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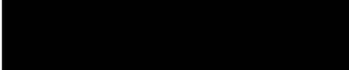
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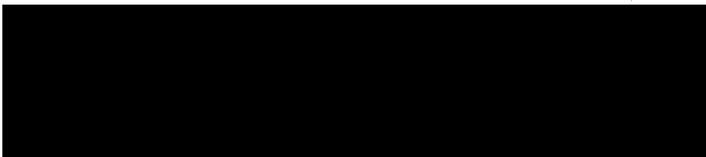


FILE: WAC 06 004 50986 Office: CALIFORNIA SERVICE CENTER Date: **APR 18 2007**

IN RE: Petitioner: 
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:



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, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a computer software development and consulting company that seeks to employ the beneficiary as a software engineer. The petitioner 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 determined that the record did not establish that the petitioner had H-1B caliber work available for the beneficiary during the three-year time period sought by the petitioner in the Form I-129 petition at the location noted on the Labor Condition Application (LCA), and accordingly that the record did not establish that a specialty occupation existed for the beneficiary. The petition was not, therefore, approvable. The director also determined that the petitioner did not qualify as a United States employer in this instance. On appeal the petitioner submits a brief and additional information contending that the proffered position qualifies as a specialty occupation, and that the petitioner will be the employer of the beneficiary with H-1B caliber employment available for him in the United States.

The first issue to be determined is whether the petitioner qualifies as a United States employer.

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.

The petitioner provided copies of several contracts that it maintains with various companies under which the petitioner provides its employees for completion of various work projects on behalf of the contracting company's clients. Under the terms of these contracts, the petitioner acts as an independent contractor in providing services. The performance of the services to be provided are performed by employees of the petitioner. The petitioner will hire the beneficiary, will pay the beneficiary, has the right to fire the beneficiary and will otherwise have control over the beneficiary's work. The fact that the beneficiary may perform services at a client facility and is subject to that client's work rules and regulations does not change the employer/employee relationship existing between the petitioner and beneficiary. The petitioner will engage the beneficiary to work in the United States, has an employer-employee relationship with the beneficiary, and has an Internal Revenue Service Tax identification number. The petitioner qualifies as a United States employer in this instance, and the director's decision to the contrary is withdrawn.

The next issue to be determined is whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(1) of 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.

The term “specialty occupation” is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields 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)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term “degree” in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The petitioner seeks the beneficiary’s services as a software engineer. Evidence of the beneficiary’s duties is set forth in the Form I-129 petition and supporting attachment. According to evidence provided by the petitioner the beneficiary would:

- Review and analyze existing systems;
- Confer with existing system users to understand needs and applications;

- Analyze user requirements, procedures and problems to automate processing and improve existing systems;
- Plan and coordinate design and development of the modification of applications to meet client needs;
- Formulate/design systems scope and objectives and write a detailed description of the user needs, program functions and steps required to develop or tailor computer programs;
- Test and implement proposed modifications and provide support if necessary;
- Configure and customize various modules based on user requirements and be involved in system integration, configuration, programs specifications, coding, testing and unit integration; and
- Work on miscellaneous activities, including coordination with other team members.

The petitioner requires a minimum of a bachelor's degree in engineering, computer science, information systems or a related field for entry into the proffered position.

In the director's decision dated February 3, 2006, it was noted that the petitioner submitted two labor condition applications (LCA). The first LCA was certified on October 1, 2005, and filed with the Form I-129 petition. That LCA authorizes employment for a software engineer in Monterey, CA at an annual salary of \$54,891. The second LCA was certified on January 18, 2006, and authorizes employment for a software engineer in Santa Ana, CA at an annual salary of \$35,173. Due to the discrepancy between the documents, the director reasoned that it could not be determined where the beneficiary would actually be employed, and consequently, it could not be determined whether the petitioner was complying with the terms and conditions of the LCA. The petitioner stated that the beneficiary initially worked (for a period of approximately one month) on a project with ██████████ in Monterey, CA, but was then removed from that project to work on a project with T Mobile USA, Inc. in Santa Ana, CA because the petitioner felt the beneficiary's talents were better suited for that project. The petitioner made no other statement explaining why the petitioner filed a Form I-129 on the beneficiary's behalf indicating that he would be employed as a software engineer earning \$54,891 in Monterey, CA, then immediately transferred the beneficiary to another position and filed an LCA stating that the petitioner would then work in a new position at a salary almost \$20,000 per year less than the one petitioned for. Further, the record does not contain any documentation establishing that the petitioner initially worked at the ██████████ project in connection with the first LCA submitted. Simply going on the record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N 190 (Reg. Comm. 1972)). Under these circumstances it cannot be determined that a specialty occupation existed when the Form I-129 was filed, or that the beneficiary was employed pursuant to the terms of the LCA filed with the Form I-129 petition.

The director requested from the petitioner copies of contracts between the petitioner and its clients as well as an

itinerary¹ specifying the dates and places of employment for the beneficiary during the term of his intended stay in the United States. Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.

The petitioner provided sample copies of contracts with various clients. The petitioner also provided a service agreement/contract between itself and T Mobile, Inc. which, by its terms expired on December 31, 2005, along with a work order for the beneficiary dated July 8, 2005. The work order did not indicate the place of employment, length of the beneficiary's employment, or specifically detail the duties to be performed by the beneficiary. The petitioner states that the contract had not expired and that it had petitioned a third party entity to become an approved contractor on future Mobil T, Inc. job orders since Mobil T, Inc. had engaged that third party to represent it with its manpower needs in the future. The record does not establish, however, that the petitioner presently has employment available for the beneficiary with Mobil T, Inc. for the duration of his intended stay in the United States. Again, simply going on the record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N 190 (Reg. Comm. 1972)).

The petitioner states that the beneficiary may perform some work at the petitioner's business location, but could primarily be available for work on various client projects at multiple, but unspecified, locations. In the Aytes memorandum cited at footnote 1, the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised his discretion in requiring contracts of work. The documentation contained in the record does not establish a complete itinerary for the beneficiary from October 1, 2005 through October 1, 2008. Accordingly, the petitioner has failed to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition must be denied.²

The beneficiary's position has been identified by the petitioner as a software engineer. The Department of Labor's *Occupational Outlook Handbook (Handbook)* notes that most employers prefer to hire software engineers with at least a bachelor's degree in computer science or software engineering. The petitioner, however, has provided no contracts, work orders or statements of work from any petitioner client for whom the beneficiary will actually perform services specifically describing the duties the beneficiary would perform and, therefore, has not established the proffered position as a specialty occupation. Simply going on the record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N 190 (Reg. Comm. 1972)).

¹ See Memorandum from [REDACTED] Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

² As noted by Assistant Commissioner [REDACTED] in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a “token employer,” while the entity for which the services are to be performed is the “more relevant employer.” The *Defensor* court recognized that evidence of the client companies’ job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. As the record does not contain any documentation from the end users of the beneficiary’s services (the petitioner’s clients) that establish the specific duties the beneficiary would perform under contract, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I). For this additional reason, the petition must be denied.

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 failed to sustain that burden.

ORDER: The appeal is dismissed. The petition is denied.