

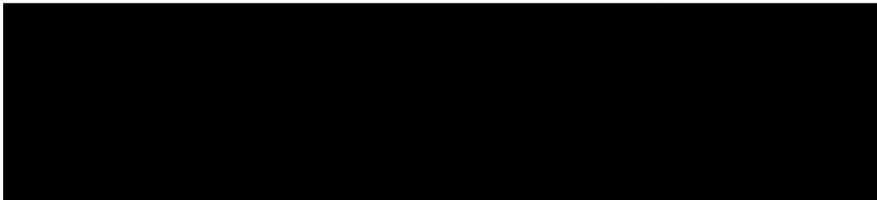
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

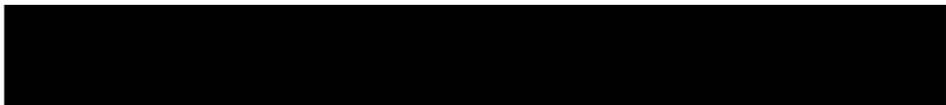
PUBLIC COPY

DI



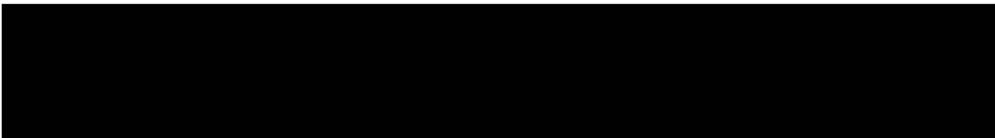
FILE: WAC 07 040 50002 Office: CALIFORNIA SERVICE CENTER Date: **MAR 03 2008**

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.

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. 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. The petitioner seeks to employ the beneficiary as a computer programmer. Accordingly, the petitioner 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 includes: (1) the Form I-129 filed November 20, 2006 and supporting documents; (2) the director's February 16, 2007 request for further evidence (RFE); (3) counsel's May 7, 2007 response to the director's RFE; (4) the director's May 24, 2007 denial decision; and (5) the Form I-290B and documents in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On May 24, 2007, the director denied the petition, determining: that the record did not establish the petitioner as the beneficiary's employer or agent; that the beneficiary would work at a different work location than the one specified on the Form ETA-9035, Labor Condition Application (LCA); and that the information submitted did not include a comprehensive description of the work the beneficiary would perform for the ultimate end-user so that the director could ascertain whether the petitioner had or would have a specialty occupation computer programming position available for the beneficiary.

On appeal, counsel for the petitioner asserts that the petitioner qualifies as an employer and resubmits contracts, invoices, and a purchase order form and letter from a client that will use the beneficiary's services. Counsel also submits a brief.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

When filing the Form I-129 petition, the petitioner averred that it employed eight persons and had a gross annual income of \$1 million. In a November 17, 2006 letter submitted in support of the petition, the petitioner stated:

With our company, the beneficiary will design, develop, test and implement software products and applications using a variety of programming languages, operating systems, databases and graphical user interfaces. The software products and applications will be developed for a wide range of industries and business processes and implemented in multiple hardware and networking environments. The programs will be designed and coded using programming methodologies such as object oriented programming and implemented on different architectures such as client/server, distributed and internet/intranet. The software products and applications will be designed with issues and considerations pertaining to scalability, security, transaction ease and speed and user efficiency and friendliness in mind. The beneficiary's responsibilities will also include development of product/application specification, data validation rules and business logic in accordance with client and business needs and requirements.

The LCA that the petitioner filed with the Department of Labor (DOL) listed the beneficiary's place of work as Edison, New Jersey and the position as a computer programmer.

On February 16, 2007, the director requested, among other things: (1) clarification regarding the employer-employee relationship between the petitioner and the beneficiary; (2) evidence of contractual agreements, statements of work, work orders, services agreements, or letters from authorized officials of the ultimate client companies where the work will actually be performed and a comprehensive description of the beneficiary's proposed duties; and (3) an itinerary that specified the dates of each service or engagement, the names and addresses of the actual employers and the venues or locations where the services will be performed for the period of time that the temporary employment is requested.

In a May 7, 2007 response, counsel for the petitioner submitted: (1) advertisements for the position of a computer programmer and an assertion that the position requires a bachelor's degree; (2) a number of contracts and work orders from client companies located in California, Texas, Ohio, Illinois, New Jersey, New York, Maryland, Connecticut, Delaware, and Virginia; (3) a contract dated November 21, 2006 between the petitioner and 4C Solutions, located in East Moline, Illinois, with an attached work order for the beneficiary's services to start December 7, 2006 for a Java/Portal Development project that would be located at Pearson Educational Services; and (4) copies of the beneficiary's pay stubs for work beginning on January 16, 2007 to March 31, 2007 showing the beneficiary's location in Coraville, Iowa.

The director denied the petition on May 24, 2007. The director determined that the record did not establish the petitioner as the beneficiary's employer or agent. The director also determined that the petitioner had not established that the beneficiary would work only at the location listed on the Form ETA-9035, Labor Condition Application (LCA). The director acknowledged that the contracts submitted by the petitioner showed that it had work available, but determined that the information submitted did not include a comprehensive description of the work the beneficiary would perform for the ultimate end-user; thus the

director could not ascertain that the petitioner had or would have a specialty occupation computer programming position available for the beneficiary.

On appeal, counsel for the petitioner asserts that the petitioner qualifies as an employer. Counsel also resubmits numerous contracts and invoices for third party companies in various locations including, California, Texas, Ohio, Illinois, New Jersey, New York, Maryland, Connecticut, Delaware, and Virginia and work orders for several different individuals for work to be performed in those various locations. Counsel also resubmits a contract dated November 21, 2006 between the petitioner and 4C Solutions, a company located in East Moline, Illinois, with an attached work order for the beneficiary's services to start December 7, 2006 for a Java/Portal Development project located at Pearson Educational Services. Counsel further submits an undated letter prepared by the human resources manager at 4C Solutions noting that the beneficiary's tenure at Pearson Education Measurement Services, located in Iowa City, Iowa, has been extended.

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 petitioner would 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 decision to the contrary. However, the petitioner's submission of various contracts with third party entities with the accompanying work orders indicating that the petitioner's employees are assigned to client projects outside the petitioner's place of business, establishes that the petitioner is an employment contractor. The AAO finds that the petitioner will place the beneficiary at work locations to perform services established by contractual agreements for third-party companies. As discussed below, the AAO finds that the petition must be denied as the petitioner did not submit an itinerary, did not detail the beneficiary's duties for the ultimate end-user of the beneficiary's services, and provided an LCA for a work location in Edison, New Jersey rather than the actual work location of the proposed duties.

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 when the record shows that the petitioner is an employment contractor. While

¹ See 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).

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 Moreover, when employment will be performed in more than one location, 8 C.F.R. § 214.2(h)(2)(i)(B) requires employers to submit an itinerary with the dates and locations of employment.

The petitioner did not submit the requested itinerary. The record before the director contained a contract dated one day after the petition was filed and an attached work order indicating that the beneficiary would begin work December 7, 2006 for a six-month term with the possibility of an extension, at an unidentified location. Thus, the record before the director did not contain an itinerary of services to be performed by the beneficiary that covered the entire period of requested employment. Absent such information, the petitioner has not established that it has three years' worth of H-1B-level work for the beneficiary to perform. The evidence contained in the record does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of the beneficiary's employment by the petitioner. The petitioner did not comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and for this reason, the petition must be denied.

In addition, when a petitioner is an employment contractor, the entity ultimately employing the alien or using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, Citizenship and Immigration Services (CIS) will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at multiple locations to perform services established by contractual agreements for third-party companies. 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, a 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.

The petitioner has provided a generic description of the types of duties the beneficiary would perform upon his employment with the company, but no evidence that establishes the specific duties. A petitioner cannot establish employment as a specialty occupation by describing the duties of that employment in the same

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."

general terms as those used by the Department of Labor's *Occupational Outlook Handbook (Handbook)* in discussing an occupational title, e.g., a programmer writes programs; a computer systems analyst designs and updates software; a computer software engineer designs, constructs, tests, and maintains computer applications software. Although the petitioner asserts that the beneficiary's duties would involve designing, developing, testing, and implementing software products and applications, the description does not demonstrate what he would actually do as a computer programmer for the petitioner's client. The AAO acknowledges that the work order submitted for the beneficiary's services indicates that the project is for Java/Portal Development; however the work details involved in this project are not explained. Only a detailed job description from the entity that requires the alien's services will suffice to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). 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)).

As the third party employer(s) do not provide a description of the proposed duties, the AAO is unable to conclude that the requirements of these employers will include duties that incorporate the theoretical and practical application of a body of highly specialized knowledge that require the 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 Department of Labor's *Handbook* indicates that there are a number of computer-related positions, some of which require a four-year course of college-level education, some of which require a two-year associate's degree, and some of which only require experience. Without a detailed job description from the entity that requires the alien's services, the petitioner has not provided evidence sufficient to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Again, 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. at 165. 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).

Further, the petitioner in this matter has provided an LCA that indicates the beneficiary will work in Edison, New Jersey. However, both the undated letter from the third party company and the beneficiary's pay stubs indicate the beneficiary is performing work in Iowa. The record does not contain an LCA for this location. The petitioner has not complied with the submitted LCA. For this additional reason, the petition will be denied.

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.

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