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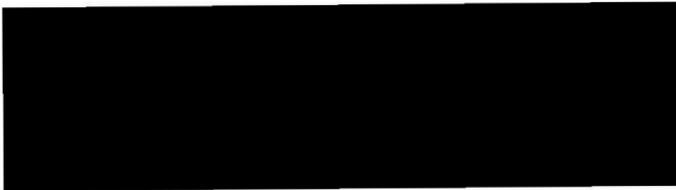


FILE: LIN 03 261 53976 Office: NEBRASKA SERVICE CENTER Date: APR 05 2006

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.

for Michael T. Kelly
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The 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 a computer software development and consulting company 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, finding that the petitioner had not demonstrated there was sufficient H-1B-level work, neither at the time the petition was filed nor at the time of the denial, to employ the beneficiary in a specialty occupation. The director found that the petitioner was not in compliance with the terms of the labor condition application (LCA). The director also stated that the petitioner did not appear to qualify as a United States employer.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's RFE response and supporting documentation; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

In its September 2, 2003 letter of support, the petitioner stated that the duties of the proposed position would include planning, developing, testing, and documenting computer programs, applying the beneficiary's knowledge of programming techniques and computer systems; evaluating user requests for new or modified programs; consulting with users to identify current operating procedures and clarify program objectives; reading manuals, periodicals, and technical reports to learn ways to develop programs, using structured analysis and design; submitting plans to users for approval; preparing flowcharts and diagrams to illustrate sequences of steps; designing computer terminal screen displays to accomplish the goals of user requests; converting project specifications, using flowcharts and diagrams, into sequences of detailed instructions and logical steps for coding into language that is processable by the computer; entering commands into computers to run and test programs; reading computer printouts or observing display screens to detect syntax of logic errors during program tests; using diagnostic software to increase operating efficiency or adapt to new requirements; analyzing, reviewing, and altering programs to increase operating efficiency to adapt to new requirements; writing documentation to describe program development, logic, coding, and corrections; writing manuals for users to describe installation and operating procedures; using computer-aided software tools, such as flowchart design and code generation in each stage of system development; potentially overseeing the installation of hardware and software; providing technical assistance to program users; installing and testing programs at user sites; monitoring performance of programs after installation; and possibly specializing in developing programs for business or technical applications.

The AAO will first consider the issue of whether the petitioner meets the definition of a United States employer. The term "employer" is defined at 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 petitioner appears to satisfy subsections (1) and (3) of this regulation: the payroll records 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.

However, subsection (2) has not been satisfied. The petitioner, a computer software development and consulting company, provides application outsourcing services and enterprising consulting solutions services. The beneficiary would travel to client sites to perform his duties. The petitioner has not demonstrated that it would have an employer-employee relationship with respect to its ability to hire, pay, fire, supervise, or otherwise control the work the beneficiary.

Rather, the record of proceeding demonstrates the opposite. The contractor agreements submitted in response to the director's request for evidence specifically stated that consultants such as the beneficiary would not be considered employees of the petitioner. Rather, they are considered employees of the company contracting for their services. The company contracting for these services would also withhold and pay any federal, state, and local income taxes resulting from its employment of these individuals, as well as file any required returns and reports.

Therefore, the petitioner does not qualify as a "United States employer."

This does not, in and of itself, however, preclude the petition from approval. As the petitioner is acting as the beneficiary's agent, the petitioner is subject to the criteria enumerated at 8 C.F.R. § 214.2(h)(2)(i)(F). If an agent satisfies these criteria, then it is eligible for H-1B approval.

With regard to agents, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) states the following:

Agents as petitioners. 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 . . . 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 it[s] 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.

In his request for evidence, the director specifically requested an itinerary of definite employment, as required by 8 C.F.R. §§ 214.2(h)(2)(i)(F)(1) and (2). This itinerary was to list the locations and organizations where the beneficiary would be providing services. The itinerary was to specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venue, or location where the service would be performed. The itinerary was to include all service planned for the period of requested employment—through September 2006.

An itinerary was not submitted in the petitioner's response, nor is one provided on appeal, as required by the regulations. Without such an itinerary, the AAO is unable to determine whether the petitioner will employ the beneficiary in a specialty occupation for a period of three years.

Counsel asserts on appeal that "the Service has no reason to presume that there is no sufficient work at the H-1B level." Counsel also states that the director has introduced a "speculative employment" concept into the proceeding. However, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) requires the submission of an itinerary. For this reason alone, the petition may not be approved.

The vendor agreements and other contractual agreements submitted on appeal do not establish an itinerary of employment, as no work is to be performed for any of these customers until work or purchase orders are issued.

On appeal, counsel submits two purchase orders and an independent contractor services agreement. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director. Additionally, the first purchase order, for work to be performed for Fortune 500 Systems, Ltd., is for work that was to begin on July 1, 2003 and conclude on December 1, 2003 (with the possibility of extension). The instant petition was received at the service center on September 5, 2003, so this project was likely largely completed by the time the petition was filed. The independent contractor services agreement, for work to be performed for Hexaware Technologies, Inc., is for work that was to begin on October 16, 2003.

The second purchase order, for work to be performed for Contract Staffing Specialists, Inc., specifically mentions the beneficiary by name. This project was to begin on September 1, 2003 and last for three years. However, this purchase order cannot substitute for an itinerary, as it does not address the criteria set forth at 8 C.F.R. § 214.2(h)(2)(i)(F). While it does specify the dates of engagement, it does not provide

the names and addresses of the actual employers (the contracting company is a staffing firm; it would place the beneficiary at a third site), and the names and addresses of the establishments, venues, or locations where services would be performed. Such information is necessary for the AAO to determine whether a specialty occupation in fact exists.

Moreover, 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 the petitioner to show that the entities ultimately employing the foreign aliens required a bachelor's degree for all employees in the position. The court found that the degree requirement should not originate with the agent that brought the aliens to the United States for employment with its clients.

The record does not contain a comprehensive description of the beneficiary's proposed duties from authorized representatives of any of the petitioner's clients, or clients of the petitioner's clients. Without such descriptions, the petitioner cannot demonstrate that the work that the beneficiary will perform at these sites qualifies as a specialty occupation. While the purchase order for work to be performed for Contract Staffing Specialists, Inc. does provide a listing of programs with which the beneficiary would work, this listing is not a comprehensive description of the proposed duties. Nor does this purchase order provide the site at which the beneficiary would work.

Nor does the record contain any other description of the beneficiary's proposed duties from an authorized representative of any of the petitioner's clients. Thus, the petitioner has not demonstrated that the work the beneficiary would perform for its clients requires a bachelor's degree in a specific specialty.

As such, the petitioner has not demonstrated that a specialty occupation in fact exists, and the petition was properly denied.

Finally, the AAO will address the LCA issue.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition “[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary.” Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of an LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). 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).

The petition was filed with an LCA certified for employment in Columbus, Nebraska, and Houston, Texas. However, no other mention of Columbus or Houston was made. Although the Form I-129 indicated that the work location would be in Port Jefferson Station, New York, no LCA for that site was submitted. The director made note of this in his request for evidence and, in response, the petitioner

submitted a certified LCA valid for employment in Newark, Delaware (the petitioner had moved its base of operations from Port Jefferson Station, New York to Newark Delaware).

As noted previously, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. As the instant petition was received at the service center on September 5, 2003, for an LCA to be valid it must have been certified prior to that date. The LCA for employment in Newark, Delaware was certified on January 22, 2004, more than four months after the petition was filed. Therefore, this LCA may not be accepted, as there is no provision in the regulations for discretionary relief from the LCA requirements.

Therefore, the only places of employment for which the petitioner has obtained LCA certification are Columbus, Nebraska and Houston, Texas. However, the record does not reflect any work for the beneficiary to perform in either of these locations. Therefore, it is impossible for the AAO to determine whether there is in fact H-1B level work available at these locations. For this additional reason, the petition may not be approved.

The petitioner does not meet the definition of a "United States employer;" rather, it is an agent. However, the petitioner has failed to submit an itinerary of definite employment, as required by the regulations and requested by the director. Also, there is no description of the beneficiary's job duties from any of the client companies, and the petitioner has not established that it will employ the beneficiary in a specialty occupation. The petitioner also failed to submit an LCA for the location of intended employment at the time of filing.

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.