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01 2005

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date:

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:

[Redacted]

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

Robert P. Wiemann, Director
Administrative Appeals Office

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 an engineering consulting firm that seeks to employ the beneficiary as a validation specialist. 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 provide sufficient evidence to establish: (1) the proffered position is a specialty occupation; (2) it would be the employer, not the agent, of the beneficiary; and (3) that the labor condition application showed the actual area(s) of intended employment. On appeal, counsel submits a brief.

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 validation specialist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail reviewing and evaluating the industry's manufacturing processes and equipment to ensure compliance with specified standards; participating with management personnel in establishing procedures for testing products and equipment; coordinating validation activities and testing of materials with other outside contractors for process qualifications; reviewing results of quality control tests to determine if products meet specifications and comply with federal standards; investigating the validity of complaints and examining test reports, production records, and current legal standards; recommending full-scale production of satisfactory batches or destruction of substandard batches; and preparing reports on the status of validation activities, needs, and issues for management's review. The petitioner's February 26, 2002 letter states that a bachelor of science in pharmacy or its equivalent is required for the proposed position, and the petitioner's document entitled "Job Description" indicates that a validation specialist is required to possess a bachelor of science in the fields of biotechnology, architecture, pharmacy, or medical sciences.

The first issue to be discussed in this proceeding is whether the petitioning entity is the employer or agent of the beneficiary, the second is whether the proposed position is a specialty occupation, the third is the validity of the labor condition application.

In determining whether the petitioning entity is the employer of the beneficiary, we turn to the regulation at 8 C.F.R. § 214.2(h)(4)(ii), which describes a *United States employer* as 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.

Under 8 C.F.R. § 214.2(h)(2)(i)(F) the term *agent* is discussed; 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 director found that the petitioner was not an employer as defined under the regulations. The director stated that the petitioner's business is to locate validation specialists and place them with firms that use such services; that no evidence shows that the petitioner has contracts with firms requiring the beneficiary's services as a validation specialist for the duration indicated on the H-1B petition because the submitted purchase orders convey that the client requires validation services for one day only; and that absent evidence that firms require the beneficiary's services as a validation specialist, the beneficiary will enter the United States to be employed in other than a specialty occupation. The director also determined that the petitioner did not establish an agency relationship with the beneficiary as defined under the regulations because it did

not submit contracts with clients. Without valid contracts, the director stated that he could not determine the validity of the labor condition application (LCA) that accompanied the H-1B petition.

Counsel states that the petitioner will be the beneficiary's employer: the petitioner has the sole control and supervision over the beneficiary's work and performance; it maintains authority to hire, fire, promote, and discipline staff; it has the exclusive right to place or withdraw staff from projects; it has an Internal Revenue Service Tax Identification number; and the petitioner's March 31, 2003 letter and the organizational chart show that the beneficiary will perform her duties under the direct supervision of the company's president and chief project engineer/director. Counsel refers to DE-6 forms to demonstrate that it employs over 50 employees, and asserts that the submitted purchase orders reveal that the petitioner has contracts with firms requiring the beneficiary's services as a validation specialist. Counsel states that it is the practice in the industry to acknowledge purchase orders as contractual agreements that are legal and binding, and explains that collectively the purchase orders involve nearly two years of work for \$245,440.

Based on the submitted evidence, the petitioner fails to satisfy the definition of a United States employer as outlined at 8 C.F.R. § 214.2(h)(4)(ii). The record reflects that CIS received the initial H-1B petition on September 6, 2001. The three submitted purchase orders relating to MedImmune, Inc. are dated subsequent to the filing of the H-1B petition. The purchase order for \$99,680 is dated January 7, 2003 and December 23, 2002; the purchase order for \$145,760 is dated January 7, 2003 and December 23, 2002; and the purchase order for \$10,000 is dated September 2, 2003. 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). Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether the petitioner qualifies as an employer as defined under the regulations. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Because the purchase orders are dated subsequent to the filing of the H-1B petition, they will not be considered in determining whether the petitioner qualifies as the beneficiary's employer. As such, the petitioner fails to qualify as a *United States employer* under 8 C.F.R. § 214.2(h)(4)(ii); it does not have any work, either from itself or from clients, in which to engage the beneficiary's services as a validation specialist while in the United States. Consequently, the petitioner did not have a specialty occupation available for the beneficiary to occupy at the time the H-1B petition was filed with CIS.

No evidence establishes that the petitioner qualifies as an agent under 8 C.F.R. § 214.2(h)(2)(i)(F). The record does not contain a contractual agreement guaranteeing the beneficiary's wages, and an itinerary of definite employment and information on any other services planned for the period of time requested for the beneficiary's services as a validation specialist. Therefore, the petitioner does not satisfy the definition of an agent under 8 C.F.R. § 214.2(h)(2)(i)(F).

The AAO will now consider whether the proposed position is 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.

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 proffered position.

The director determined that the proffered position is not a specialty occupation. The director stated that the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) reveals that the beneficiary's duties are performed by science technicians, which is an occupation that does not require a bachelor's degree. The director found unpersuasive counsel's assertion that the *Handbook* shows that a validation specialist requires a bachelor's degree because scientific and engineering jobs require a bachelor of science degree; the director stated that a validation specialist is not a scientific or engineering job. The submitted evidence, the director stated, does not indicate that the petitioner normally requires applicants to possess a baccalaureate or higher degree. The director determined that the proposed duties and stated level of responsibility did not indicate complexity or authority beyond what is normally encountered in the occupational field, and that an experienced person whose educational training falls short of a baccalaureate degree could perform the proposed position.

On appeal, counsel states that the proposed position is a specialty occupation. Counsel asserts that the petitioner is an engineering consulting firm that provides engineering, mechanical, civil, electrical, structural engineering design, validation services, information technology systems, and drafting and cGMP documentation support to assist clients from the inception phase to validation of research and development projects and products. Counsel states that the submitted purchase orders are from a publicly traded biotechnology company. According to counsel, the proposed position does not belong to the classification

“science technicians”; instead it more appropriately is under the section about drug manufacturing in the *Handbook*, which indicates that half of all workers have a bachelor’s or higher degree and that for scientific and engineering jobs, a bachelor of science degree is the minimum requirement. Counsel refers to information from the California Employment Development Department (EDD) to show that the proposed position requires a bachelor’s or master’s degree in biological sciences or another scientific discipline, and also refers to submitted job postings to establish that employers require a specific baccalaureate degree for a validation specialist. Counsel states that the petitioner’s hiring procedures and guidelines indicates its requirement of a bachelor’s degree for the proposed position. Counsel maintains that the proposed position’s duties cannot be performed by a person who does not hold the requisite degree.

The evidence does not establish that the beneficiary will occupy a specialty occupation. The regulation at 8 C.F.R. § 214.2(h)(1)(ii)(B) states that an H-1B classification applies to an alien who is coming temporarily to the United States to perform services in a specialty occupation. As discussed above in this decision, no evidence establishes that the petitioner had a specialty occupation available for the beneficiary to occupy at the time the H-1B petition was filed with CIS. Thus, the evidentiary record fails to establish that the beneficiary is an alien who is coming temporarily to the United States to perform services in a specialty occupation.

Furthermore, in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now CIS, reasonably interpreted the statute and the regulations when it required that the petitioner show that the entities ultimately employing the foreign nurses require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the nurses to the United States for employment with the agency’s clients.

Although the record contains purchase orders between the petitioner and [REDACTED], where the beneficiary may work, the record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of [REDACTED]. Without such a description, the petitioner has not demonstrated that the work that the beneficiary will perform at MedImmune, Inc. will qualify as a specialty occupation.

The AAO will now address the validity of the labor condition application (LCA).

The director concluded that without valid contracts he could not determine the validity of the LCA that had accompanied the H-1B petition. As already discussed above in this decision, the petitioner is neither the employer nor the agent of the beneficiary; as such, the location of the beneficiary’s job site is undetermined and the LCA is not valid.

As related in the discussion above, the petitioner has failed to establish that the petitioner is an employer or agent, that the proffered position is a specialty occupation, and that the LCA is valid. Accordingly, the AAO shall 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.