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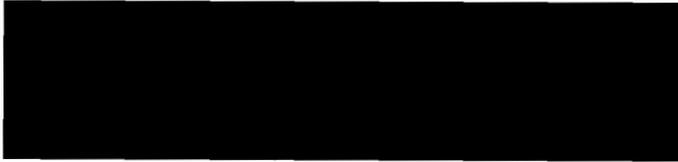
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U.S. Citizenship  
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FILE: WAC 07 121 50231 Office: CALIFORNIA SERVICE CENTER Date: NOV 05 2008

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 service center 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 development and consulting firm that seeks to employ the beneficiary as a programmer analyst. 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; the petitioner did not establish that the proffered position qualified as a specialty occupation; and the petitioner had not submitted a valid Labor Condition Application (LCA) for the place of intended employment. On appeal the petitioner submits a brief and additional information contending that: the petitioner qualifies as a United States employer in this instance; the proffered position qualifies as a specialty occupation; and the LCA submitted with the filing of the Form I-129 petition was valid for the intended place of employment.

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 provided sufficient contract documentation to establish that it will provide its employees to work on various client contracts providing computer-consulting services. The petitioner acts as an independent contractor under these agreements. 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.

The next issue to be determined is whether 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 programmer analyst. Evidence of the beneficiary’s duties is set forth in the Form I-129 petition and supporting attachment. According to evidence provided by the petitioner the beneficiary would:

- Provide custom program development and implementation, and system analysis and design; and
- Provide software support to clients which will include testing, debugging and modifying software to meet customer specifications;

The petitioner requires a minimum of a bachelor’s degree in computer science, electronics, computer engineering, physics, engineering, mathematics or a related field for entry into the proffered position.

In the director’s decision, she noted that the petitioner had not provided contracts or other documentary evidence to establish the duties to be performed by the beneficiary for the ultimate user of his services, and

that the petitioner had not provided an itinerary<sup>1</sup> for the beneficiary's services during the course of his intended stay in the United States (from 3/20/07 – 3/19/10). 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 provided copies of contracts between it and clients for whom the beneficiary may perform services. The petitioner indicated that the beneficiary would perform some work at client locations, and would perform work on in-house projects should the client contracts end. 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. The documentation contained in the record does not establish a complete itinerary for the beneficia from March 20, 2007 through March 19, 2010. The petitioner presented a letter from [REDACTED], SIIS Program Manger, California Department of Health Services, wherein it was stated that the beneficiary worked as a programmer analyst on the SIIS project under an agreement with the Community Services Planning Council, Inc. from April 16, 2007 through June 30, 2007. [REDACTED] further states that beginning July 1, 2007, the beneficiary began working as a programmer analyst on the SIIS project with Public Health Foundation Enterprises, Inc. (PHFE), and that the SIIS project would continue until June 30, 2008. A subcontract agreement between the petitioner and PHFE verifies that the SIIS project will end June 30, 2008. While the PHFE subcontract details the services to be performed by the petitioner's employees, a contract between PHFE and the end user of the services of the petitioner's employees (California Department of Health Services) detailing the duties to be performed by the beneficiary has not been submitted.<sup>2</sup>

Although the petitioner states that it expects the SIIS project to continue after June 30, 2008, the record does not verify that expectation. The petitioner states that should the SIIS project not be renewed, the beneficiary would work at its home office developing a computer application for [REDACTED] for the remainder of the beneficiary's expected stay in the United States. In support of that assertion, the petitioner submitted a copy of a confidentiality agreement it entered into on March 25, 2004 with [REDACTED], which expires March 25, 2010. The confidentiality agreement is of poor copy quality and is not legible in many areas of the agreement. The agreement, however, is not an agreement for a specific project to be performed by the petitioner for [REDACTED]. The agreement indicates that the parties plan to discuss certain confidential information regarding a prospective relationship between the parties in the field of HTML and other software development. The agreement is not a contract for specific work to be performed by the petitioner, but simply protects any confidential information of [REDACTED], which may come into the petitioner's hands should the petitioner perform services on behalf of [REDACTED]. Further, a statement from the petitioner's Director of Operations, [REDACTED], indicating that the petitioner has a long-term contract with [REDACTED], and that it is authorized to send or add personnel for the projects at the [REDACTED] development center is insufficient to establish any such agreement. The petitioner has not established that

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<sup>1</sup> 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).

<sup>2</sup> The Form I-129 was filed with CIS on March 21, 2007. The dates of intended employment listed in the Form I-129 are from March 20, 2007 to March 19, 2010. From this information, a possible issue exists as to whether the beneficiary was employed with the petitioner prior to the filing of the Form I-129.

in-house employment opportunities are available for the beneficiary working on behalf of [REDACTED], as asserted. 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.<sup>3</sup>

As noted above, the petitioner provided a copy of a contract with another subcontractor (PHFE) under which the beneficiary performed services for the California Department of Health Services (DHS). The petitioner did not provide a copy of the contract between PHFE and DHS detailing the duties to be performed by the beneficiary for DHS, the end user of the beneficiary's services. Thus, it cannot be determined from the record precisely what duties the beneficiary would perform for the end user of his services, and it cannot accordingly be determined that the offered position qualifies as a specialty occupation.

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> 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 (DHS) 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). As such, the petition must be denied.

The director also denied the petition because the petitioner had not filed an LCA valid for all locations of employment. The AAO agrees. The petitioner filed with the Form I-129, an LCA valid for Richmond, CA, where the beneficiary performed services at a DHS facility. That employment was slated to end on June 30, 2008. The record contains insufficient evidence to establish that the petitioner would employ the beneficiary on in-house projects which would be covered by a separate LCA for a job location at the petitioner's offices in Fremont, CA. The record establishes, based upon the nature of the petitioner's business, that the beneficiary will work at various unidentified locations for the petitioner's clients. Without an itinerary of employment covering the entire period of employment requested, the record does not establish that the petitioner has filed an LCA valid for all locations of employment. For this additional reason, the petition may not be approved.

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<sup>3</sup> 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."

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The burden of proof in this proceeding 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.