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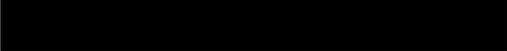
**U.S. Citizenship
and Immigration
Services**

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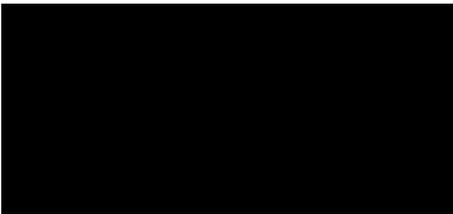
Dr

FILE: LIN 04 229 52152 Office: NEBRASKA SERVICE CENTER Date: **JUN 06 2006**

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

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 The director's decision will be withdrawn and the petition remanded for entry of a new decision.

The petitioner provides software consulting services. It seeks to employ the beneficiary as a systems 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 failed to establish that it met the definition of a "United States employer" at § 214.2(h)(4)(ii).

Counsel submits a timely appeal.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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.

Pursuant to 8 C.F.R. § 214.2(h)(2)(i)(F):

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 CFR part 274a.

In denying the petition, the director found that the submitted evidence contained discrepancies regarding the beneficiary's salary, and that it failed to describe the beneficiary's work location and who would control and supervise his work. The director concluded that the petitioner failed to establish that it would be the beneficiary's employer as defined by the regulation at 8 C.F.R. § 214.2(h)(4)(ii). The director also found discrepancies in the evidence regarding the number of the petitioner's employees.

On appeal, counsel states that the petitioner will be the beneficiary's employer and that the petitioner currently has 20 employees.

The AAO finds that based on the evidence in the record, the petitioner qualifies as the beneficiary's employer.

The petitioner's July 21, 2004 letter and the employment contract with the beneficiary indicate that the petitioner will pay the beneficiary's salary. The July 28, 2004 subcontractor agreement entered into with Corpus Inc. states that the personnel supplied by the petitioner shall remain the petitioner's employees or independent contractors. The record contains two purchase orders entered into with Corpus Inc. The purchase order, dated July 28, 2004, and issued pursuant to the subcontractor agreement states that the beneficiary is to provide services as a TIBCO developer for Corpus Inc. for at least 24 months starting on January 3, 2005. The purchase order entered into on July 18, 2004, states that the petitioner is to provide the beneficiary's services from January 3, 2005 to January 2, 2007 for a client of Corpus Inc. The December 20, 2004 letter from Corpus Inc. to the petitioner describes the duties associated with the project. The letter conveys that the personnel assigned to Corpus Inc.'s projects shall remain the petitioner's employees or independent contractors, and the letter indicates that the petitioner will

provide general supervision of its employees and contractors and that the employees will report to the petitioner for the statement of work. Based on the evidence of record, the petitioner qualifies as the U.S. employer of the beneficiary according to 8 C.F.R. § 214.2(h)(4)(ii), as the evidence reflects that the petitioner will pay the beneficiary's salary and supervise or otherwise control his work.

The petition is not approvable at this time, nevertheless. The evidence of the record is insufficient to establish that the beneficiary will perform a specialty occupation. The purchase order entered into on July 28, 2004 states that the petitioner will provide the beneficiary's services from January 3, 2005 to January 2, 2007 for a client of Corpus Inc. In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now CIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the foreign nurses require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the nurses to the United States for employment with the agency's clients.

With the instant petition, although the record contains an agency service agreement between the petitioner and Corpus Inc., the purchase order entered into on July 28, 2004 indicates that the beneficiary will not work for Corpus Inc. but will provide services to Corpus Inc.'s client. The record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of the Corpus Inc. client although the beneficiary will provide consulting services for the Corpus Inc. client. Without such a description, the petitioner has not demonstrated that the work that the beneficiary will ultimately perform for Corpus Inc.'s client will qualify as that of a specialty occupation under the Act.

The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the offered position qualifies as a specialty occupation, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record at it relates to the regulatory requirements for eligibility. The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's December 8, 2004 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.