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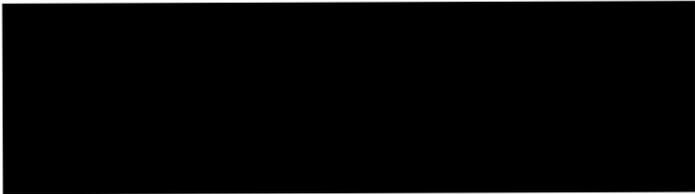
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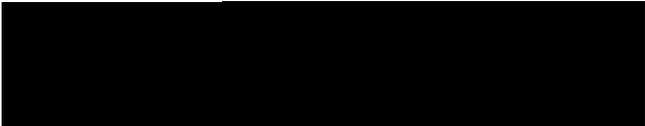
U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 006 50790 Office: CALIFORNIA SERVICE CENTER Date: **MAR 03 2008**

IN RE: Petitioner: 
Beneficiary:

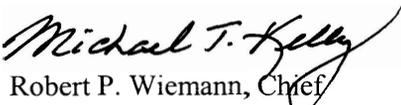
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.

for 
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 development and computer consulting 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 record includes: (1) the Form I-129 and supporting documents; (2) the director's request for further evidence (RFE); (3) counsel's response to the director's RFE; (4) the director's denial decision; and (5) the Form I-290B and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition determining that the petitioner had not established that it qualified as the beneficiary's United States employer and that the petitioner had not provided sufficient evidence of the specific duties to be performed by the beneficiary while working for a third-party client. The director concluded that the petitioner had not established that it had a specialty occupation position available for the work location listed on the labor condition application (LCA).

On appeal, the petitioner's president and CEO states, in part, that the petitioner is the beneficiary's employer, as it not only has the right to control the beneficiary's work, but is also obligated to control such work. He also states that the petitioner's control of the beneficiary's work is demonstrated in the petitioner's contracts with Princeton and Fidelity Investments. He states further that the work location listed on the LCA is valid, as the beneficiary is to be placed in the same general metropolitan statistical area as the petitioner's location in Edison, New Jersey.

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.

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 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.

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.

In a September 28, 2006 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered programmer analyst position as follows:

Perform, plan, define, analyze, design, develop, integrate, test, and implement database applications, software systems, and technology services using structured analysis, object oriented methodologies, Oracle, Unix, and Power Builder with Client/server.

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

In an RFE, the director requested additional evidence from the petitioner, including 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 an itinerary for the beneficiary.

In response to the RFE, counsel submitted a job offer letter signed by the petitioner and the beneficiary to demonstrate that the petitioner is the beneficiary's actual employer. Counsel also submitted a supplier agreement, effective as of February 24, 2005, between the petitioner and Princeton Information, Ltd., and a corresponding work order signed on November 20, 2006, listing the beneficiary as a consultant to the following client of Princeton Information, Ltd.: Fidelity Investments. Counsel also submitted a description of the beneficiary's project at Fidelity Investments prepared by the petitioner.

As discussed above, the director denied the petition, on determining that the petitioner had not established that it qualified as the beneficiary's United States employer and that the petitioner had not provided sufficient evidence of the specific duties to be performed by the beneficiary while working for a third-party client. The director concluded that the petitioner had not established that it had a specialty occupation position available for the work location listed on the labor condition application (LCA), Edison, New Jersey. On appeal, the petitioner's president and CEO states, in part, that the petitioner is the beneficiary's employer, as it not only has the right to control the beneficiary's work, but is also obligated to control such work. He also states that the petitioner's control of the beneficiary's work is demonstrated in the petitioner's contracts with Princeton and Fidelity Investments. He states further that the work location listed on the LCA is valid, as the beneficiary is to be placed in the same general metropolitan statistical area as the petitioner's location in Edison, New Jersey.

Preliminarily, the AAO notes that the supplier agreement between the petitioner and its client calls for the petitioner to provide technical services personnel for various clients "to provide technical services to Client according to the Client's specifications. . . ." The AAO further 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 September 25, 2006 letter.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 properly exercised her discretion to request additional information regarding the beneficiary's ultimate employment, as the evidence of record indicates that the beneficiary would be working in multiple locations. Although the AAO declines to find that the petitioner is acting as the beneficiary's agent, the petitioner in this

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).

matter is employing the beneficiary to work for its clients or its clients' clients, and thus can be described as an employment contractor. The beneficiary in this matter is providing services to a third-party client.

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.

When a petitioner is acting as an employment contractor, the entity ultimately 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, 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.

In this matter, the petitioner submitted on appeal a description of the beneficiary's project at Fidelity Investments prepared by the petitioner. Fidelity Investments, however, must prepare a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties, as it is the entity ultimately using the alien's services. An H-1B petitioner must detail its expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. In circumstances where the beneficiary will provide services to a third party, the third party must also provide details of its expectations of the position. Such descriptions must correspond to the needs of the petitioner and/or the third party and be substantiated by documentary evidence. To allow otherwise would require acceptance of any petitioner's generic description to establish that its proffered position is a specialty occupation. CIS must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business and what the third party contractor expects from the beneficiary in relation to its business and what the proffered position actually requires, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty.²

The petitioner does not provide substantive evidence that the duties of the proffered position incorporate the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a bachelor's or higher degree in the specific specialty or its equivalent as a minimum for entry into the

² The AAO observes that the *Handbook* reports that there are many training paths available for programmers and that although bachelor's degrees are commonly required, certain jobs may require only a two-year degree or certificate; that most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of a variety of computer systems and technologies for positions of computer software engineer; and that there is no universally accepted way to prepare for a job as a systems analyst, although most employers place a premium on some formal college education.

occupation in the United States. 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)).

In this matter, without a comprehensive description of the beneficiary's actual duties from the entity utilizing the beneficiary's services and a substantive explanation that demonstrates why these particularized duties require at least a bachelor's degree in a related specialty, the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).

In that the record does not offer a comprehensive description of the substantive work that the beneficiary would perform for the petitioner's client and how that work qualifies as a specialty occupation, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the proffered position as more complex or unique than similar, but non-degreed, employment, as required by the alternate prongs of the second criterion. Absent a detailed listing of the duties the beneficiary would perform under contract, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

Finally, the AAO will address the director's conclusion that the petitioner did not establish that it has complied with the terms of the LCA.

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. . . .

Upon review of the record in its entirety, the AAO finds that the LCA filed by the petitioner is valid. The LCA submitted at the time of filing lists the work location as Edison, New Jersey. The record establishes that the beneficiary will work in Jersey City, New Jersey, which is within the same standard metropolitan statistical area (SMSA) as Edison, New Jersey and is subject to the same prevailing wage for the occupation in both locations. Thus the LCA is valid for the work location. The petition may not be approved, however, as the petitioner has not demonstrated that the position is a specialty occupation.

The petition will be denied and the appeal dismissed for the above stated reasons. 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.