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U.S. Citizenship
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FILE:

Office: CALIFORNIA SERVICE CENTER

Date: OCT 17 2006

WAC 05 092 50186

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

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.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn, the appeal will be sustained, and the petition will be approved.

The petitioner provides software development and consulting services. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not offered the beneficiary a permanent job.

On appeal, counsel submits a brief and additional evidence.

As quoted by the director, the regulation at 20 C.F.R. § 656.3 defines “employment” as it relates to the labor certification process for the permanent employment of aliens as follows:

“Employment” means permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee.

On the Form I-40 petition, the petitioner indicated that the proffered position was permanent. On February 16, 2006, the director requested information regarding whether the beneficiary would be outsourced and requested the petitioner’s quarterly wage and withholding reports. In response, the petitioner indicated that the beneficiary was working on a project with NetApp. The petitioner continued:

Generally, the initial contracts are for a specified number of unnamed engineers. Engineers are assigned to a contract when the start date is imminent. As the contracts are extended, the engineers working on these projects usually stay with the project, and are often named in the contract extension. Most of [the petitioner’s] accounts are extended for lengthy periods of time. The contract renewal with NetApp is in progress and we anticipate that the contract will be extended for at least another year. [The beneficiary] will continue working on the project at NetApp.

The petitioner then submitted its contract with NetApp listing the beneficiary. The most recent extension was through April 30, 2007.

The director concluded that the beneficiary was only employed on a temporary basis. On appeal, the petitioner asserts that the beneficiary has been working for the petitioner since November 2000 and has been working on the NetApp project since December 2004. The petitioner asserts that if the contract with NetApp ends, the petitioner will assign the beneficiary “to work either on one of its other numerous contracts or on further developing its products.” The petitioner submits its brochures and several client contracts. The petitioner also submitted evidence of the beneficiary’s prior work for different clients.

The letter from the petitioner submitted in response to the director's request for additional evidence was drafted in response to that request, which inquired as to whether the petitioner outsources the beneficiary's services. In that context, the letter in no way implies that the beneficiary's contract with the petitioner is contingent on the petitioner's contract with NetApp. The listing of the beneficiary on the contract between the petitioner and NetApp does not suggest that the beneficiary's contract with the petitioner is similarly a term contract. We are satisfied that the record, including the evidence submitted on appeal, does not suggest that the beneficiary has a term appointment with the petitioner. Nothing in the record contradicts the petitioner's assertion that, should the contract with NetApp end, the beneficiary will be reassigned to another client as he was in December 2004.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has met that burden.

ORDER: The decision of the director dated May 25, 2006, is withdrawn. The appeal is sustained and the petition is approved.