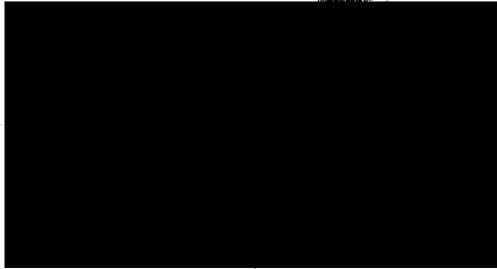




U.S. Citizenship
and Immigration
Services

Handwritten signature or initials



FILE: LIN 03 123 51717 Office: NEBRASKA SERVICE CENTER Date: **SEP 02 2004**

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.

Handwritten signature: Mai Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy**

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 consultancy firm 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 director denied the petition because the petitioner failed to establish that: (1) a specialty occupation existed at the petition was filed; and (2) it qualified as an employer as defined by the regulation. On appeal, counsel submits a brief and additional evidence.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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;
- (3) Has an Internal Revenue Service Tax identification number.

Further, under 8 C.F.R. § 214.2(h)(2)(i)(F) the term *agent* is discussed and the section states that:

A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent. A petition filed by a United States agent is subject to the following conditions:

- (1) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.

- (2) A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of employment and to provide any required documentation.

The record of proceeding before the AAO contains: (1) 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) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a programmer analyst. Evidence of the beneficiary's duties in the record includes: the I-129 petition; the March 3, 2003 letter accompanying the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: analyzing software requirements to determine the feasibility of design; consulting with hardware engineers to evaluate the interface of software and hardware; formulating and designing the software system; developing and directing the system's test procedures, programming, and documentation; consulting with customers concerning maintenance of the software system; and coordinating the installation of the system. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in engineering, mathematics, statistics, commerce, and economics, business, or computer science.

The director denied the petition because the petitioner's evidence was insufficient to establish that: (1) a specialty occupation was available for the beneficiary to occupy when the petition was filed; and (2) it qualified as an employer as defined by the regulation.

On appeal, counsel states that the petitioner intended to employ the beneficiary in the area of Waukegon, Illinois, the location identified in the labor condition application (LCA). Furthermore, counsel states that the submitted contract with Midcom and the February 28, 2003 purchase order, which indicated that the beneficiary was to work at Abbott Laboratories, established that the petitioner had a specialty occupation available for the beneficiary when the petition was filed. Counsel refers to the petitioner's letter of support and employment letter to demonstrate that the petitioner qualifies as an employer. Finally, counsel submits copies of four AAO H-1B petitions and web pages about Abbott Laboratories.

Based on the submitted evidence, the petitioner fails to satisfy the definition of a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii). The document entitled "Contractor Agreement" is entered into between the petitioner, referred to as the contractor, and MIDCOM Corporation, referred to as the broker. The contract stated

that the petitioner will provide services to a third party client who has requested that the broker locate temporary staffing for its project, and that the broker will be paid a commission. Section nine of the contract stated that the contractor and its personnel are not the employees of the broker or the client; section eleven read that the contractor is solely and completely accountable for the services that it provides to the client, and that the contractor releases the broker and client for all liability. The March 3, 2003 letter from the petitioner stated that it is responsible for paying, hiring, firing, supervising, and controlling the beneficiary from its Livonia, Michigan, office. The document entitled "Purchase Order" which was entered into between the petitioner (the Contractor) and [REDACTED] reveals that the petitioner was to provide services for Abbot Laboratories (the Client). This document does not provide a work location for the beneficiary; the document stated the "Contractor will discuss its hours and [the] location where the work is to be performed with the Client." In light of this statement, it is not reasonable for the petitioner to claim that it will supervise and control the beneficiary's work when it clearly has not reached an agreement as to the actual location where the beneficiary will perform services or how it will supervise and control the beneficiary's work. In addition, the work location indicated in the LCA differs from the location of Abbott Laboratories. On appeal, counsel states that the proffered position is in the "area of Waukegon, Illinois, the location identified in the LCA," and counsel also states "Abbott Laboratories is located in the metropolitan area of Waukegon, Illinois, the job site listed in the LCA." Counsel's statements and the evidence are inconsistent. The LCA plainly states that Livonia, Michigan, and not Waukegon, Illinois, is the beneficiary's work location.

Most important, the validity of the Purchase Order is called in question because the Employer Identification Number (EIN) of 38-3429287 that is listed in the contract differs from the EIN of 38-3429297 that is provided on the certified LCA and the Form I-239 petition. Based on these discrepancies, it is unclear who will employ the beneficiary, where he will work, and whether the petitioner is a valid U.S. entity. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

There is no evidence that would establish that the petitioner qualifies as an agent. The petitioner has provided no evidence of an itinerary of definite employment or of services or engagements for the beneficiary for the requested three years of employment.

The AAO concurs with the director's determination that the Contractor Agreement and the document entitled "Purchase Order" are insufficient to establish that the petitioner had a specialty occupation available for the beneficiary to occupy when the petition was filed, and that it actually intended to employ the beneficiary. In the first place, the job title offered to the beneficiary in the Purchase Order is "[v]alidation [a]nalyst," whereas the immediate petition seeks the beneficiary's services as a programmer analyst. Second, the Purchase Order did not indicate the location of the beneficiary's employment with Abbott Laboratories; it stated "Contractor will discuss its hours and location where the work is to be performed with the Client." Finally, as already discussed, the evidence regarding the beneficiary's actual location of work is inconsistent.

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). Given the apparent discrepancies in the job title and beneficiary's location of the employment, the AAO finds that the petitioner failed to establish that it had a specialty occupation for the beneficiary to occupy at the time it filed the petition, and that it actually intended to employ the beneficiary. The AAO finds a stronger reason still for its finding: the Purchase Order indicated that the petitioner's contract of work for Abbott Laboratories is from March 5, 2003 to September 10, 2003 while the appeal states that the immediate petition's revised ending date of intended employment is to July 2, 2005. Although the Purchase Order allows for a month-to-month extension after the September date, the actual end date of the contract with Abbott Laboratories is September 10, 2003 - a date that falls woefully short of July 2, 2005.

As related in the discussion above, the petitioner has failed to establish that it would be the beneficiary's employer or is an agent for the actual employer, and that the proffered position exists and is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, there is insufficient evidence to establish that the beneficiary is qualified to perform duties in a specialty occupation. For this additional reason, the petition may not be approved.

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.