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U.S. Citizenship
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FILE: WAC 07 139 50693 Office: CALIFORNIA SERVICE CENTER Date: ⁷JUL 03 2008

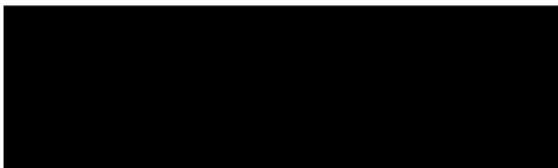


IN RE: Petitioner:
Beneficiary:



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 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 consulting, development, and training business that seeks to employ the beneficiary as a 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 director denied the petition because the petitioner made a material change to the beneficiary's work location after filing the petition.

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

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation. . . .

Citizenship and Immigration Services (CIS) consistently interprets the term “degree” in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000).

The petitioner seeks the beneficiary’s services as a programmer analyst. Evidence of the beneficiary’s duties includes: the petitioner’s March 23, 2007 letter in support of the petition and the petitioner’s former counsel’s July 16, 2007 response to the director’s RFE. As stated in the petitioner’s March 23, 2007 letter, the proposed duties are as follows:

Analyze, research, design, write specifications, maintain, enhance, and develop applications software consistent with the petitioner’s needs;

- Analyze user requirements, procedures, and problems to automate processing and to improve existing systems using Oracle, Informatica, UNIX, Cognos, PL/SQL, Visual Basic, ASP, .Net, C#.Net, SQL Server, Java, HTML, DHTML, and Business Objects;
- Design new applications and develop application prototypes;
- Write detailed descriptions of user needs, program function and steps required to develop or modify computer programs;
- Promote efficient user utilization of the system;
- Provide technical support to project teams, members, and associates to analyze current operational procedures, identify problems, and specify input and output requirements;
- Develop and maintain proficiency in utilizing technical and analytical tools to give optimum results to the business and management;
- Perform studies to aid development of new systems to cope with current project needs;
- Plan and prepare technical reports, memoranda and instruction manuals as documentation of program development; and

Perform analysis, conversion coding, code walkthrough, and unit and integration testing.

The record also includes an LCA submitted at the time of filing listing the beneficiary's work location in Worthington, Ohio as a programmer analyst.

In an RFE, the director requested additional information from the petitioner, including an itinerary and copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or service agreements for the beneficiary.

In response to the RFE, the petitioner's former counsel stated, in part, that at the time of filing, the beneficiary was expected to work on an in-house product at the petitioner's worksite in Worthington, Ohio. However, the petitioner had a requirement to fulfill for a client, and the beneficiary was found to be "a perfect fit." Therefore, the beneficiary was currently working for Verizon Business, the client's end-client, in Beltsville, MD. The following was submitted as supporting documentation: an "offer of appointment" from the petitioner to the beneficiary; a consulting agreement made on November 22, 2006, between DataLinx Corp. and UITS, Inc., naming the beneficiary to work as a consultant beginning on or around November 27, 2006 through May 27, 2007; a work order between the petitioner and DataLinx Corp., dated May 28, 2007, for the beneficiary's services as a programmer/analyst to be utilized by Verizon Business, the end-user, in Beltsville, Maryland; and a new

LCA listing the beneficiary's work locations in Worthington, Ohio and Beltsville, Maryland as a programmer analyst.

The director found that the petitioner had made a material change to the beneficiary's work location after filing the petition, that the petitioner's work order with DataLinx Corp. was dated May 28, 2007, after the RFE was sent, and that the petitioner had not complied with the LCA requirements, in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(B).

On appeal, counsel states, in part, that at the time of the filing of the petition, the evidence, including the "offer of appointment," showed that the petitioner was the beneficiary's actual employer because the petitioner was able to hire, pay, fire, supervise or otherwise control the beneficiary's work. Counsel also states that at the time of the filing of the petition, the beneficiary's job location was the petitioner's principle office in Worthington, Ohio, and thus the LCA filing requirements were satisfied for the proffered programmer analyst position. Counsel states: "Subsequent to [the] filing of the petition and prior to the deadline for the [RFE response], the Petitioner's client requested the Beneficiary's services in Beltsville, Maryland. The petitioner filed a new [LCA] for [the] Beltsville, Maryland job location and submitted it . . . along with its response to the [RFE]."

Pursuant to 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.

Preliminarily, the AAO finds that the evidence of record is sufficient to 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 as set out in the petitioner's November 24, 2006 "Offer of Appointment."¹ See 8 C.F.R. § 214.2(h)(4)(ii).

The Aytes memorandum cited at footnote 1 indicates that the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director

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).

properly exercised her discretion to request additional information regarding the beneficiary's ultimate employment, as the nature of the petitioner's business is software consulting, development, and training, and 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.² 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.

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.

The AAO acknowledges counsel's assertion on appeal that at the time of the filing of the petition, the beneficiary's job location was the petitioner's principle office in Worthington, Ohio, and thus the LCA filing requirements were satisfied for the proffered programmer analyst position. This assertion, however, conflicts with information reflected in the consulting agreement between DataLinx Corp. and UITS Inc., dated November 22, 2006, naming the beneficiary to perform work as a consultant for UITS Inc., located in Columbus, Ohio, with a start date of November 27, 2006, which is prior to the April 4, 2007 filing date of the petition. Moreover, the current U.S. address provided for the beneficiary at the time the petition was filed was Greenbelt, Maryland. The petitioner's former counsel stated in his July 16, 2007 letter submitted in response to the RFE that: "The beneficiary at the time of filing was expected to work on an in-house product of the petitioner in Worthington, OH. However the petitioner had a requirement with their client which the beneficiary was found to be a perfect fit. Therefore, the beneficiary was sent to work on the said project for the ultimate client Verizon Business [in Beltsville, Maryland]." The record contains no explanation for these inconsistencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

As discussed above, in response to the RFE, the petitioner's former counsel submitted a new certified LCA identifying the beneficiary's work location in Beltsville, Maryland. However, that application was certified on July 20, 2007, a date subsequent to April 4, 2007, the filing date of the visa petition. The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(I) provides that *before filing a petition for H-1B classification in a specialty occupation*, the

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."

petitioner shall obtain a certification from the DOL that it has filed a labor condition application (Emphasis added). Since this did not occur, the petition may not be approved.

Beyond the decision of the director, as the record does not contain a comprehensive description of the beneficiary's proposed duties from the end-client, in this case, Verizon Business, the petitioner has also failed to establish that the proffered 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 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. 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).

In addition, although information on the petition that was signed by the petitioner's president on March 31, 2007, reflects that the petitioner has a gross annual income of \$500,000 and two employees, the record contains no evidence in support of these claims. It is noted that the petitioner's federal income tax return for 2006 reflects \$4,500 in gross receipts or sales, and no compensation of officers or salaries and wages paid. Moreover, the petitioner's quarterly wage and withholding report for the first quarter of 2007 reflects only one employee for March 2007. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). For these additional reasons, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n: 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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.