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FILE: WAC 07 148 53118 Office: CALIFORNIA SERVICE CENTER Date: OCT 05 2009

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:  
[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew for  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director of the California Service Center denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

To employ the beneficiary in what the petitioner designates a software engineer position, the petitioner filed this nonimmigrant petition to classify the beneficiary as an H-1B 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). In its March 29, 2007 letter filed with the Form I-129, the petitioner describes itself as a firm that “provides consulting, technical support and services to the Information Technology (IT) industry,” and that it “provides a full range of [IT] services in systems evaluation, design, development and integration, working for both small and Fortune 500 companies.”

The director based her denial of the petition on her determination that the petitioner had not established that it was qualified to file an H-1B petition, in that the evidence of record did not establish the petitioner as either (a) a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F).

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), defines an H-1B nonimmigrant as an alien:

(i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . . , who meets the requirements of the occupation specified in section 1184(i)(2) . . . , and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

The regulation at 8 C.F.R. § 214.2(h)(1)(i) states:

(h) Temporary employees--(1) Admission of temporary employees--(i) General. Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer. . . .

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) identifies a “United States employer” as authorized to file an H-1B petition. “United States employer” is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

*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 regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) allows a “United States agent” to 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.”

On appeal, counsel contends that the director’s denial of the petition is erroneous and should be reversed. Counsel argues that the petitioner established that the petitioner is the beneficiary’s employer within the definition at 8 C.F.R. § 214.2(h)(4)(ii), in that the evidence of record establishes that the beneficiary will be employed exclusively by the petitioner on its own in-house Enterprise Data Warehouse Monitoring Framework (EDWMF) project; that the petitioner shall itself generate and fully control the beneficiary’s work; that the petitioner is hiring him; and that the petitioner alone will pay the beneficiary, manage his work, supervise him, and have the authority to fire him. Counsel also asserts that the agency issue is irrelevant, in that the evidence of record establishes that it is the only employer involved in the petition.

As will be discussed below, the AAO finds that the director’s decision to deny the petition was correct, in that the evidence of record does not establish that the petitioner was, at the time of the filing of the petition, either a United States employer or an agent.

At the outset, the AAO notes that the petitioner expressly concedes that it does not have an agency relationship with the beneficiary and did not file the petition as an agent. Thus, the only issue on appeal is whether the director was correct in denying the petition on the basis that the evidence of record did not establish the petitioner as a United States employer.

The AAO finds the following aspects of the record dispositive of the United States employer issue. The petition was filed on April 2, 2007. The first mention of an in-house project is in the petitioner’s response to the service center’s request for additional information (RFE), which the petitioner filed on October 16, 2007. The Executive Overview section of the in-house project’s information packet that was submitted as part of the RFE states that the project was initiated in May 2007, thereby indicating that the project did not exist at the time the petition was filed. According to counsel’s brief on appeal, the petitioner’s “To Whom It May Concern Memo” submitted on appeal, and the letter that the petitioner submitted in reply to the RFE, no work has been identified for or would be assigned to the beneficiary outside the scope of the aforementioned in-house project. Citing the regulation at 8 C.F.R. § 103(b), the director correctly rejected consideration of the evidence about the in-house project on the basis that the project did not exist at the time that the petition was filed.

To qualify as a United States employer, a petitioner must satisfy all three of the criteria at 8 C.F.R. § 214.2(h)(4)(ii). Further, the petitioner must satisfy the criteria at the time that the petition is filed. This is obvious in the plain reading of 8 C.F.R. § 214.2(h)(2)(i)(A). USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Therefore, the director correctly concentrated upon whatever evidence the record might contain of work existing for the beneficiary at the time the petition was filed.

The record establishes that work claimed for the beneficiary, on the EDWFMF project, would be generated by the petitioner, but that neither that project nor work for the beneficiary on it existed at the time that the petition was filed. Thus, the record indicates that at the time that the petition was filed the petitioner was not engaging the beneficiary for actual work in the United States. Therefore, the petitioner failed to satisfy the requirement at 8 C.F.R. § 214.2(h)(4)(ii)(1).

With regard to the requirement at 8 C.F.R. § 214.2(h)(4)(ii)(2) that a U.S. employer have an employer-employee relationship with its beneficiary, the AAO notes that the record's evidence regarding the petitioner's assertion that it would employ the beneficiary in its in-house project has no probative value. This is because the project did not exist when the petition was filed. *See* 8 C.F.R. 103.2(b)(1). *See also Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. Also, the record contains no documentary evidence of the petitioner's having engaged in any self-generated, in-house project other than the EDWFMF project asserted in this petition. Further, the petitioner's letter of support filed with the Form I-129 contains no mention of the EDWFMF project or any project not generated by contractual agreements with clients.

The AAO further notes that the Form I-129 and the petitioner's letter of support filed with it indicate that the petitioner's business involves consulting, technical support, and other services to clients contracting with it for particular services, thus indicating that entities other than the petitioner are routinely involved in controlling the work of workers associated with the petitioner. Therefore, there is no basis for ascertaining, from the evidence existent at the time that the petition was filed, what work relationships and work control dynamics might arise among the petitioner, its clients, and the beneficiary. Moreover, given that (1) the merits of an H-1B petition are gauged by the nature of the work reserved for the beneficiary at the time the petition was filed; (2) the present petition was filed without the existence of actual work for the beneficiary for the petition's employment period; and (3) the actual work is the anchor and defining framework for any employer-employee relationship, the director was correct in determining that the petitioner has not established sufficient indicia of control over the beneficiary and his work to satisfy the requirement at 8 C.F.R. § 214.2(h)(4)(ii)(2) that a United States employer have an employer-employee relationship with respect to the beneficiary. Without work over which to exercise control, an entity does not have the ability referenced at 8 C.F.R. § 214.2(h)(4)(ii)(2) to "control the work" of any employee. Moreover, speculative employment cannot form a credible basis for a bona fide offer of employment such that, as of the time the petition was filed, it could be found that the petitioner would employ the beneficiary in the United States for the period of time requested.

For the reasons discussed above, the AAO finds that the petitioner has not satisfied either the first or second criteria of 8 C.F.R. § 214.2(h)(2)(i)(A). Therefore, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO finds that the petition must also be denied because the evidence of record does not establish a specialty occupation. The record indicates that the petitioner's claim that the proffered position qualifies as a specialty occupation is based upon the work that the beneficiary would perform in the course of the petitioner's self-generated EDWF project. However, as earlier discussed in this decision, the record indicates that this project and, therefore, any work that it would generate for the beneficiary, did not exist at the time that the petition was filed. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. Absent an actual project or assignment to which the beneficiary would be detailed or assigned, an evaluation cannot be made as to the duties the beneficiary will perform and, as such, it cannot be determined whether the beneficiary will perform the duties of a specialty occupation for the period of time requested in the instant petition. For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *affd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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, and the petition is denied.