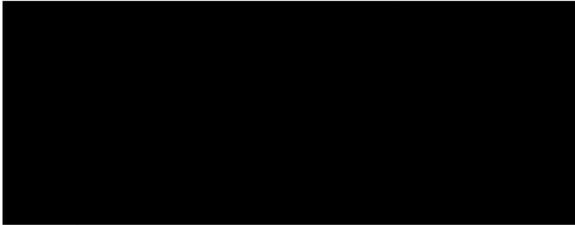


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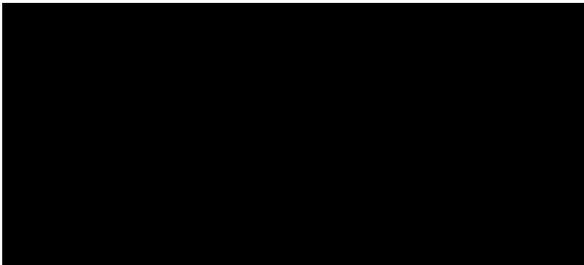
FILE: WAC 04 136 51989 Office: CALIFORNIA SERVICE CENTER Date: **JUN 26 2006**

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 service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a software consulting firm that seeks to employ the beneficiary as a systems 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 because the petitioner failed to establish that: (1) it is the employer or agent of the beneficiary; and (2) the offered position is a specialty occupation. Counsel submits a timely appeal.

The AAO will first address the director's conclusion that the petitioner failed to establish that it is the employer or agent of the beneficiary.

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.

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.

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 denying the petition, the director found that the petitioner did not establish that a specialty occupation exists for the beneficiary to occupy. The director concluded that the petitioner is not the beneficiary's employer, and in order for the petitioner to establish that it qualifies as the beneficiary's agent, the petitioner needed to submit contracts showing the beneficiary's complete itinerary. The director stated that the petitioner did not submit a contract from the entity ultimately requiring the beneficiary's services. Without the contracts the director could not determine whether the petitioner complied with the terms of the labor condition application (LCA). The director found conflicting statements in the evidence of record as to the beneficiary's actual work location; and based on the physical limitations of the petitioner's office, he questioned the feasibility of placing the beneficiary there.

On appeal, counsel discusses the contract with Data Systems Worldwide and International Aluminum Corporation. According to counsel, the two contracts establish that the beneficiary will perform services as a systems analyst. Counsel maintains that the petitioner is the beneficiary's employer as it will hire him, control his work, retain the authority to discharge him, and pay his salary. Counsel further states that the contract with Data Systems Worldwide indicates that the petitioner is the beneficiary's employer. According to counsel, case law, federal statutes, and regulations determine whether the petitioner would have an employer/employee relationship with the beneficiary. Counsel asserts that the petitioner has complied with the terms of the LCA, and that the LCA does not require that the petitioner specify the beneficiary's actual workplace location. The LCA, counsel asserts, "simply requests the employer's address, not the actual location where [the beneficiary] will be working." Counsel states that the beneficiary will perform work at the client's place of business.

Based on the evidence in the record, the AAO finds that the petitioner established that it is the beneficiary's employer.

In the denial letter, the director stated that the petitioner did not qualify as the beneficiary's employer. The AAO finds that the evidence of record establishes that an employer/employee relationship would exist between the petitioner and beneficiary. The contracts entered into between the petitioner and International Aluminum Corporation support the petitioner's assertion that the petitioner is the beneficiary's employer. The petitioner will pay the beneficiary's salary and will retain the right to terminate the beneficiary.

The AAO will now address whether the petitioner established that the offered position qualifies as a specialty occupation.

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 nurses 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 nurses to the United States for employment with the agency's clients.

With the situation here, the contract with International Aluminum Corporation specifically identifies the beneficiary, the dates of his employment (starting February 28, 2005 for a 24 month project), and the duties

that the beneficiary will perform for International Aluminum Corporation. Although the contract does not indicate that the entity ultimately employing the beneficiary requires a bachelor's degree for all employees in that position, the AAO finds that the nature of the proposed duties is so specialized and complex as to require a bachelor's degree in a field related to the proposed position.

The AAO finds that the LCA contained in the record indicates that the beneficiary's work location will be Los Angeles, California, or San Jose, California. The document entitled "Professional Services Subcontractor Agreement" entered into with International Aluminum Corporation does not state the beneficiary's work location; however, it does reflect the address of Vernon, California, for International Aluminum Corporation. The location of Vernon, California, is within the county of Los Angeles, California. Thus, the LCA contained in the record properly lists the beneficiary's work location.

On appeal, counsel asserts that the LCA "simply requests the employer's address, not the actual location where [the beneficiary] will be working." The AAO disagrees. The LCA specifically requests information relating to the work location for the H-1B nonimmigrant. The petitioner must file an amended H-1B petition should the beneficiary's work location change to an area outside of the city of Los Angeles or San Jose, California.

Based on the evidence of record, the AAO concludes that the petitioner has established that the offered position qualifies as a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The evidence of record reflects that the beneficiary is qualified to perform the proposed position. The evaluation in the record of the beneficiary's education indicates that the beneficiary possesses the equivalent of a bachelor's degree in business administration in accounting with an additional concentration in computer science from a regionally accredited university in the United States. The record contains the beneficiary's transcripts, bachelor of commerce degree, master of business administration degree, and certificates and transcript from NIIT.

As related in the discussion above, the petitioner has established that it is the beneficiary's employer, that the proffered position is a specialty occupation, and that the beneficiary is qualified to perform the services of the specialty occupation.

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 sustained. The petition is approved.