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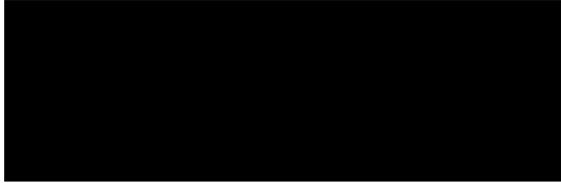
U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Room 3000
Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**

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FILE: WAC 06 171 52560 Office: CALIFORNIA SERVICE CENTER Date: SEP 17 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 engaged in information technology staffing, consulting and software development. It seeks to employ the beneficiary as a software engineer-applications. The petitioner, therefore, endeavors to extend the beneficiary's classification 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 finding that the petitioner did not meet the statutory definition of a "United States employer" or an agent, had not demonstrated the existence of a specialty occupation, and failed to submit a Labor Condition Application (LCA) certified for the location of intended employment at the time of filing the instant petition.

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 and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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:

- (I) 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 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). The petition may not be approved, however, as the record does not establish that the beneficiary will be employed in a specialty occupation, that the employer has submitted an itinerary of employment for the entire period of employment requested by the petitioner on the Form I-129, or that the employer timely submitted an LCA valid for the location of employment.

The evidence of record, including the petitioner's support letter which indicated that the beneficiary will work at "Addison, TX and Attached Locations," and the several employment agreements, work orders,

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).

and contractor services agreements between the petitioner and clients submitted by the petitioner, establish that the petitioner is an employment contractor in that the petitioner places its employees at work locations to perform services established by contractual agreements for third-party companies.

In response to the director's request for evidence, the petitioner submitted one "sub-contractor services agreement" and purchase order, two contractor agreements and four consulting agreements, all in which the petitioner is referred to as the "contractor." The agreements indicate that the petitioner provides personnel to the end-user clients' location for a period of time as indicated in the agreement. As noted by the director in her decision, none of the agreements or work orders indicate work to be performed by the beneficiary for any of the end user clients.

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 record is clear that the beneficiary would provide services for the petitioner's clients' at their job sites throughout the United States.

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 establish that the petitioner had three years of work for the beneficiary to perform, the director properly exercised her discretion to require an itinerary of employment.²

The director requested in its May 16, 2006 request for additional evidence, an itinerary that specifies the dates of each service or engagement and the locations where the services will be performed; however, the petitioner did not submit the requested documentation. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The record as presently constituted contains no contracts, work orders or statements of work from the entity for whom the beneficiary would provide his services (i.e., the petitioner's clients, the end user of the services). Absent such information, the petitioner has not established that it has three years' worth of H-1B-level work for the beneficiary to perform. Although the petitioner submits several contracts in response to the director's request for evidence, no corresponding work orders for the beneficiary's services have been issued by any of these companies.

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."

The evidence contained in the record does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as the petitioner did not submit a service agreement covering the entire period of requested employment, and there are no additional contracts, work orders, or statements of work establishing the dates and locations of the proposed employment through May 3, 2009. Thus, the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition was properly denied. The information submitted by the petitioner does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B).

Although the contracts submitted by the petitioner do not include a service agreement in which the beneficiary will be assigned to a work location, the evidence establishes that the petitioner is an employment contractor. The AAO agrees with the director that the petition does not establish that the beneficiary will be employed in a specialty occupation.

Although the petitioner submitted an employment services contract between the petitioner and the beneficiary, and a job description for the duties the beneficiary will perform, it failed to submit a description of the work duties to be performed at the client's place of business. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proposed position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity (the end-user client in this case) 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 documentation that establishes the specific duties the beneficiary would perform under contract for an end-user client, 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 for classification 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)(1). Thus, the petition may not be approved.

As noted by the director, the petitioner failed to submit an LCA certified for the location of intended employment at the time of filing the instant petition. The petitioner stated in a support letter that the beneficiary would be working in Addison, Texas and the "attached locations." The petitioner did not submit a list of the locations referred to in the support letter. The petitioner submitted an LCA certified for employment in Addison, Texas only and did not provide an LCA for the additional locations.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor

condition application in the occupational specialty in which the alien(s) will be employed.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition “[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary.” The petitioner’s failure to procure an LCA certified for the location of intended employment prior to filing the H-1B petition precludes its approval. Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). Further, without an itinerary of employment it cannot be determined that the LCA for Addison, Texas will cover all work locations. For this additional reason, the petition may not be approved.

Based on the foregoing analysis, the AAO has determined that the record fails to establish that the beneficiary would be performing services in a specialty occupation, as defined in section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), that the employer has submitted an itinerary of employment, or that the petitioner submitted a certified LCA for the location of intended employment in a timely manner. Accordingly, the petitioner has failed to overcome the grounds of 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.