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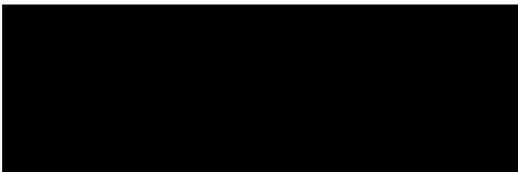
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FILE: LIN 04 075 52730 Office: NEBRASKA SERVICE CENTER Date: OCT 12 2005

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.

[Handwritten signature]

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 information technology business that seeks to employ the beneficiary as a "mechanical engineering technician II." The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 does not qualify as a U.S. employer, and the petitioner has not demonstrated that it has sufficient H-1B level work for the beneficiary. On appeal, counsel submits a brief and additional evidence, including the following: letters from the petitioner's vice president of U.S. operations and from the president/COO of the petitioner's client, Tesco Engineering; a copy of the petitioner's financial statement for the year ending December 31, 2003; copies of the petitioner's quarterly tax returns for 2003 and the first quarter of 2004; and copies of the most recent pay stubs for the petitioner's two employees.

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.

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.

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 "mechanical engineering technician II." Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's January 16, 2004 letter in support of the petition; and the petitioner's response to the director's request for evidence.

The director found that the petitioner's lease agreement for an area of [REDACTED] was not large enough to conduct business or support two employees. The director found further that the petitioner's 2003 tax report was not submitted, and its 2002 tax report reflected a net loss. The director also found that an email was not sufficient evidence of a contract agreement or that the petitioner had sufficient H-1 level work to support another employee.

On appeal, counsel states, in part, that the petitioner is a legitimate entity conducting business in Auburn Hills, Michigan, with sufficient H-1B level work for the beneficiary at its client site, [REDACTED] in Auburn Hills, Michigan. Counsel states further that the letter submitted by the petitioner's vice president of U.S. operations explains that the petitioner's office at [REDACTED] Auburn Hills, Michigan, is utilized for administrative purposes only and that the engineers work primarily on site. Counsel also states that the petitioner's financial statement for the year ending December 31, 2003, reflects total revenues in the amount of \$108,596.00 and a net profit in the amount of \$4,903.00, which demonstrates the petitioner's ability to pay the proffered wages. Counsel additionally states that the petitioner's organizational chart indicates that it employs a systems analyst and a mechanical engineer, as well as a control engineer on an independent contractor basis.

Due to inconsistencies in the record, the petitioner has not overcome the objections of the director, namely that the petitioner has not demonstrated that it is a United States employer within the meaning of the regulations and that it will employ the beneficiary in a specialty occupation. In a letter dated May 6, 2004, the petitioner's vice president of U.S. operations states, in part, that its lease of 168 square feet at [REDACTED] Michigan, is "only to have the administrative office to conduct our administrative operations." It is not clear, however, what employees make up the petitioner's administrative office, as information on the petition and on the petitioner's most recent quarterly federal tax return for the period ending March 31, 2004, reflects that the petitioner has only one employee. It is further noted that the petitioner's Form 941 quarterly tax return for the quarter ending on March 31, 2004, does not reflect the petitioner's address at [REDACTED] Michigan, though the lease for this address was entered into on January 1, 2004. Counsel additionally states on appeal: "The organizational chart clearly indicates that a Systems Analyst, and Mechanical Engineer is [sic] employed in the U.S. by the petitioner. In addition, the Petitioner is utilizing the services of a Control Engineer on a [sic] independent contractor basis." Counsel

submits copies of two paychecks and notes that one of the employees was hired on April 12, 2004. Counsel's statement and evidence are noted. The petitioner, however, must establish eligibility at the time of filing the nonimmigrant visa petition. In this case, the petition was filed on January 22, 2004, and the petition and supporting documentation reflected only one employee. 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). Furthermore, although some documentation in the record, including information on the petition, reflects the petitioner's address as [REDACTED] other documentation in the record, including the petitioner's 2002 federal income return, reflects the petitioner's address as [REDACTED] and the petitioner's Form 941 quarterly tax return for the quarter ending on September 30, 2003, reflects the petitioner's address as [REDACTED]. As such, the exact nature and location of the petitioning entity are unclear. 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). 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In view of these unresolved inconsistencies, the petitioner has not overcome the objections of the director.

Beyond the decision of the director, the petitioner has not established that the nature of the work in which the beneficiary will be employed is a specialty occupation. In *Défensor 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 the petitioner to show that the entities ultimately employing the alien beneficiaries 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 alien beneficiaries to the United States for employment with the agency's clients.

In this case the petitioner contends that the beneficiary will work off site at its client location, but provides no comprehensive job description of the beneficiary's duties from an authorized representative of the client. Without such a description, the petitioner has not demonstrated that the work that the beneficiary will perform at the client site will qualify as a specialty occupation. For this additional reason, the petition may not be approved.

As related in the discussion above, the petitioner has failed to establish that it qualifies as a U.S. employer, or that it will employ the beneficiary in a specialty occupation. 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.