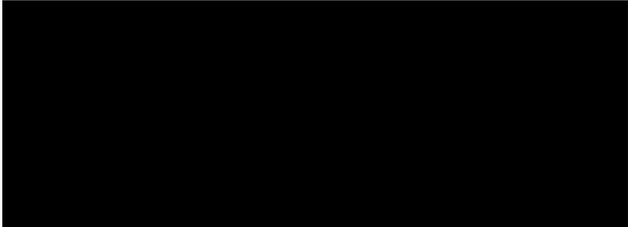




U.S. Citizenship
and Immigration
Services



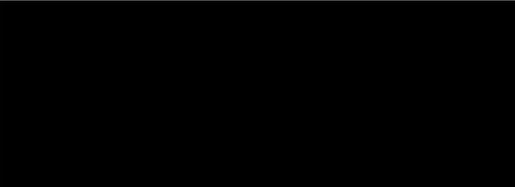
FILE: WAC 01 085 53833 Office: CALIFORNIA SERVICE CENTER Date:

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.

Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
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 is a job placement agency that seeks to employ the beneficiary as a systems analyst/programmer. 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 agent of the beneficiary as defined at 8 C.F.R. § 214.2(h)(2)(i)(F). On appeal, counsel submits 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.

The issue to be discussed in this proceeding is whether the petitioning entity established that it qualifies as an agent.

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; and
- (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 systems analyst/programmer. Evidence of the beneficiary's duties includes: the Form I-129; the January 8, 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 analyzing a company's needs and designing and developing systems and software to meet those needs; performing system enhancements, developing and fixing bugs; upgrading system documentation; assuring quality control for programs and data changes to systems; correcting program errors; maintaining the database; defining problems and providing solutions; designing web pages; and providing technical support and training staff. The petitioner stated that the beneficiary holds a bachelor's degree in computer science and over three years of experience, which is the background that serves the needs of its clients.

The director denied the petition. According to the director, without complete and valid contracts for the beneficiary's services, the petitioner failed to establish that: (1) it would be an agent performing the function of the beneficiary's employer or would be the representative of both the employer(s) and the beneficiary; (2) the beneficiary would provide services as a systems analyst/programmer; and (3) the labor condition application (LCA) was valid.

On appeal, counsel submits a contract between the petitioner and Preferred Rehab Center; an agreement between the beneficiary and the petitioner; a job description; the LCA; and a map. Counsel contends that these documents demonstrate the existence of not only a contract, but a position for the beneficiary as well.

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 submitted January 8, 2001 company letter stated that the petitioner would be the beneficiary’s employer and that the beneficiary’s services would be contracted to the petitioner’s clients. Counsel’s July 9, 2001 letter stated that the client company would directly supervise and evaluate the beneficiary’s performance, and would rely on the petitioner to resolve employee issues. The petitioner averred to having responsibility to hire, fire, and pay the employee. The record contains several agreements: (1) the document entitled “Commitment to Hire” stated that the petitioner would employ the beneficiary and assign the beneficiary to work at Preferred Rehab Center; (2) the document entitled “Exhibit B” is vague, stating that the beneficiary will report directly to the “President/Owner” and that the “President/Owner or designated representative” would be responsible for hiring and firing; (3) the document entitled “Agreement,” dated October 10, 2000, indicated that Preferred Rehab Center would use the services of the petitioner to find an applicant for Preferred Rehab Center to hire; that Preferred Rehab Center agreed to hire the beneficiary as a systems analyst/programmer from January 1, 2001 to January 1, 2004; and that it would compensate the petitioner in an amount equal to one month’s salary for its services as a job placement agency; and (4) the document entitled “California Subscriber Service Agreement, dated October 10, 2000, stated that the petitioner would provide leased employees to Preferred Rehab Center, and that the petitioner and Preferred Rehab Center would be the beneficiary’s co-employers.

The document entitled “Agreement” is plainly inconsistent with the other submitted agreements. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the instant petition, the petitioner has provided no explanation for this obvious inconsistency. Consequently, the provisions of the Agreement explicitly show that the petitioner is not the beneficiary’s employer as defined at section 8 C.F.R. § 214.2(h)(4)(ii).

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 8 C.F.R. § 214.2(h)(2)(i)(F)(1), an agent may perform the function as the beneficiary’s employer. Paragraph 8 C.F.R. § 214.2(h)(2)(i)(F)(2) provides that 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.

As discussed, the terms in the Agreement expressly indicated that Preferred Rehab Center agreed to hire the beneficiary as a systems analyst/programmer for three years and to compensate the petitioner for its services as a job placement agency. Accordingly, the petitioner is acting in the capacity as a job placement agency; it is not an agent/employer of the beneficiary.

Nor is the petitioner an agent charged with filing an H petition involving multiple employers as the representative of both the employers and the beneficiary. As previously discussed, Preferred Rehab Center agreed to hire the beneficiary for a three-year period, and to compensate the petitioner for its services as a job placement agency. This clearly established that the petitioner provided services as a job placement agency; it is not a representative who arranges short-term employment on the beneficiary's behalf with numerous employers. The petitioner therefore fails to qualify as an agent 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.