

PUBLIC COMMENT

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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

DZ

NOV 29 2004

FILE: WAC 03 072 51355 Office: CALIFORNIA SERVICE CENTER Date:

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:

SELF-REPRESENTED

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. 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 computer services consulting company that seeks to employ the beneficiary as a computer programmer/analyst. 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 did not establish that it was the actual employer of the beneficiary, and, thus, the petitioner had not established that the proffered position is a specialty occupation. On appeal, counsel states that the position is a specialty occupation and submits further documentation.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation . . .

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.

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 documentation of services to be performed in multiple locations, 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 . . .

Furthermore, 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 providing documentary evidence for establishing whether a position is a specialty occupation, 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.) Further, a Citizenship and Immigration Services (CIS) memorandum entitled "Supporting Documentation for H-1B Petitions," dated November 13, 1995, states as follows: "Requests for contracts should be made only in those cases where the officer can articulate a specific need for such documentation."

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the petitioner's letter of support; (3) the director's request for additional evidence, dated July 21, 2003; (4) the petitioner's letter that responds to the director's request, erroneously dated April 25, 2003; (5) the director's denial letter; and (6) 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 computer programmer/analyst. The petitioner

described itself as a one-stop solutions company providing professional consulting services in software, management, and support services areas. In response to the director's request for further evidence as the petitioner's business and the duties of the proffered position, the petitioner stated that the beneficiary would continue working with one of its clients, [REDACTED], in Sunnyvale, California, and that this project was expected to last for 18 months. The petitioner stated that it also wanted to utilize the services of the beneficiary for contracts with other companies. In response to the director's questions with regard to contracts between the beneficiary and the beneficiary's actual employer, the petitioner submitted a contract between itself and [REDACTED]. The petitioner also submitted an organizational chart that indicated it had contracted-out its accounting, contracts and legal documents, and payroll responsibilities, while it had in-house positions such as a business analyst, a contracts specialist, a human resources employee and an office assistant.

The petitioner also submitted Internal Revenue Service (IRS) Form 941, Employer's Quarterly Tax Return, for the period ending September 30, 2003, that indicated it had six employees. The petitioner indicated that a candidate for the computer programmer/analyst consulting position would have to possess a bachelor's degree in computer science, information systems, or other technical field with one to five years of work experience.

The director denied the petition and described the petitioner as a contractor. As such, the director stated that the petitioner was not the actual employer of the beneficiary. In addition, the director stated that the petitioner had not provided sufficient evidence to establish that it had contracts with firms requiring the computer programming services of the beneficiary. The director stated that the contract that the petitioner submitted in its response to the director's request for further evidence also did not establish the actual employer of the beneficiary. The director further stated that [REDACTED] appeared to be an employment contractor, and not the actual employer of the beneficiary.

The director further stated that the fact that the petitioner would pay the beneficiary's salary did not establish that the petitioner was the actual employer of the beneficiary. The director stated that the actual employer would be the person who had control and direction over the work to be done. With regard to the petitioner, the director stated that the petitioner appeared to be an agent with multiple employers that represented both the employers and the beneficiary. The director then stated as an agent, the petitioner had to provide contracts that included a complete itinerary of work sites where the beneficiary's services would be provided. Since the petitioner did not provide such contracts or itinerary, the director stated it was not possible to determine whether the petitioner met the CIS definition of agent.

Finally, the director noted that the Labor Condition Application (LCA) submitted by the petitioner did not adequately indicate the locations where the beneficiary would be employed. The director also noted that the purchase order for the beneficiary's services with [REDACTED] only indicated one work location for a limited amount of time for the beneficiary. As a result, the director determined that the LCA was not in compliance with regulatory criteria.

On appeal, the petitioner states that it has a valid contract for the beneficiary that is extendable. The petitioner submits a subcontract agreement between itself and GAVS Information Services, Denver, Colorado. The agreement is for the provision of temporary consultants to provide services to GAVS Information Services. The agreement states that the relationship of employer and employee shall not exist between GAVS and any person engaged by the petitioner to provide any service under the agreement. The petitioner also states that

after the completion of the GAVS contract, the beneficiary would work in-house to do developmental work for the petitioner and its clients.

In his request for further evidence, the director specifically requested copies of contracts between the petitioner and the clients where the beneficiary would perform services, and a complete itinerary of services or engagements where the beneficiary would perform those services for the period of time requested, or until 12/29/05. The petitioner was put on notice of required evidence and given reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Upon review of the record, and pursuant to 8 C.F.R. § 214.2(h)(4)(ii)(2), the petitioner has not established that it is the actual employer of the beneficiary or that it serves as an agent for various companies who will employ the beneficiary in various locations in a specialty occupation. As correctly noted by the director, the petitioner is a consulting company that contracts out employees, and, as such, will not directly control the work of the beneficiary. In addition, the sole contract provided by the petitioner that will be considered on appeal does not establish any employer-employee relationship between a company for whom the beneficiary would directly perform duties in the computer programming field and the beneficiary. The contract outlines and explains the relationship between the petitioner and another contracting company. The contract does not specify any particular duties to be performed by the beneficiary, except for in a brief addendum, where the beneficiary's duties are described in full as "Develop applications, using Oracle, C/C++, and Visual Basic." While the contract identifies [REDACTED] as a subcontractor for the petitioner's services, no client is identified on the addendum, naming the beneficiary, and no subcontract is appended to this agreement guaranteeing the beneficiary's employment in a full time capacity.

Furthermore, as noted by the director, there is no itinerary submitted with regard to work to be performed over the requested three-year period of H-1B eligibility. The LCA submitted by the petitioner only states that the beneficiary would work in Fremont, California. Without more persuasive evidence, the petitioner has not established the actual employer of the beneficiary, the actual work duties to be performed by the beneficiary, and the actual locations where such work would be performed. The petitioner has not established that the proffered position is a specialty occupation.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. 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.