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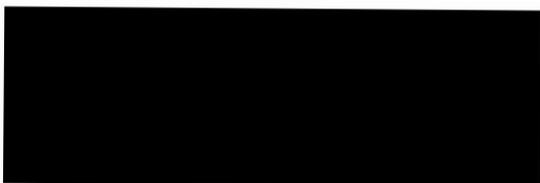
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U.S. Citizenship  
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Services

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FILE: LIN 05 001 51870 Office: NEBRASKA SERVICE CENTER

Date: JUL 05 2006

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:

SELF-REPRESENTED

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. Wienmann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director of the service center 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 software development and information technology consulting business that seeks to employ the beneficiary as a systems analyst and to classify her 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 denied the petition on the basis that the petitioner had not established H-1B level work for the intended dates of employment, and that a specialty occupation could not exist at the location indicated on the certified labor condition application (LCA) because the petitioner's business license at this location had been revoked. On appeal, the petitioner submits a letter and additional evidence.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation and certified LCA; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B with accompanying letter. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner seeks the beneficiary's services as a systems analyst. Evidence of the beneficiary's duties includes Form I-129 with attachments, the petitioner's response to the RFE, and the petitioner's appeal letter. According to this evidence, the beneficiary's duties would include: analyzing the requirements for assigned modules and developing detailed specifications for enhancements; preparing high level and low level designs; optimizing the design model; preparing logical and physical designs in terms of both software and hardware integration; construction and development of the code; running and executing the code; testing peer reviews, execution, and verification of the test results; maintaining and enhancing the code; documenting business flows; assisting in the preparation of implementation strategy; providing support for implementation of the programs; documenting a review with the business users; and assisting in the quality assurance process by executing the regression library. The petitioner stated that the position required at least a bachelor's degree or foreign equivalent in computer science, computer engineering, information technology, software applications, or a related area.

The director found the duties initially listed for the proposed position were too general and asked the petitioner to submit the working contract between the petitioner and the business who had the need for the beneficiary's services. The petitioner submitted the requested contract but the contract did not specify the duties to be performed by the beneficiary consultant. As a result, the director found the documentation insufficient to establish that the beneficiary would be employed in a specialty occupation for the intended dates of employment. The director also noted that the petitioner's business license had been revoked by the state of Wisconsin.

On appeal, the petitioner submits evidence to show that the petitioner's business license is currently valid. The petitioner asserts that the contract showed the places where the two businesses were incorporated but maintains that the beneficiary will perform her job duties in Wisconsin. The petitioner admits that the job duties were not included in the original contract but states that it cannot amend the contract because it has already been signed. The petitioner submits an itinerary listing the beneficiary's proposed duties.

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.

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

The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at multiple work locations to perform services established by contractual agreements for third-party companies. The petitioner, however, has not provided contracts, work orders or statements of work that sufficiently describe the duties the beneficiary would perform for its clients and, therefore, has not established the proposed position as a specialty occupation.

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> 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 that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients, 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. The only contract the petitioner submitted did not contain a description of proposed duties and only provided three months of work for the beneficiary. The itinerary of employment submitted on appeal was not attached to the original contract and is not signed by the petitioner's client. This is not sufficient to establish that the beneficiary will be employed in a specialty occupation for the intended dates of employment. 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)(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).

The director also found that the LCA submitted with the original petition was not valid for the work location it listed. The petitioner explains on appeal that the addresses for the petitioner and the client were their corporate addresses but that the beneficiary would be performing the proposed duties at the petitioner's Wisconsin site. Therefore, the AAO withdraws the director's decision in this regard.

Beyond the decision of the director, the AAO finds that the petitioner did not submit evidence to satisfy the requirements for employers acting as agents pursuant to 8 C.F.R. § 214.2(h)(2)(i)(F). The evidence of record, including the contract and work order, establish that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.<sup>1</sup> See 8 C.F.R. § 214.2(h)(4)(ii). As the beneficiary will be placed at multiple work locations established by contractual agreements between the petitioner and third-party companies, the petitioner is also an agent, as described at 8 C.F.R. § 214.2(h)(2)(i)(F):

A United States agent may 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. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent . . . .

The regulation governing agents at 8 C.F.R. § 214.2(h)(2)(i)(F)(I) requires the submission of an itinerary of definite employment to cover the entire period of time requested in the petition. Employers, pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), must also submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.

In his RFE, the director asked for the beneficiary's employment contracts of work to be performed. The itinerary submitted by the petitioner does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(F)(I) as it does not cover the entire period of the beneficiary's employment by the petitioner. For this additional reason, the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(F)(I), and the petition must be denied.

The burden of proving eligibility for the benefit sought rests entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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<sup>1</sup> See also Memorandum from Michael L. Aytes, 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).

LIN 05 001 51870

Page 5

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