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FILE: WAC 05 071 51694 Office: CALIFORNIA SERVICE CENTER Date: JAN 19 2007

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, 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 provides application outsourcing services and enterprise consulting solutions to third party companies. The petitioner seeks to employ the beneficiary as a project manager. Accordingly, 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 record includes: (1) the January 12, 2005 Form I-129 and supporting documents; (2) the director's February 25, 2005 request for further evidence (RFE); (3) counsel's April 16, 2005 response to the director's RFE; (4) the director's July 19, 2005 denial decision; and (5) the Form I-290B and counsel's statement in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On July 19, 2005, the director denied the petition observing that the record did not contain a service agreement between the petitioner and [REDACTED] and without the service agreement the record was insufficient to establish the petitioner as the beneficiary's employer. The director also found that the petitioner failed to establish the position as a specialty occupation. On appeal, counsel for the petitioner notes that the petitioner did provide a copy of a contractual agreement between the petitioner and [REDACTED] and asserts that this document provides sufficient evidence to establish that the petitioner is a U.S. employer.

The initial issue before the AAO is whether the record establishes the petitioner as a U.S. employer or agent, the entities authorized by regulation to file a Form I-129 to classify a beneficiary as an H-1B worker.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), a petitioner qualifies as a U.S. employer, if it:

- (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.

In a December 29, 2004 letter appended to the petition, the petitioner indicated it was working with Wells Fargo Bank to reengineer certain banking systems. The petitioner stated that it would be the beneficiary's actual employer and that the beneficiary would perform services at its offices and at the office of [REDACTED]. The petitioner referenced a "Master Contractors Agreement" between itself and Wells Fargo Bank, N.A. dated December 15, 2003 and indicated that the contract covered an indefinite amount of work to be specified by "Statements of Work" executed by the parties from time to time. The petitioner stated that a copy of the Master Contractors Agreement was attached to the petition. However, the record does not include a copy of this document.

In a May 18, 2005 letter in response to the director's RFE, the petitioner stated that the beneficiary is a direct employee of the petitioner, that the petitioner had contracted the beneficiary's services out to [REDACTED] Inc., and that [REDACTED] Inc. had contracted the beneficiary's services out to Wells Fargo Bank, the end user of the beneficiary's services. The petitioner explained that Wells Fargo is only permitted to contract with "preferred providers" and that [REDACTED] Inc. is a preferred provider and that the petitioner is not. The petitioner indicated that the beneficiary would be working at [REDACTED] at [REDACTED] Concord, California, that the petitioner would need to retain the beneficiary through January 10, 2008, and that the beneficiary would work five eight-hour days per week and would be paid twice per month.

The record also includes the following information related to this issue:

A February 17, 2004 work order between the petitioner and [REDACTED] Inc. indicating that the beneficiary would be working as project manager for the Wells Fargo Bank, with the start date as October 1, 2004, and the term of the contract as one year, ending September 30, 2005 (renewable).

An undated letter signed by the chief executive officer of [REDACTED] Inc. listing the beneficiary's work location as [REDACTED] California and a detailed job description of the beneficiary's duties as project manager for Wells Fargo Bank.

A January 14, 2005 offer of employment from the petitioner to the beneficiary listing his wages per hour, a covenant of confidentiality, an agreement that the beneficiary would abide by the petitioner's rules and regulations, and an indication that the beneficiary is hired "at-will."

An April 18, 2005 letter signed by the technology manager for Wells Fargo Bank indicating that she supervised the beneficiary's work on a daily basis; that the beneficiary is an employee of [the petitioner]; that the petitioner had leveraged its services to [REDACTED] Inc, a Wells Fargo preferred vendor; that the beneficiary had started working on a "particular project on October 1, 2004, while under [the petitioner], he began working January 10, 2005, and under the contract will continue working here to September 30, 2005. Thereafter, his contract to work here is renewable."

The Labor Condition Application (LCA) approved by the Department of Labor (DOL), January 3, 2005, listed the beneficiary's place of work as Cupertino, California.

In his denial, the director focused on a perceived omission in the record of a contractual agreement between the petitioner and [REDACTED] but as counsel notes on appeal, the work order is in the record. The evidence of record, including the work order, the letter from Wells Fargo, the letter from [REDACTED] Inc., and the employment agreement with the beneficiary establish that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary. *See* 8 C.F.R. § 214.2(h)(4)(ii). Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an

itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.¹

The petitioner's LCA indicates that the beneficiary will be employed in Cupertino, California, the petitioner's place of business when the petition was filed. However, in its December 29, 2004 letter appended to the petition, the petitioner indicated that the beneficiary would also perform services at [REDACTED] in Concord, California. In his request for evidence, the director properly asked for the beneficiary's employment itinerary including dates of services requested, work schedule, pay schedule, and the contractual agreements between the petitioner and the companies for which the beneficiary would be providing consulting services, as it appeared the beneficiary would work in multiple locations. In the Aytes memorandum cited at footnote 1, the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary.²

The contractual agreements submitted indicated that the beneficiary would perform services at Wells Fargo Bank in Concord, California to September 30, 2005 and that thereafter the contract would be renewable. Although the petitioner indicated in its May 18, 2005 response to the director's RFE that it would need to retain the beneficiary through January 10, 2008, the petitioner does not identify the location(s) of the beneficiary's employment subsequent to September 30, 2005. The petitioner does not provide evidence of the beneficiary's employment should his services cease to be required by the end-user of his services Wells Fargo Bank, prior to the end of the three-year period the petitioner has requested. The itinerary submitted by the petitioner does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of the beneficiary's employment by the petitioner. As the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), the petition must be denied.

The AAO acknowledges counsel's claim that it had provided the contractual agreement between the petitioner and [REDACTED] Inc., and finds that the work order between the petitioner and [REDACTED] Inc. is in the record. However, the record does not include the December 15, 2003 master contractual agreement between the petitioner and Wells Fargo Bank N.A. that was referenced by the petitioner in its initial submission to Citizenship and Immigration Services (CIS). Thus, the AAO cannot conclude that the need for the beneficiary's services may extend beyond the specific project detailed by Wells Fargo Bank and subject to end September 30, 2005. In addition, the AAO declines to speculate on the petitioner's failure to provide this document and notes only that the existence of this document appears to conflict with the petitioner's later statements that the petitioner is not a Wells Fargo "preferred provider" and therefore cannot directly contract with Wells Fargo for Wells Fargo to use the services of the petitioner's employees.

¹ See also Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

² As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."

In addition, because the petitioner has failed to provide contracts for the beneficiary's employment for the time period subsequent to September 30, 2005 and through January 2008, the petitioner has not established that the beneficiary would be employed in a specialty occupation for the entire three-year period of the H-1B classification.

Upon review of the totality of the record, the record fails to reveal sufficient evidence to establish an itinerary detailing the beneficiary's services, where the services will be performed, or the duration of those services.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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