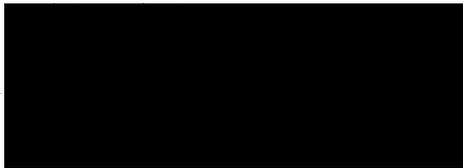


D2

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services

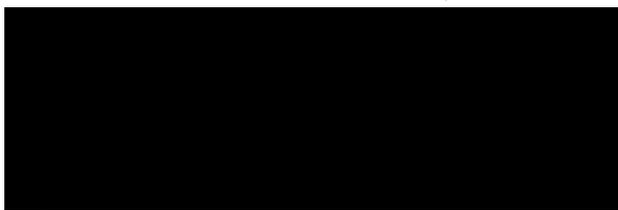


FILE: LIN 03 043 52436 Office: NEBRASKA SERVICE CENTER Date: APR 23 2004

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:



PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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 *Mari Johnson*
Robert P. Wiemann, Director
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 an IT (information technology) consulting and management firm that seeks to employ the beneficiary. In order 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 denied the petition on two independent grounds, namely, that the petitioner had failed to establish that (1) the worksites for the proffered position complied with the location that the petitioner designated in the labor condition application (LCA), and (2) the petitioner proffered a position for which work actually existed.

On appeal, counsel submits a brief and additional evidence.

The AAO will address only the issues involved in the denial of the petition. This decision will not assess whether the proffered position is a specialty occupation or whether the beneficiary is qualified to serve in a specialty occupation.

The evidence of record supports the director's dismissal on one basis only, namely, the petitioner's failure to establish that it had sufficient work to engage the beneficiary in the proffered position.

In reaching this decision, the AAO considered the entire record, including: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's brief, and the documentary evidence accompanying the brief.

The LCA is a necessary and material part of the nonimmigrant worker visa petition, and strict compliance with the representations in the LCA is a necessary condition for approval of an H-1B visa petition. The totality of the evidence, however, does not support the director's finding that the petitioner had not established that the beneficiary's employment would be confined to the Madison Heights area, the proposed work location cited in the LCA. Of particular note, the record supports counsel's assertion that the contractual documents submitted in response to the RFE were presented only as evidence of the petitioner's financial viability, and not to indicate locations where the beneficiary would work.

Also, there is not a sufficient evidentiary basis for the director's comment that it did not appear that "the beneficiary and the petitioner will have a true employee-employer relationship."

However, the evidence of record does not establish that the petitioner actually had work in which to employ the petitioner in accordance with the position outlined in the petition. Therefore, the director's decision to deny the petition was correct.

Classification of a beneficiary as an H-1B nonimmigrant worker in a specialty occupation must be based on work in that specialty occupation that is actually available for the term of the proposed employment. See section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), *supra*. Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the

time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Counsel's assertion that the petitioner "has the ability to pay the proffered wage" misses the issue, which is whether the beneficiary would actually be coming to perform H-1B services that conform to the duties proposed in the petition. The petitioner indicates that the petitioner's work would be a function of client contracts for the petitioner's information technology services. However, the record does not contain persuasive evidence that the petitioner had valid contracts to sustain the beneficiary's performance of programmer analyst duties.

As the director noted, not all of the contracts submitted by the petitioner have the signatures of all parties nor do they appear to be final in terms of setting for the duration of services or fees to be paid the petitioner. In fact, it is not clear that the petitioner is a U.S. business with any clients. The petitioner claims on the Form I-129 that it is located at [REDACTED], Madison Heights, MI. According to information contained on its LCA and in the masthead of its stationary, the telephone number for this office address is [REDACTED]. However, at least two of the client contracts that the petitioner submitted show that the petitioner's telephone number¹ is [REDACTED]. In addition, on page 3 of a November 22, 2002 letter submitted by the petitioner, it claims to be located at [REDACTED], Madison Heights, MI. This is significant because the latter telephone number and address are also claimed by one of the petitioner's clients, Rapid Global Business Solutions, Inc.

The petitioner has submitted additional conflicting information relating to its other claimed employees. An addendum to a copy of the petitioner's Form 941 Employer's Quarterly Federal Tax Return that appears to be for the period ending on September 30, 2002 lists seven current employees and their current client location. However, several client services contracts for the same quarter show the employees to be in different locations or name other employees not on the Form 941.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Based on the conflicting information provided by the petitioner, the evidence does not establish that the petitioner is a U.S. employer or that it has the ability to hire, fire, pay, fire, supervise, or otherwise control the work of any of its employees within the meaning of 8 C.F.R. § 214.2(h)(4)(ii).

Aside from the director's decision, the record contains information which, though ambivalent and inconsistent, indicates that the beneficiary may be dispatched, as other employees have been, to work at client locations, however, the requisite itinerary is not contained within the record. Pursuant to 8 C.F.R. § 214.2(h)(2)(i)(B), a petition which requires services to be performed in more than one location "must include an itinerary with the dates and locations of the services."

Counsel asserts, in part, "[The beneficiary] *was not anticipated* to work directly at any client's particular office site, but rather to assess user needs from the Madison Heights corporate location only." (Emphasis added.) A letter submitted on appeal by the petitioner's president states that the beneficiary "will *primarily*

¹ Telephone Number contained in the contract stationary at the bottom of each page.

work at our Madison Heights, MI location.” (Emphasis added.) However, the employment agreement between the petitioner and the beneficiary contains clauses about “extraordinary travel expenses,” and it also states, in pertinent part, that the beneficiary’s services “will be provided at locations designated by [the petitioner], primarily at [the petitioner’s] Madison Heights, MI location and may include the offices of [the petitioner’s clients].” Furthermore, the “Location of the Project” section of the letter of support that the petitioner’s president submitted with the Form I-129 states, “The establishment, venue, and location of the service that will be performed at [the petitioner’s Madison Heights address] and other unanticipated location[s] in the Detroit, MI MSA.”

As the above information indicates that the petitioner may dispatch the beneficiary to client locations, it is incumbent on the petitioner to provide an itinerary. Pursuant to 8 C.F.R. § 214.2(h)(2)(i)(B), a petition which requires services to be performed in more than one location “must include an itinerary with the dates and locations of the services.”

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.