



U.S. Citizenship
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FILE: LIN 04 188 50039 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:

SELF-REPRESENTED

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 software development and consulting firm that seeks to employ the beneficiary as a software engineer. 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 provides additional information 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that the petitioner will be the employer of the beneficiary, and the director's decision to the contrary shall be withdrawn.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 ecfirst.com., the petitioner shall furnish a full-time computer programming consultant for a project commencing June 21, 2004 with the Wells Fargo Services Corporation. The term of the initial contract will be for six months but may be extended by appropriate notice. The petitioner/beneficiary shall perform any and all general data analysis, design and programming services required or requested in connection with the project. Pursuant to the terms of that agreement, the beneficiary will not be an employee of ecfirst.com but shall be the employee of the petitioner. The petitioner is responsible for all workers compensation, liability, health, and accident insurance on behalf of the beneficiary that is required by law and acts as an independent contractor in this agreement. The contract provides that the beneficiary will not be the employee of ecfirst.com and that the petitioner shall be free to dispose of such portion of his/her time for ecfirst.com as the petitioner/beneficiary sees fit and on behalf of such persons, firms or ecfirst.com as the petitioner deems advisable. The work to be performed by the beneficiary shall be considered "work for hire." The petitioner will maintain an employer/employee relationship with the beneficiary, pay his salary and benefits, and retains the right to hire, fire and otherwise control the terms of the beneficiary's employment. The fact that the beneficiary will work at a third party location 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 determined that the petitioner had failed to provide contracts of work, work orders, or documentation establishing that the beneficiary would be employed for the two and one-half year period requested in the petition. 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 the proposed employment. However, the record contains no documentation regarding the dates and locations of the beneficiary's employment for the entire period of the beneficiary's employment by the petitioner (from 06/21/2004 through 12/21/2006). 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.