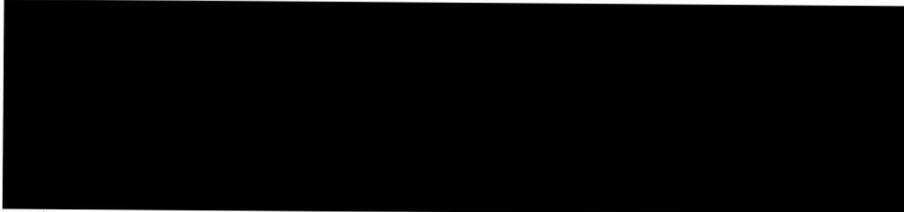


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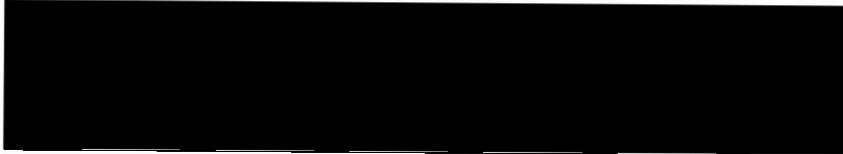
FILE: WAC 06 227 51501 Office: CALIFORNIA SERVICE CENTER Date: OCT 05 2007

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.

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 provides information technology consulting services. It seeks to employ the beneficiary as a computer programmer analyst. 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, filed July 20, 2006 and supporting documentation; (2) the director's July 27, 2006 request for additional evidence (RFE); (3) counsel for the petitioner's August 15, 2006 response to the director's request; (4) the director's August 21, 2006 denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition, determining that the petitioner had failed to demonstrate that it qualified as a United States employer or agent and had failed to demonstrate the existence of a specialty occupation, as it had not submitted a contract or other evidence of the beneficiary's proposed duties for the third party employer.

On appeal, counsel submits a copy of a job description for a development/technical writer issued by the Department of Administrative Services of the State of Georgia.

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.

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 proposed position.

The term "employer" is defined at 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 AAO disagrees with the director's finding that the petitioner would not act as the beneficiary's employer. The evidence of record establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.¹ See 8 C.F.R. § 214.2(h)(4)(ii). In view of this evidence, the AAO finds that the petitioner will be the employer of the beneficiary and withdraws the director's determination on this issue to the contrary.

The petition may not be approved, however, as the petition does not establish that the beneficiary will be employed in a specialty occupation or that the employer has submitted an itinerary of employment.

¹ 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).

As the petitioner indicates on the Form 9035E, Labor Condition Application (LCA), the beneficiary will work in Tucker, Georgia and other job sites in metro Atlanta, Georgia. Counsel, in the August 15, 2006 response to the director's RFE, states that the petitioner will act as an agent performing the function of an employer and will place the beneficiary as a consultant with the State of Georgia for the entire term of the H-1B visa request. Counsel also submits a copy of an unsigned supplier agreement between the State of Georgia and COMSYS Information Technology Services, Inc. (COMSYS) with a signed addendum between COMSYS and the petitioner dated September 7, 2005. The petitioner also submits a copy of a contract dated July 8, 2006 between the petitioner and the beneficiary wherein the petitioner agrees to employ the beneficiary as a programmer analyst. Based on this information the AAO concludes that, although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at various work locations to perform services established by contractual agreements for third-party companies.

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 in such situations. While the Aytes memorandum cited at footnote 1 broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. As the evidence contained in the record at the time the petition was filed did not provide evidence that the petitioner had three years of work for the beneficiary to perform, the director properly exercised his discretion to require an itinerary of employment.²

As observed above, counsel, on appeal, submits a copy of a job description for a development/technical writer issued by the Department of Administrative Services of the State of Georgia.

The AAO finds that the job description for a development/technical writer is insufficient to establish that the petitioner has three years of H-1B level work for the beneficiary to perform as a programmer analyst. The job description submitted does not identify the beneficiary as the individual who will provide these services to the State of Georgia. The record in this matter does not contain any other evidence of work orders or statements of work identifying where the beneficiary will work. The record does not contain any evidence that the State of Georgia or that COMSYS will use the beneficiary on particular projects for the length of the H-1B requested employment. Moreover, the AAO finds that the petitioner's submission of a job description for a development/technical writer is not for the same position as a programmer analyst, the occupation identified in the petitioner's letter of support and the LCA. Absent work orders or statements of work identifying the beneficiary as the individual providing services to the ultimate employer, the petitioner has not established that it has three years' worth of H-1B-level work for the beneficiary to perform. The evidence of record does not establish that the petitioner has complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B). The petition was properly denied.

The record also does not establish that the proposed position is a specialty occupation. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a

² As noted by Assistant Commissioner Aytes 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."

proposed 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 proposed 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 identifying the beneficiary as the individual that would perform specific duties under contract for any of 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. Again, the AAO observes that the job description provided on appeal does not relate to the beneficiary and moreover does not identify the same position as offered to the beneficiary in the Form I-129 petition and LCA. Accordingly, the petitioner has not established that the proposed position of a programmer analyst qualifies for classification 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)(1).

The petitioner has failed to establish that it has an itinerary of employment for the beneficiary, that it has three years of work for the beneficiary, that the proposed position qualifies for classification as a specialty occupation, and that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

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.