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U.S. Citizenship  
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*Dr*

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FILE: WAC 04 091 50210 Office: CALIFORNIA SERVICE CENTER Date: JAN 20 2006

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:

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.

A handwritten signature in black ink, 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 appeal will be sustained. The petition will be approved.

The petitioner is digital solutions provider that seeks to employ the beneficiary as a programmer-level 3. 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: (1) the petitioner met the definition of "agent" at 8 C.F.R. § 214.2(h)(2)(i)(F), or the definition of "United States employer" at § 214.2(h)(4)(ii); and (2) the beneficiary's employment would comply with the terms of the Labor Condition Application (LCA).

On appeal, the petitioner submits additional evidence.

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):

*Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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 conceded that the proposed position met the definition of a specialty occupation. However, the director stated that the petitioner did not need the services of an in-house computer programmer and that the petitioner "is in the business of locating aliens with computer backgrounds and placing these aliens in positions with firms that use computer programmers to complete their projects." The director further stated that the petitioner failed to submit requested evidence of valid contracts with clients that would have demonstrated the existence of a specialty occupation for the beneficiary to occupy upon entry into the United States. The director stated that in order to petition for aliens to enter the country in the H-1B classification, the petitioner must establish that it is a U.S. employer. In concluding that the petitioner did not meet the definition of a United States employer, the director stated, "the rule for determining whether an

individual is employed by an employer is stated in 53 Am.Jur.2d, Master and Servant, S.2.” The director stated further that, according to the Master and Servant definition, the most important factor is not which entity pays the alien’s wages, but which entity controls the alien’s work. The director concluded that the petitioner is not a computer-programming firm that uses the services of an in-house computer programmer, thus, the petitioner will not exercise control over the beneficiary and, therefore, cannot be considered a United States employer.

When discussing whether the petitioner was an agent, the director stated that the definition of agent at 8 C.F.R. § 214.2(h)(2)(i)(F) provides for two types of agents: (1) “[a]n agent performing the function of an employer”; and (2) “[a] company in the business as an agent involving multiple employers as the representative of both the employers and the beneficiary.” The director stated that, because the petitioner functioned as the second type of agent, the petitioner “would need to provide contracts showing any arrangements and including [sic] a complete itinerary of [services].” The director concluded that, because the petitioner failed to submit the requested contracts and itinerary, its status as an agent could not be determined.

Finally, the director stated that the absence of contracts and an itinerary rendered it impossible to determine that a specialty occupation will exist if the beneficiary should enter the United States in H-1B status. The director determined further that, without contracts, Citizenship and Immigration Services (CIS) was unable to determine whether the petitioner had complied with the terms of the labor condition application (LCA).

On appeal, the petitioner states that it is the beneficiary’s employer: the beneficiary will work out of its Encinitas office, the beneficiary’s salary will be paid by the petitioner, and the control over the beneficiary and the authority to hire and fire him rests with the petitioner. The petitioner further states that it develops software products in-house that are licensed to and customized for clients, and that clients are not involved in selecting who will work on the product. The petitioner asserts that it did not submit the requested evidence because it does not engage in contracting work. The petitioner submits into the record two March 27, 2003 documents “Specifications Document, Gift Certificate Specifications,” and “Quote, Gift Certificate Quote,” and a February 25, 2004 document “Specifications Document, Restaurant Stream Site Design, Phase 2 (Level 2 and 3). The petitioner also submits invoices, brochures, and the beneficiary’s timesheets for work performed in August 2004.

Based upon the evidence submitted on appeal, the AAO finds that the petitioner qualifies as the U.S. employer of the beneficiary according to 8 C.F.R. § 214.2(h)(4)(ii). The timesheets show that the beneficiary will be employed at the petitioner’s worksite, the specifications documents and the brochure reveal that the petitioner develops and customizes software products for clients, and the timesheets suggest that the petitioner has control over the beneficiary and the authority to hire and fire him. Thus, the evidence reveals that the petitioner has an employer-employee relationship with the beneficiary, and that it has an Internal Revenue Service Tax identification number. As such, the petitioner qualifies as a United States employer pursuant to 8 C.F.R. § 214.2(h)(4)(ii).

The certified LCA reflects the location of work will be at the petitioner’s address in Encinitas, California. The petitioner has established that it will comply with the terms of the LCA.

The AAO will now address whether the beneficiary is qualified for the proposed position.

The petitioner seeks to employ the beneficiary based on his experience and master's degree in computer engineering. The record contains an educational evaluation from Education Evaluators International, Inc. that states that the beneficiary's diploma, HB [REDACTED] is the educational equivalent of a master of science in computer systems engineering awarded by regionally accredited colleges and universities in the United States. The record also contains copies of the beneficiary's diploma, HB [REDACTED] transcript; and translations of these documents into the English language. Based on this evidence, the beneficiary is qualified for the proposed position of programmer-level 3.

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 sustained that burden.

**ORDER:** The appeal is sustained. The petition is approved.