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FILE: WAC 04 083 50099 Office: CALIFORNIA SERVICE CENTER Date: **AUG 25 2006**

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 an IT development and consulting business that seeks to employ the beneficiary as an “engineer - network.” 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 proffered position is not a specialty occupation, as the petitioner did not establish that it would have an employer-employee relationship with the beneficiary. The director found further that the petitioner did not establish that it would comply with the terms of the labor condition application. On appeal, the petitioner submits a brief and a letter from the petitioner.

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 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 an "engineer – network." Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's January 28, 2004 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform the following duties:

[The beneficiary] will be assigned to SIFY International, Inc., located in Santa Clara, California. [The petitioner] is in the business of providing consulting and managed services in the areas of Information Technology. Specifically, they are involved in Network Management, Systems Management, Security Management, Mail Management and Facilities Management. These services are provided by [the petitioner] to its customers in the United States making it a Managed Services Provider.

[The beneficiary] will be a member of the Network Implementation and Maintenance project team. His job duties will include: Configuration of Cisco 7603, 7206 VXR routers and Cisco 3550 LAN switches; Configuration, analysis and trouble-shooting of OSPF and BGP routing protocols; Analyze and troubleshoot network related issues; Ensure a high network up time of internet gateway links; Ensure optimal and efficient flow of traffic; Configure, manage and maintain OSPF and BGP routing protocols; Ensure Network parameters such as latency and packet loss are controlled and maintained.

On appeal, counsel asserts that an employer-employee relationship exists between SIFY International, Inc. and the beneficiary, that the beneficiary will be working for the petitioner, on the petitioner's premises, under the petitioner's full control at all times. Counsel references a letter from the petitioner's director, asserting that this letter establishes the employer-employee relationship between the petitioner and the beneficiary. Counsel further asserts that the proffered position is a specialty occupation.

Upon review of the record, the petitioner has established that an employer-employee relationship exists between the petitioner and the beneficiary.

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.

To qualify as a United States employer, all three criteria must be met. The quarterly wage reports indicate that the petitioner engages persons to work in the United States, and the Form I-129 indicates that it has an Internal Revenue Service Tax Identification Number. The petitioner has demonstrated that it would have an employer-employee relationship with the beneficiary with the authority to hire, pay, fire, supervise, or otherwise control the work the beneficiary would perform.

The director also found that the petitioner is an agent. The AAO disagrees.

Pursuant to 8 C.F.R. § 214.2(h)(2)(i)(F):

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, 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 the employment and to provide any required documentation.
- (3) A foreign employer who, through a United States agent, files a petition for an H nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274a.

In the petitioner's April 8, 2004 response to the director's request for additional evidence, the petitioner's director stated as follows:

The nature of the questions posed by the Service regarding "consulting services" implies that the primary purpose of the position is to supply consultants to the industry. It is pointed out at the end of the job description, Exhibit G, that [the beneficiary] is an employee of SIFY International and as such will not be billed out to clients per se. The services provided by the Petitioner are such that their employees are dedicated to their employer but, as a necessary function of the service, will have a great deal of contact with their customers.

The AAO determines that the petitioner will not be an agent as defined in the regulation.

The director also found that the petitioner had not provided an itinerary of employment. On appeal, the petitioner states that the beneficiary “will spend NO time on client premises.” In response to the RFE, the petitioner states: “When the project is completed, the employee will be reassigned to new projects and/or will return to the parent corporation to take part in new projects.” Further, the April 8, 2004 letter indicates that the beneficiary will have a great deal of customer contact. Thus the evidence is inconsistent as to whether or not the beneficiary will provide services off-site as well as on-site.

The evidence of record, including the petitioner’s tax documentation and offer of employment to the beneficiary, establish that the petitioner will act as the beneficiary’s employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.¹ See 8 C.F.R. § 214.2(h)(4)(ii).

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.

In his request for evidence, the director asked for the beneficiary’s employment itinerary and contracts of work to be performed. 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. Upon review, the director properly exercised his discretion to request contracts reflecting the dates and locations of employment and an employment itinerary. However, the record contains no documentation regarding the dates and locations of the beneficiary’s employment or contracts of work to be performed. 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.²

Therefore, the petitioner has failed to establish that it meets the regulatory requirements for an employer who will employ the beneficiary in multiple work locations. Therefore, the petition may not be approved.

The director also found that the petitioner had not demonstrated that has complied with the terms of the labor condition application. As discussed above, the petitioner’s April 8, 2004 letter indicates that the beneficiary will work both on site and off site. When the beneficiary works off site, the record contains no evidence indicating that he will be working within the geographical area covered by the LCA. 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.

¹ See also 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).

² 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.”