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U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 04 263 50631 Office: VERMONT SERVICE CENTER Date: **SEP 18 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:



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 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 recruitment and staffing agency that seeks to employ the beneficiary as an accountant. The petitioner, therefore, 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 record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the basis of his determination that the record "lacks sufficient evidence to convince [Citizenship and Immigration Services (CIS)] that the beneficiary will be occupied primarily in a specialty occupation." Noting that the petitioner currently employs eight accountants, the director stated that "[i]t is questionable that a company of your size and scope would require the services of such a large accounting staff performing virtually identical duties." The director also denied the petition—citing section 274C(a) of the Act—because CIS was unable to make a determination of the "validity of any positions offered or claims made, or the authenticity of any documents submitted by [the petitioner]" due to "the large number of obvious and intentional alterations to various documents submitted by [the petitioner] as well as a number of misleading statements made by [the petitioner]." In particular, the director found that "contracts between [the petitioner] and the beneficiary as well as pay statements for several beneficiaries...had been obviously altered" to remove sponsorship or filing fee deductions. The director also noted inconsistencies in the number of employees the petitioner listed in the various petitions it had filed and in income tax statements submitted with these petitions. Finally, the director found that the petitioner made "false and misleading statements" in petitions it filed for "in-house accountants" concerning the number of accountants working for the petitioner.

On appeal, counsel contends that the director erred in denying the petition. Counsel states that the petitioner has not altered any documents or intentionally misrepresented any fact to CIS and that the director erred in concluding that it had. Counsel asserts that CIS also mistakenly concluded that the petitions submitted by the petitioner for accountants were for in-house accounting staff. Counsel indicates that the accountants for whom the petitioner petitioned will actually be working for the petitioner's clients. Counsel states that "these accountants do the work at [the] petitioner's main office instead of being assigned individually to work at the offices of [the petitioner's] clients which might not have the necessary space to house the accountants."

As a preliminary matter, the AAO finds that the director erred in denying the petition on the basis of evidence not in the record of proceeding and without giving the petitioner an opportunity to address the reasons for denial. Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Furthermore, 8 C.F.R. § 103.2(b)(16)(i) requires the director to advise the petitioner "if a decision will be adverse to the...petitioner and is based on derogatory information considered by the Service and of which the...petitioner is unaware", and give the petitioner "an opportunity to rebut the information in his/her own behalf before the decision is rendered." The director's January 7, 2005 request for additional

evidence did not give the petitioner adequate notice of the director's intention to deny the petition on the basis of misrepresentations or alteration of documents or an opportunity to rebut this information.

However, the AAO nonetheless agrees with the director that the petitioner has failed to submit sufficient evidence from which CIS may determine that the proposed position qualifies for classification as a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (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:

[A]n 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.

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 proposed position.

The duties described by the petitioner indicate that the proposed position is that of an accountant. The evidence of record establishes that the petitioner, in general, is an employment contractor in that the

petitioner places individuals at multiple locations to perform services established by contractual agreements for third-party companies. The petitioner submitted inconsistent evidence concerning the intended employment of the beneficiary. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As noted previously, counsel asserts that the beneficiary will actually perform accounting services on behalf of the petitioner's clients, and not for the petitioner itself as CIS had previously determined. Counsel indicates that CIS mistakenly concluded from the evidence submitted by the petitioner that the beneficiary would perform services directly for the petitioner. The AAO notes that the petitioner's March 8, 2005 response to the director's request for additional evidence did not directly state that the beneficiary would be performing services directly for the petitioner, nor did it state that the petitioner would be performing services on behalf of the petitioner's clients. The offer letter between the petitioner and the beneficiary indicates that the beneficiary's "place of assignment will be at [the petitioner]." The director's conclusion from the evidence that the beneficiary would perform services directly for the petitioner—based on the fact that the petitioner submitted no evidence of a contract or work order with a third-party company pursuant to which the beneficiary would perform accounting services, combined with the petitioner's statement that the petitioner had two other accountants in its employ, and its statement that the beneficiary would be assigned to work at the petitioner's location—was reasonable. Its statement that it now wishes to employ the beneficiary at its client sites is not supported by the evidence.

Additionally, the petitioner has failed to demonstrate that the proposed position is a specialty occupation because it has not provided contracts, work orders or statements of work describing the duties the beneficiary would perform for the entity actually receiving the beneficiary's services.

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.

In this case, the petitioner has submitted no contracts, work orders or statements of work describing the duties the beneficiary would perform for the entity that will receive the beneficiary's services. Thus, as the record contains insufficient documentation establishing 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. 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).

As demonstrated in the discussion above, the petitioner has failed to establish that the proposed position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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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 not sustained that burden.

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