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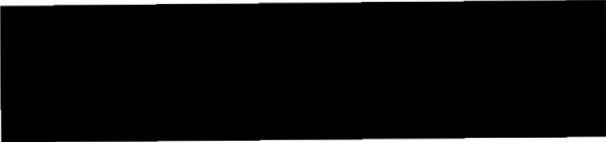
FILE: LIN 05 001 52143 Office: NEBRASKA SERVICE CENTER Date: SEP 27 2006

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 a recruiting and staffing firm that seeks to employ the beneficiary in a position entitled "quality control". The petitioner 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 determined that the petitioner had not established that it qualified as a United States employer and had not submitted contracts of work for the period of employment, and accordingly denied the petition. On appeal, the petitioner states that the director erred in denying the petition and indicates that the petitioner qualifies as an employer.

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.

The record establishes that the petitioner will be the employer of the beneficiary, and the director's decision to the contrary shall be withdrawn. Under the terms of a contract between the petitioner and [REDACTED] the petitioner shall furnish employees to [REDACTED] who shall be assigned to work at [REDACTED] Pursuant to the terms of that agreement, the beneficiary will not be an employee of [REDACTED] or [REDACTED] [REDACTED] but shall be the employee of the petitioner. The petitioner is responsible for interviewing, hiring, orienting and training the beneficiary, and shall be responsible for paying the beneficiary's wages and maintaining applicable workers compensation insurance or other employee mandated coverage required by law. The petitioner has the authority to terminate the beneficiary's employment and the employment relationship between the petitioner and beneficiary is an at-will employment relationship as set forth in the employment agreement entered into between the petitioner and beneficiary. The beneficiary is entitled to participate in employee benefit plans offered by the petitioner, and the petitioner is responsible for collecting and paying applicable taxes arising out of the beneficiary's employment by the petitioner. The fact that the beneficiary will perform services at a client facility and is subject to that client's work rules and regulations does not change the employer/employee relationship existing between the petitioner and beneficiary. The petitioner will engage the beneficiary to work in the United States, has an employer-employee relationship with the beneficiary, and has an Internal Revenue Service Tax identification number. The petitioner qualifies as a United States employer in this instance.

The director also found that the petitioner failed to submit a contract of work to be performed by the beneficiary on behalf of the petitioner. The AAO agrees. Pursuant to language at 8 C.F.R.

§ 214.2(h)(2)(i)(B), employers must submit an itinerary¹ 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 (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, e.g. an employment itinerary. However, the record contains no documentation regarding the dates and locations of the beneficiary's employment for the period of the beneficiary's employment by the petitioner (from 10/1/2004 through 10/1/2007). The petitioner submitted a contract between itself and ██████████ to provide project work for ██████████ a number of job categories. However, no purchase order naming the position, work project, or the beneficiary has been submitted. The petitioner has not established that the beneficiary will work at ██████████. 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

Beyond the decision of the director, it has not been established that the proffered position qualifies as a specialty occupation. The evidence 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 is 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 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.

As the record does not contain any documentation from the client[s] for whom the beneficiary would actually perform services, that establishes the specific duties the beneficiary would perform under contract for the petitioner's client[s], 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 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). For this additional reason, the petition may not be approved.

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).

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.

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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 and the appeal shall accordingly be dismissed.

ORDER: The appeal is dismissed. The petition is denied.