U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

D2

FEB 06 2004

FILE: WAC 02 034 53391 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

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

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 The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a consulting and job placement agency that seeks to employ the beneficiary as an actuary. 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, in part, because the petitioner failed to submit contracts indicating the actual place of the beneficiary's employment. On appeal, counsel submits a brief.

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;

(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 entirely before issuing its decision.

In denying the petition, the director found that the petitioner had failed to submit evidence of contracts indicating where the beneficiary will work, concluding that the beneficiary would be unemployed in the United States until the petitioner secures employment. The director also stated that, absent this evidence, the relationship between the petitioner and the actual place of the beneficiary's employment was indeterminate. Addressing the labor condition application (LCA), the director found that without valid contracts she could not determine whether the labor condition application was valid with respect to the beneficiary's area of intended employment and its respective wage. Thus, the director concluded that the petition could not be given further consideration.

On appeal, counsel states that the petitioner had responded to the director's request for evidence, dated January 21, 2002, by submitting a job description, training/experience equivalence information, and the beneficiary's original college degree and transcripts. Counsel states that the director had never requested contracts between the petitioner and the company where the beneficiary will actually work. Counsel concludes, therefore, that the director erroneously denied the petition by finding that the petitioner never provided contracts. Counsel, on appeal, submits two contracts. One is a commitment to hire between the petitioner and the beneficiary; the other is an agreement between the petitioner and prospective employer, Industrial Alliance Pacific Life Insurance Company. Finally, counsel states that the LCA is valid because the petitioner will pay the beneficiary's wage.

The AAO finds that the request for evidence sought three items: (1) a job description; (2) documentation of the beneficiary's training/experience; and (3) the beneficiary's original college degree and school transcripts. As previously related, the director denied the petition because the petitioning entity failed to submit contracts. The request for evidence did not ask for contracts; however, the director denied the petition on the ground that the petitioner failed to submit contracts. The matter will, therefore, be remanded to the director for further consideration.

The director shall address the issue of whether the petitioner's submitted contracts establish the requisite relationship as required by the regulations found at 8 C.F.R. § 214.2(h)(4)(ii) and 8 C.F.R. § 214.2(h)(2)(i)(F). In addition, the director must determine whether the beneficiary's ultimate employment in the United States will be in a specialty occupation. The AAO notes that the beneficiary will be performing services for one of the petitioner's clients. Thus, the petitioner must submit a comprehensive description of the beneficiary's proposed duties from an authorized representative of the petitioner's client where the beneficiary will ultimately perform the proposed duties. Without such description, the petitioner has not demonstrated that the proffered position meets the statutory definition of specialty occupation. As with employment agencies as petitioners, CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner, 201 F.3d 384 (5th Cir. 2000).*

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.

ORDER: The director's June 28, 2002 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.