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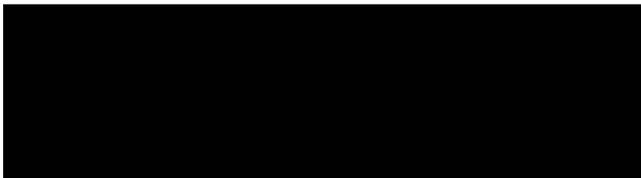
FILE: LIN 04 222 53126 Office: NEBRASKA SERVICE CENTER Date: **AUG 30 2006**

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
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 Internet technology consulting and staff augmentation 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 failed to establish that it met the definition of a “United States employer” at 8 C.F.R. § 214.2(h)(4)(ii), and show that the proposed position qualifies as a specialty occupation. Counsel submits a timely appeal.

The AAO will first consider the director’s finding that the petitioner does not qualify as the U.S. employer of 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.

On appeal, counsel states the petitioner is the beneficiary’s employer. Counsel also states that the Aytes memorandum¹ indicates that: (1) the employment itinerary relating to the beneficiary does not have to list each and every day of the beneficiary’s employment in the United States; (2) the labor condition application serves as the petitioner’s commitment to pay the beneficiary’s wage even during periods of time when the alien is on travel or between assignments; and (3) because the contractor remains the employer and is paying the beneficiary’s salary, this constitutes employment for the purposes of H-1B classification.

Based on the evidence of record, the petitioner has established that it qualifies as the U.S. employer, as defined at 8 C.F.R. § 214.2(h)(4)(ii), of the beneficiary. The petitioner is seeking to engage the beneficiary to work within the United States as a programmer analyst. The consulting contractual agreements in the record such as the CSC Associate Supplier Teaming Agreement; the Interactive Business Systems, Inc.

¹ 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).

Subcontractor Agreement, and the Contract Services Agreement with Alticor, Inc. indicate that the petitioner, not the company to which it is supplying contractors, would be the employer of the consultants that it supplies pursuant to contractual agreements. As such, 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. The evidence shows that the petitioner has an Internal Revenue Service Tax identification number. As such, based on the evidence of record, the petitioner satisfies the definition of an U.S. employer at 8 C.F.R. § 214.2(h)(4)(ii).

The AAO will now consider whether the offered position qualifies as a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (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.

On appeal, counsel asserts that the director is not authorized to either evaluate whether a company has the ability to pay the prevailing wage or to request a specific itinerary of employment, and he refers to a prior AAO case and the Aytes memorandum to support his assertions. Counsel states that the petitioner intends to place the beneficiary at a client site in Aurora, Illinois.

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. The evidence of record reflects that the beneficiary will perform services at 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. Counsel refers to a prior AAO case and the Aytes memorandum to establish that the director has no authority to request contracts or an employment itinerary relating to the beneficiary's proposed employment. The AAO finds that the facts in the prior AAO decision are distinguishable from those in the present proceeding. In the prior AAO decision, the evidence of record reflected that the beneficiary would work at the beneficiary's facility at Bellevue (now Kirkland), Washington, and would also work for its client, Microsoft, located in Redmond, Washington. With the situation at hand here, the evidence indicates that the beneficiary will work in the petitioner's office and that he will work in more than one location in providing services on behalf of the petitioner's clients. However, no evidence of record identifies the location(s) or client(s) for whom the beneficiary will perform services. The prior AAO decision, which identifies the beneficiary's work locations and the client for whom he will provide services, is therefore distinguishable from the facts presented in this proceeding.

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 or an employment itinerary. Counsel's February 9, 2005 letter indicates that the petitioner staffs Fortune 100 companies and provides consulting services. Counsel further indicates that the beneficiary will provide consulting services to a client in Aurora, Illinois. The record contains master consulting contractual agreements entered into between the petitioner and a number of different companies; however, no statement of work or other document is in the record substantiating that the beneficiary will provide consulting services as a programmer analyst for a particular client or clients in Aurora, Illinois, or elsewhere. Thus, the petitioner failed to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition must be denied.²

The director also found that the petitioner would not employ the beneficiary in a specialty occupation. The AAO agrees. 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, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant

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."

employer.” The *Defensor* court recognized that evidence of the client companies’ job requirements is critical where the work 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.

With the situation here, the evidence of record reflects that the beneficiary will perform consulting duties for the petitioner’s clients. In accordance with *Defensor*, to establish that the offered position qualifies as a specialty occupation, the petitioner was required to submit evidence of the job requirements of its client companies. As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner’s clients, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. The petitioner 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 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.