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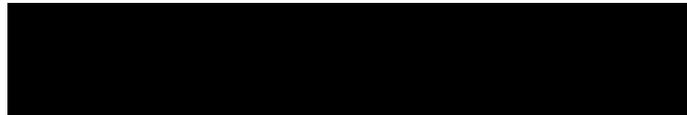
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MAY 11 2005



FILE: WAC 03 193 50102 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:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director 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 an employee leasing services company that seeks to employ the beneficiary as a test engineer. The petitioner 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 either an employer-employee relationship or an agent relationship existed. On appeal, the petitioner submits a letter.

In order to establish eligibility under this classification, the petitioner must establish that the proffered position is a specialty occupation and that the beneficiary is qualified to perform the specialty occupation. Further, the petitioner must establish that it is either a United States employer or a United States agent. A United States employer is defined in 8 C.F.R. § 214.2(h)(4)(ii) to mean:

. . . 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.

The regulation at 8 C.F.R. § 214.2(h)(F) also allows for agents to file petitions on behalf of certain workers.

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.

The director found that it was not clear that the petitioner would be the employer of the beneficiary. The director requested the petitioner to provide copies of the contracts from companies where the beneficiary would work. In response, the petitioner submitted a staffing agreement signed by both the petitioner and its client. The petitioner also submitted a work order request, also signed by both parties. The director found that these documents did not include a comprehensive description of the beneficiary's duties, and therefore, did not demonstrate that a specialty occupation existed. The director also stated that because the beneficiary would be working outside the petitioner's place of business, a contract would be needed to determine that the

beneficiary would be working in a specialty occupation. Because these contracts were not included in the petitioner's response to the director's request for evidence, the director found that the petitioner had not established that it is either the employer or agent of the beneficiary.

The AAO finds that the staffing agreement that was submitted satisfactorily sets out the terms of the relationship between the petitioner and its client, and includes a brief description of the beneficiary's duties. This agreement, however, also establishes that an employer-employee relationship does *not* exist between the petitioner and the beneficiary.

The staffing agreement between the petitioner and its client indicates that the client would have control over the beneficiary. The staffing agreement notes that the petitioner will be considered the beneficiary's employer "for all purposes," and that it would pay the beneficiary's compensation and be responsible for withholding all federal and state taxes. Section 3.2 of the agreement, however, states, "[c]lient shall have full and complete direction and supervision over all employees." Nothing in the agreement states that the petitioner would have control of the beneficiary; the only reference to control and supervision of the beneficiary is in Section 3.2 of the staffing agreement, quoted above. The language of the staffing agreement is clear that the client would maintain control over and supervise the beneficiary. In addition, while Section 2.6 states that the petitioner "shall assume sole and exclusive responsibility for payment of compensation due to employees for performing duties for the Client," Section 3.3 states that the client "agrees to pay the Employee the hourly rate reflected above." These two clauses are contradictory, with one indicating that the client would be paying the beneficiary. 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). Even in the event that the petitioner were compensating the beneficiary, for all intents and purposes, it appears that the client would be the actual employer. Thus, the petitioner is not a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii).

As related in the discussion above, the petitioner has failed to establish that the petitioner would be the employer of the beneficiary. 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.