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MAR 23 2007

FILE: WAC 05 017 50823 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.

*for Michael T. Kelly*  
Robert P. Wiemann, Chief  
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 The director's decision will be withdrawn. The petition will be remanded to the director for entry of a new decision.

The petitioner is a consulting and staffing services company. It seeks to employ the beneficiary as a programmer analyst and endeavors to classify him 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 stating that the petitioner "has not sustained the burden of proof that the petitioner is a United States employer who has an employer-employee relationship with respect to employees under 8 C.F.R. § 214.2(h)(4)(ii), indicating a fact that it may supervise or otherwise control the work of such employee." On appeal, the petitioner submits a brief stating that it qualifies as an employer in this instance and that it will control and direct the work of its employee (the beneficiary).

The first issue to be determined is whether the petitioner qualifies as a United States employer.

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.

The record establishes that the petitioner will be the employer of the beneficiary, and the director's decision to the contrary shall be withdrawn. The petitioner submitted an agreement whereby the petitioner would provide its employees as a vendor to work on projects obtained by Technical & Management Staffing Associates, LLC (TMSA). The agreement with TMSA specifically provides that the personnel provided by the petitioner under the agreement shall be the employees of the petitioner, and the petitioner is working with TMSA as a subcontractor. The petitioner will hire the beneficiary, will pay the beneficiary, has the right to fire the beneficiary and will otherwise have control over the beneficiary's work. The fact that the beneficiary may perform services at a client facility and be subject to that client's work rules and regulations does not change the employer/employee relationship existing between the petitioner and beneficiary. The petitioner will engage the beneficiary to work in the United States, has an employer-employee relationship with the beneficiary, and has an Internal Revenue Service Tax identification number. The petitioner qualifies as a United States employer in this instance, and the director's decision to the contrary is withdrawn.

The director did not determine whether the proffered position qualified as a specialty occupation as the petition was denied on another ground. As such this petition must be remanded to the director to make that determination.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the proffered position qualifies as a specialty occupation in accordance with section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), and the implementing regulations on H-1B petitions at 8 C.F.R. § 214.2(h)(4), and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

It should be noted that the record does not contain documentation establishing the beneficiary's itinerary for the duration of his requested period of stay (10/25/04 – 10/25/07). The work order submitted with the TMSA agreement indicates that the period of work for the beneficiary (AOC/Deloitte project) shall be from October 25, 2004 through October 1, 2005. Further, the record does not contain a detailed description of the work to be performed by the beneficiary for the end user of the beneficiary's services (AOC/Deloitte). Without this documentation, it cannot be determined that the proffered position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A), or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I). The director may request such additional information as he deems necessary in rendering his opinion.

As always, the burden of proof in this proceeding rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's February 17, 2005 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.