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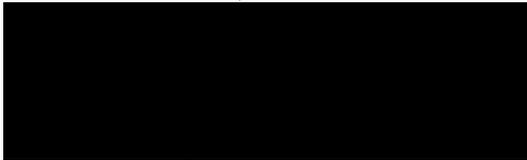
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FILE: LIN 03 204 53677 Office: NEBRASKA SERVICE CENTER Date: **AUG 18 2005**

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The director's decision will be withdrawn and the petition remanded for entry of a new decision.

The petitioner is a computer programming and software development company. It seeks to employ the beneficiary as a programmer analyst and to classify him 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).

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.

As provided in 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 criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To qualify to perform the services of a specialty occupation an alien must meet one of the following criteria set forth in 8 C.F.R. § 214.2(h)(4)(iii)(C):

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the grounds that (a) the petitioner did not appear to qualify as a "United States employer" as defined in the regulations, 8 C.F.R. § 214.2(h)(4)(ii), and (b) the record failed to establish that the petitioner had a specialty occupation position available for the beneficiary in the location identified on the Form ETA 9035 Labor Condition Application (LCA) at the time the petition was filed. With respect to the employment relationship between the petitioner and the beneficiary, the director interpreted the pertinent documentation as follows:

The "Independent Contractor Basic Agreement" and related "Purchase Order" between the petitioner and IT Link International as well as other documentation in the record clearly indicate that the petitioning organization (Corporate Computer Services, Inc.) is a "contractor" that is serving as a "vendor" to supply the beneficiary's unspecified "services" to an unnamed third party entity at an unspecified address (presumably in Detroit, Michigan)

As the petitioner is providing unspecified "services" to its client (IT Link International) who is then "brokering" the beneficiary's services to an unrelated and unnamed third party entity (presumably located in Detroit, MI), this suggests that the petitioner does *not* have an independent contract to provide any tangible product or service to any client *directly*. The petitioner's business . . . is . . . to provide temporary labor to an unknown third party . . . that ultimately controls the key factors related to a proper employer-employee relationship. As a result, the petitioner . . . does not qualify as a "United States employer" as contemplated by regulation.

On appeal the petitioner has submitted a brief and supporting evidence, which includes the following pertinent documentation:

1. The petitioner's quarterly federal tax returns for 2003 (showing its employer identification number).

2. Pay stubs showing the beneficiary was an employee of the petitioner in December 2003 and January 2004.
3. An attachment to the Master Agreement between IT Link International and the petitioner in January 2002 confirming that the petitioner would remain the employer of a consultant providing services to third parties and be responsible for filing the H-1B petition and all tax returns relating to the consultant; paying, hiring, firing, and controlling the consultant's work; as well as handling the consultant's insurance and employee benefits mandated by law.
4. A letter from IT Link International identifying the third party client and the business location where the beneficiary would be performing services.
5. The petitioner's offer letter to the beneficiary, dated June 2, 2003, detailing the conditions of their employer-employee relationship.
6. The petitioner's letter to CIS that was filed with Form I-129, dated June 12, 2003, describing the job duties the beneficiary would perform for clients as a "programmer analyst."

Based on the above documentation (some of which was already in the record), and other previously submitted documentation, the AAO determines that the beneficiary would be an employee of the petitioner under the H-1B classification requested in the instant petition and performing services at an identified location in the United States. The AAO concludes that the petitioner qualifies as a "United States employer" under 8 C.F.R. § 214.2(h)(4)(ii) as has overcome that ground for denial.

The director also found that the record failed to establish that the petitioner had a position available for the beneficiary at the location identified on the LCA at the time the petition was filed. The LCA identified "metro Detroit" as the place where the beneficiary would work. The petitioner has identified [REDACTED] a suburb of Detroit and within commuting distance, as the work location. *See* 20 C.F.R. § 655.715. Thus, the LCA is valid.

The petition cannot be approved, however, as it has not been determined whether the proffered position qualifies as a specialty occupation under one or more of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A), and whether the beneficiary is qualified to perform the services of a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(C).

As the director has not addressed these issues, the director's decision will be withdrawn and the petition will be remanded for a determination as to whether the proffered position is a specialty occupation and whether the beneficiary is qualified to perform the services thereof. The director may afford the petitioner the opportunity to provide pertinent evidence. The director shall then issue a new decision based on the evidence of record. As always, the burden of proof rests with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision of January 8, 2004 is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, shall be certified to the AAO for review.