



U.S. Citizenship
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FILE: WAC 07 127 53421 Office: CALIFORNIA SERVICE CENTER Date: NOV 05 2008

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:



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 service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The petition will be remanded to the director for entry of a new decision.

The petitioner is an IT consulting, services and outsourcing company that seeks to employ the beneficiary as a software consultant. 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 director determined that the record of proceedings did not establish that the petitioner qualified as a United States employer, and that the record does not establish that the petitioner "is a viable company that is financially able to expand [its] workforce." The director further determined that it could not be determined from the record the condition and scope of the services to be performed by the beneficiary. On appeal, counsel submitted a brief and additional information stating that: the petitioner qualifies as a United States employer; it is an ongoing and viable business concern; and the proffered position qualifies as a specialty occupation.

The first issue to be determined is whether the petitioner qualifies as a United States employer.

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.

The petitioner submitted sufficient evidence of its business operations, tax filings and bank records to establish that it is a going concern. It provides employees to work on client contracts, submits invoices for its services, files tax returns, and pays its employees. The petitioner will hire the beneficiary, will pay the beneficiary, has the right to fire the beneficiary and will otherwise have control over the beneficiary's work. The fact that the beneficiary may perform services at a client facility and is subject to that client's work rules and regulations does not change the employer/employee relationship existing between the petitioner and beneficiary. The petitioner will engage the beneficiary to work in the United States, has an employer-employee relationship with the beneficiary, and has an Internal Revenue Service Tax identification number. The petitioner qualifies as a United States employer in this instance, and the director's decision to the contrary is withdrawn. Nevertheless, the petition may not be approved because the record does not establish that the proffered position qualifies as a specialty occupation.

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:

- (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.

The petitioner seeks the beneficiary’s services as a software consultant. Evidence of the beneficiary’s duties is set forth in the Form I-129 petition and supporting attachment, and in response to the director’s request for evidence. According to evidence provided by the petitioner the beneficiary would design, develop and implement software applications pursuant to company requirements. In performing these duties, the beneficiary would perform the following tasks:

- Complete detailed system specifications;
- Plan and design complex software systems and programs for customers;
- Determine data processing systems that will provide system capabilities required for projects;
- Plan and layout new system capabilities required for projects and existing systems;
- Analyze software requirements in conjunction with hardware project development to determine feasibility of design within time and cost constraints;

- Formulate and design software systems using mathematical models to predict and measure outcomes and consequences of design;
- Analyze client data processing requirements and computer hardware;
- Translate client needs into software requirement specifications;
- Determine the feasibility, cost, time requirements and compatibility of new functions or enhancements with current systems and computing capabilities;
- Provide clients with oral and written recommendations in line with current technologies;
- Document the scope and objectives of the new development or enhancement to make it more friendly and use the features available to improve business;
- Outline the steps required to develop new or modified programs;
- Identify the system integration, linkage and security issues;
- Prepare data models for ICON technical reference;
- Prepare process models for ICON functional reference;
- Determine the database level changes for enhancement or new programs;
- Write scripts to perform the database changes;
- Develop ICON prototypes using front-end GUI development tools;
- Provide demonstration of the functional prototype to clients;
- Set up test environments;
- Perform environmental tests;
- Build test beds, and create test data for various test cases; and
- Write conversion scripts if required.

The petitioner finds the beneficiary qualified for the proffered position by virtue of her foreign education which has been determined by a credentials evaluation service to be equivalent to a master's degree in computer science from an accredited college or university in the United States.

In the director's decision, she noted that the petitioner was asked to provide contracts or other documentary evidence to establish the duties to be performed by the beneficiary for the ultimate user of her services, and the petitioner's itinerary¹ for services to be performed during the course of the beneficiary's intended stay in the United States (from 3/25/07 – 3/9/10). The director stated that these documents were not provided. 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 petitioner did not provide copies of contracts under which the beneficiary would be employed. It did provide a statement dated June 4, 2007 from [REDACTED], Project Coordinator, DSW, Inc. (DSW), which states that the beneficiary would provide contract services on behalf of the petitioner from September 10, 2007 until August of 2008. The beneficiary would ensure the quality of software systems to be installed and maintained in DSW Retail stores. Specifically, the beneficiary would be tasked with writing test scripts, test cases and test procedures, executing them to test defect fixes and ensuring proper integration between the point of sale and back office applications. The beneficiary would also generate data and reports from which answers could be obtained for further analysis. In the Aytes memorandum cited at footnote 1, the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. While the documentation submitted is sufficient to establish the beneficiary's itinerary and duties to be performed from September 10, 2007 until August of 2008, it does not establish the beneficiary's itinerary for the duration of her period of intended stay in the United States (March 25, 2007 – March 9, 2010).

The petitioner states in its response to the director's request for evidence that the beneficiary would perform services for DSW from September of 2007 until August of 2008, and that during the remainder of the beneficiary's stay in the United States she would be performing services on in-house projects at the petitioner's office in Dayton, OH. The petitioner, however, provided no documentation establishing that it has in-house project work available for the beneficiary. The business of the petitioner is providing consulting services for clients at various client locations. The only evidence of record pertaining to in-house project development is the petitioner's unsupported statement. Simply going on the 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 190 (Reg. Comm. 1972)). Accordingly, the petitioner has failed to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition must be denied.²

As noted above, the petitioner has not established that it has employment available for the beneficiary during her entire period of intended stay in the United States. The petitioner notes that the beneficiary will, in addition to working in-house and on the DSW project, perform services for other petitioner clients as "the[y] come" during her period of employment. Without contracts from the end users of the beneficiary's services,

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).

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."

it cannot be determined that the duties she would perform would require the theoretical and practical application of a body of highly specialized, thereby qualifying any such positions as specialty occupations.

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 from the end users of the beneficiary’s services, other than DSW, that establish the specific duties the beneficiary would perform under contract, 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)(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’s decision did not specifically address whether the proffered position qualifies as a specialty occupation. As such, this proceeding is remanded to the director to issue a new decision addressing that issue.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The decision of the director is withdrawn. This matter is remanded to the director to render a new decision commensurate with the directives of this opinion, which, if adverse to the petitioner, shall be certified to the AAO for further review.