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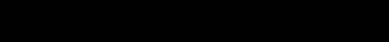
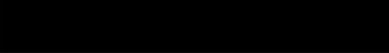
**U.S. Citizenship
and Immigration
Services**

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02

FILE: WAC 04 259 50186 Office: CALIFORNIA SERVICE CENTER Date: **AUG 29 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 director of the California 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 development firm, with 17 employees. It specializes in the design and development of customized software packages and seeks to employ the beneficiary as a software engineer 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 he determined that the record did not establish that the beneficiary would be employed in a specialty occupation, that the petitioner was eligible to file a Form I-129 on behalf of the beneficiary or that it had complied with the terms of the Labor Condition Application (LCA) submitted at the time of filing.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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, a petitioner must establish that its position meets one of four 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.

The petitioner states that it seeks the beneficiary’s services as a software engineer. In response to the director’s request for evidence regarding the specific responsibilities of the proffered position, counsel for the petitioner listed the following as the duties that would be performed by the beneficiary as a software engineer:

- Analysis of user needs, involving the review and analysis of existing systems;
- Planning and coordinating the design and development of application modifications;
- Testing and implementation of proposed modifications, providing support if necessary; and
- Miscellaneous responsibilities, including reports, staff meetings and following up on new technology.

The petitioner has stated that the beneficiary is qualified to perform these duties as he holds a baccalaureate degree in electrical and electronics engineering.

The AAO now turns to a consideration of whether the record establishes that the petitioner is eligible to submit the Form I-129 on behalf of the beneficiary, either as a U.S. employer or as an agent.

The director’s denial of the petition concluded that the record did not establish the petitioner as a U.S. employer under the regulation at 8 C.F.R. § 214.2(h)(4)(ii) and failed to provide the evidence necessary to demonstrate that the petitioner was serving as the beneficiary’s agent under 8 C.F.R. § 214.2(h)(2)(i)(F).

The evidence of record demonstrates 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 contracts or work orders under which the beneficiary would be employed. In the Aytes memorandum cited at footnote 1, the director has the discretion to request that a petitioner employing the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised his discretion to request the contracts under which the beneficiary would provide services.

Responding to the director, counsel submitted a master services agreement signed by the petitioner and a firm in Palo Alto, California, indicating that the firm would be the client for which the beneficiary would provide services. However, the agreement, which states it will remain in force for two years, does not identify the beneficiary and fails to detail the services to be performed by the petitioner on its behalf.² It is not supplemented by any statement of work that would remedy these deficiencies.³ Accordingly, the evidence submitted by the petitioner does not satisfy the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B). The petition must, therefore, be denied.⁴

The petitioner's failure to submit a statement of work for the beneficiary's employment at the Palo Alto firm also precludes it from establishing the proffered position as a specialty occupation under any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at multiple work locations to perform services established by contractual agreements for third-party companies. The petitioner, however, has provided no contracts, work orders or statements of work describing the duties the beneficiary would perform for its clients and, therefore, has not established the proffered position as a specialty occupation.

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, a business that acts as an employment contractor – an entity placing employees at third-party companies to perform services under contract – is merely a “token employer,” while the entity for which the services are to be performed is the “more relevant employer.” The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work

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 The AAO also notes that the contract is undated, although the text of the agreement indicates an unspecified date in August 2004 for start-up.

³ The agreement indicates that the actual services to be performed under it will be articulated in statements of work that become effective only upon “execution by authorized representatives of both parties.”

⁴ 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.”

is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. Therefore, it is not the duties listed by the petitioner at the time of filing, but those established under its master services agreement with its client that must demonstrate a degree requirement or its equivalent for the proffered position. As the petitioner has failed to provide evidence of these contractual duties, it has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I).

The director also concluded that, without a contract or statement of work establishing the location where the beneficiary would be employed, he was unable to determine whether the petitioner was in compliance with the terms of the LCA submitted at the time of filing, as required by 8 C.F.R. § 214.2(h)((4)(iii)(B)(2). The AAO agrees. As the master services agreement between the petitioner and its Palo Alto client does not identify the beneficiary, the record does not establish the beneficiary's place of employment. Accordingly, the petitioner has not demonstrated its compliance with the terms of the LCA filed with the Form I-129.

For reasons related in the preceding discussion, the record does not establish the duties of the proffered position as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), that the petitioner has met the filing requirements at 8 C.F.R. §§ 214.2(h)(2)(i)(B) and (F)(I) or has established compliance with the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(2). Therefore, the AAO shall not disturb the director's denial of the petition.

The AAO notes that certain aspects of its decision differs from the reasoning relied upon by the director. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.