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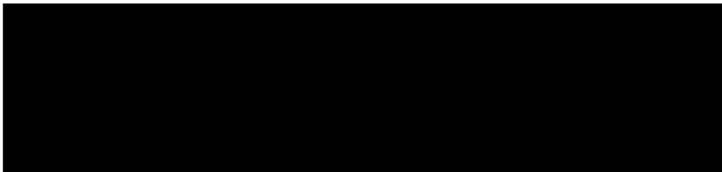


FILE: WAC 07 130 51593 Office: CALIFORNIA SERVICE CENTER Date: **MAR 12 2008**

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 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 and technical services company that seeks to employ the beneficiary as a systems 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 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 documentation previously submitted. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on three grounds: (1) that the petitioner had failed to demonstrate that it meets the regulatory definition of an "employer" and that it will engage in an employer-employee relationship with the beneficiary; (2) that the petitioner had failed to demonstrate the existence of a specialty occupation, as it had not submitted an itinerary of services to be performed; and (3) that the petitioner had not established that it would comply with the terms and conditions of the labor condition application (LCA) certified for the location of intended employment.

On appeal, counsel contends that the director erred in denying the petition.

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). The petitioner submitted a letter of employment, signed by the petitioner and the beneficiary, indicating that the petitioner will hire, pay, fire and control the work of the beneficiary. 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.

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 notes on appeal, the beneficiary's duties include "architecting and designing applications to deploy a functions solution that satisfied client requirements." The petitioner also submitted two independent contractor agreements and a consulting agreement. Accordingly, 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 beneficiary will 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 when the beneficiary will be working in multiple locations. 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

In his April 16, 2007, request for additional evidence, the director requested an itinerary of definite employment for the beneficiary. In its June 25, 2007, letter in response to the director's request for additional evidence, counsel for the petitioner stated that the beneficiary will work in the home office of the petitioner. The petitioner did not submit the requested itinerary. 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).

As noted previously, the petitioner's failure to submit an itinerary of services to be performed, which covers the entire period of requested employment, was one of the grounds of the director's denial of the petition. The AAO agrees and finds that the petitioner's failure to comply with the itinerary requirement is a ground for denying the petition.

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 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.

In response to the director's request for evidence, the petitioner submitted the following: (1) a Statement of Work stating that the petitioner's president is a consultant who will provide "development services to Company"; (2) a document entitled "Agreement Regarding Confidentiality and Intellectual Property" between [REDACTED] (3) an Independent Contractor Agreement between the Associated [REDACTED] and, (4) a Consulting Agreement between [REDACTED]

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."

and [REDACTED]. However, none of these documents specifically request the services of the beneficiary, and do not indicate that the beneficiary was selected from the petitioner's qualified workers. In addition, the petitioner is not a party to any of the contracts. In a letter dated June 25, 2007, counsel for the petitioner stated that [REDACTED] is an acronym for the petitioning company. However, in reviewing the petitioner's articles of incorporation, tax returns and business license, none indicate that the petitioner's full name is [REDACTED] s. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, the record does not contain any contracts, statements of work or agreements between the petitioner and a third-party company establishing the work to be performed. The record contains no work orders with the beneficiary's itinerary. Absent such information, the petitioner has not established that it has three years worth of H-1B-level work for the beneficiary to perform.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform 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. 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)(I).

The director also found that the record did not establish that the LCA was valid for all work locations. As the record does not contain an itinerary of employment, it cannot be determined that the LCA is valid for the locations of employment. For this additional reason, the petition may not be approved.

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, that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation, or that the LCA is valid for the work locations. 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.