



U.S. Citizenship
and Immigration
Services

TO:

C/O [REDACTED]
[REDACTED]
[REDACTED], CA [REDACTED]

DATE: SEP 24 2012

Petition: Form I-129

File: [REDACTED]

DECISION

Your Form I-129, Petition for a Nonimmigrant Worker, filed in behalf of [REDACTED] has been denied for the following reason(s):

See Attachment

If you desire to appeal this decision, you may do so. Your notice of appeal must be filed with this office within 30 days of the date of this notice. Your appeal must be filed on Form I-290B. A fee of \$630.00 is required, payable to U. S. Citizenship and Immigration Services with a check or money order from a bank or other institution located in the United States. If no appeal is filed within the time allowed, this decision will be the final decision in this matter.

In support of your appeal, you may submit a brief or other written statement for consideration by the reviewing authority. You may, if necessary, request additional time to submit a brief. Any brief, written statement, or other evidence not filed with Form I-290B, or any request for additional time for the submission of a brief or other material must be sent directly to:

DHS/USCIS
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

Any request for additional time for the submission of a brief or other statement must be made directly to the Administrative Appeals Office (AAO), and must be accompanied by a written explanation for the need for additional time. An extension of time to file the appeal may not be granted. **The appeal may not be filed directly with the AAO.**

The Small Business Regulatory Enforcement and Fairness Act established the Office of the National Ombudsman (ONO) at the Small Business Administration. The ONO assists small businesses with issues related to federal regulations. If you are a small business with a comment or complaint about regulatory enforcement, you may contact the ONO at www.sba.gov/ombudsman or phone 202-205-2417 or fax 202-481-5719.

Sincerely,

Rosemary Langley Melville
Director, California Service Center

Enclosure: Form I-290B

cc: [REDACTED]

Form I-292

You filed this Form I-129, Petition for a Nonimmigrant Worker, on April 24, 2012, to classify the beneficiary, [REDACTED] as an alien employed in a specialty occupation under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act).

You, [REDACTED], LLC, are a [REDACTED], California, for-profit company engaged in the business of management consulting. You seek to temporarily employ the beneficiary as a Systems Engineer for a period of three (3) years.

The only issue to be discussed is whether you have established that you have an employer-employee relationship with the beneficiary.

101(a)(15)(H)(i)(b) of the Immigration and Nationality Act defines an H-1B nonimmigrant as an alien:

...who is coming temporarily to the United States to perform services...in a specialty occupation described in section 214(i)(1)..., who meets the requirements for the occupation specified in section 214(i)(2)..., and with respect to whom the Secretary of Labor determines and certifies...that the intending employer has filed with the Secretary an application under section 212(n)(1).

Title 8 Code of Federal Regulations ("C.F.R.") 214.2(h)(2)(i)(A) provides that a "United States employer" shall file an [H-1B] petition.

The term "United States employer", in turn, 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.

In considering whether or not one is an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS focuses on the common-law touchstone of "control." See 8 C.F.R. § 214.2(h)(4)(ii)(2) defining a "United States employer" as one who "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" (Emphasis added)

In your initial filing, you stated that you have an immediate need for a Systems Engineer. The specific duties and responsibilities of this professional position are, but not limited to, plan, direct and coordinate SAP (enterprise software) information systems used for production planning and scheduling; purchase management; stock and warehouse management; sales and stock forecast; as well as supply network planning. The Systems Engineer will review each of your Business clients' Company specific SAP Enterprise Resource Planning Software ("ERP") and/or SAP advanced Planning and Optimizer ("APO") software and

will develop & implement business specific project plans for each one of your corporate clients, which will be used to schedule and coordinate their specific project activities. Additionally, the Systems Engineer will consult with your clients' management team, suppliers and technicians in order to assess their company specific computing needs and current system requirements, as well as solicit their cooperation and resolve any foreseen, as well as unforeseen problems with their software implementation. However, documentation regarding your business, including your corporate structure, was not submitted. As such, USCIS was unable to determine who would have the right to control the beneficiary's work, including the ability to hire, fire, pay, supervise or otherwise control the work of the beneficiary while he was working in the United States.

On May 8, 2012, you were issued a Request for Evidence (RFE) and were asked to provide information regarding your company, completion of the Form I-129 and a detailed description of the beneficiary's duties as a System Engineer. On July 30, 2012, you responded to the RFE by providing an amended Page 5 and Page 12 of the I-129 petition, information about your company and evidence pertaining to the beneficiary's positions as a System Engineer.

On August 3, 2012, you were issued an additional RFE and were asked to provide information regarding the employer-employee relationship between you and the beneficiary.

On August 27, 2012, you responded to the second RFE by providing the following information:

- Statement from [REDACTED];
- Copy of the Operating Agreement for [REDACTED], LLC a California Limited Liability Company;
- Copy of the Employment Agreement between [REDACTED] LLC and [REDACTED];
- Copy of a USCIS Press Release dated August 2, 2011;
- Copy of the USCIS Question & Answers: USCIS Issues Guidance Memorandum on Establishing the "Employer-Employment Relationship" in H-1B Petitions; and
- Copy of a Performance Review Form.

Company Members

According to the evidence, the beneficiary, [REDACTED], is a Member of your company with a Membership Interest of 50%. Additionally, the evidence indicates that [REDACTED] is the other Member with a Membership Interest of 50%. Therefore, [REDACTED] and [REDACTED] are equal Members of your company.

Right to Control

Your Operating Agreement state that the management of your company will shall be vested in your Managers. Your Managers consists of the beneficiary, [REDACTED], and [REDACTED]. Specifically, Article IV.1 of your Operating Agreement states:

The management of the Company shall be vested in its Managers. [REDACTED], [REDACTED] and [REDACTED] are hereby designated as the Managers of the Company. The Members may remove [REDACTED], [REDACTED] or [REDACTED] as Managers anytime, for any reason whatsoever, by a majority vote of the Members

(with each Member having one vote or a fraction of one vote for each percentage point or fraction of percentage point in such Member's Membership Percentage). In the event [REDACTED], [REDACTED] or [REDACTED] are removed as Managers, then the Members, by majority vote, shall designate replacements for the removed Managers.

When evaluating the employer-employee relationship, USCIS looks at several factors to determine if the employer will have a sufficient level of control over its employees. The petitioner must be able to establish that it has the right to control over when, where, and how the beneficiary performs the job. Since you indicated that the beneficiary would be employed with your company as a System Engineer, USCIS will review who in your company will have the right to control the beneficiary's employment.

Your company is a California Limited Liability Company involved in management consulting. Your company is controlled by two members, [REDACTED] and [REDACTED] who hold equal Membership Interest. Additionally, the record indicates that the management of your company will be vested in your Managers: [REDACTED], [REDACTED] and [REDACTED].

According to the evidence, the beneficiary will be performing the duties of a System Engineer on-site at your location. While you state that the beneficiary will be reporting to your Managers, who will manage your company as outlined in your Operating Agreement. Article IV.1 of your Operating Agreement states that the company's Members may remove any of your Managers for any reason whatsoever and will have the ability to replace any of the removed Managers.

While it appears that your company will pay the beneficiary and claim him for tax purposes, the ability to pay is just one factor that USCIS uses when determining the employer-employee relationship. USCIS evaluates the petitioner's right to control the beneficiary's employment through a totality of factors. No single factor is dispositive.

According to your Employment Agreement, your company may terminate the beneficiary's employment for the reason listed in your Employment Agreement. Your Operating Agreement under section IV.3 states the ability to fire a company's employee, including a Software Engineer, for your company will come under the control of your Managers. However, the Managers will come under the control of your Members.

From the evidence, it appears that your Members will have the ultimate control whether your company can hire, fire, pay, supervise and set the rules and regulations on the beneficiary's work. The evidence does not indicate that the beneficiary reports to anyone higher in your organization; rather, it indicates that the beneficiary and [REDACTED] will have an equal amount of influence on your company as your company's Members.

Further, while your company will be managed by your Managers, the evidence indicates that the right to control the beneficiary's employment resides with the beneficiary and [REDACTED] equally as your company's Members. As such, it appears that the beneficiary will have an equal amount of influence in the ultimate right of control over his own employment.

The evidence in the record has not established that a valid employer-employee relationship exists between you, the petitioner, and the beneficiary.

WAC- [REDACTED]
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The burden of proof in these proceedings rests solely with the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here that burden has not been met.

Consequently, the petition is hereby denied for the above stated reason.