The petitioner's August 6, 2001 letter stated "[w]e are in the negotiation phase for several important accounts, but inasmuch as none have yet been concluded we are unable to provide the requested documentation" of client contracts. The letter also stated that "once the client contracts have been signed, [the beneficiary] will manage the technical aspects of those contracts." Submitted on appeal is the petitioner's July 5, 2001 letter to Microteams.com Pte. Ltd. This is not a signed contract to engage the beneficiary's services; the purpose of this letter is to:

[C]onfirm the non-binding understanding between KFKI and MT to negotiate and develop mutually acceptable arrangements to pursue the formation and promotion of a new entity ("Newco") that will use the competitive competencies of KFKI and MT to develop and support a portal directed at the life sciences and pharmaceutical industries in Asia.

Based on the evidence in the record, the petitioner fails to provide contracts or other evidence that it will engage the beneficiary's services in a specialty occupation.

As previously stated in this decision, the Act provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to *perform* services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act. The regulation set forth at 8 C.F.R. § 214.2(h)(1)(ii)(B)(1) also states that the

H-1B classification applies to an alien who is coming temporarily to the United States to perform services in a specialty occupation. Moreover, Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). In this case, the AAO notes that the petitioner concedes that it has no signed contracts to engage the beneficiary's services as a project manager upon the beneficiary's arrival in the United States. In light of this circumstance, the AAO cannot find that the beneficiary would be coming temporarily to the United States to perform services in a specialty occupation according to section 101(a)(15)(H)(i)(b) of the Act and the regulation as set forth at 8 C.F.R. § 214.2(h)(1)(ii)(B)(1).

Beyond the decision of the director, the petitioner has not established that this is a specialty occupation. For this additional reason, the petition may not be approved.

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