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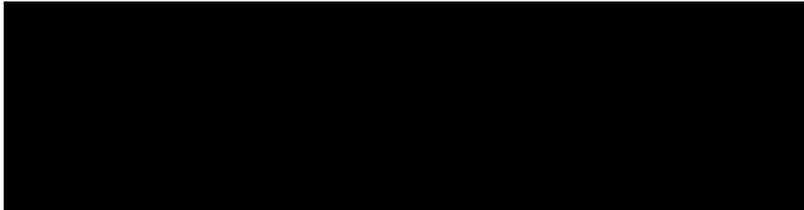
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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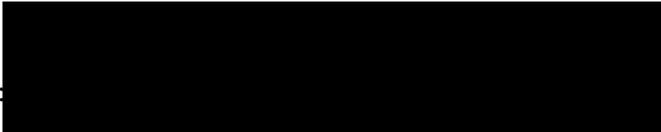
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FILE: WAC 06 149 51057 Office: CALIFORNIA SERVICE CENTER Date:

SEP 10 2007

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 computer software development and consulting company 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 denied the petition stating that: the record did not establish that the beneficiary was coming to the United States to perform work in a specialty occupation; the proffered position did not qualify as a specialty occupation; and that the petitioner's failure to provide contracts for the work to be performed by the beneficiary at various petitioner client locations precluded a determination of whether the petitioner had a valid Labor Condition Application (LCA) for the beneficiary's intended work locations. On appeal, the petitioner submits a statement from another subcontractor indicating that the beneficiary is employed for one of its clients (American Family Insurance), and copies of earnings statements. The petitioner states that the petition should be approved.

The issue to be determined is whether the proffered position qualifies as a specialty occupation.

Section 214(i)(1) of 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The petitioner seeks the beneficiary's services as a software engineer. Evidence of the beneficiary's duties includes the Form I-129 petition with attachment and the petitioner's response to the director's request for evidence. According to the evidence provided by the petitioner the beneficiary would:

- Analyze existing programs and systems;
- Design and develop programs and systems;
- Administer software installations, tune performance and monitor system resources;
- Test, repair and modify software programs to ensure the technical accuracy of the programs;
- Use COBOL, VSAM, CICS, DB2, TSO, REXX, C++, CA-7, JCL and Mainframes in design, modeling, application development and system architecture.

The petitioner requires a minimum of a bachelor's degree in engineering with work experience in research, design, implementation, and testing of computer systems for entry into the proffered position.

The director determined that the petitioner had not provided contracts for the period of time requested on the petition. The AAO agrees that the petitioner has not provided an itinerary¹ for the beneficiary's work to be performed from March 30, 2006 through March 30, 2009, the period of requested stay in the United States.

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.

In his request for evidence, the director asked for copies of contracts between the petitioner and its clients for whom the beneficiary would perform services and an itinerary for the beneficiary's employment. 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 the contracts described above.² In response to the director's request for evidence, the petitioner provided an independent contractor agreement entered into between it and the Exacta

¹ See 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."

Corp. (Exacta) accompanied by a statement from Exacta which indicates that the beneficiary will be employed at American Family Insurance. The statement does not list the length of the beneficiary's employment on the American Family Insurance project. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states that the itinerary shall establish the dates and locations of employment. The documentation submitted by the petitioner from Exacta does not provide that information. Nor does the record establish other locations where the beneficiary will be employed during the remainder of any authorized period of stay in the United States should the beneficiary's employment through Exacta on the American Family Insurance project end prior to the end of any authorized stay. The documentation submitted does not satisfy the cited regulation requiring an itinerary of employment.

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 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 whom the beneficiary will provide services that establishes the specific duties the beneficiary would perform under contract for any of the petitioner's clients (here, American Family Insurance), 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. Accordingly, 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)(1).

Finally, the petitioner's failure to provide contracts establishing the beneficiary's work locations during his entire period of intended stay in the United States precludes CIS from determining whether an LCA valid for all work locations was certified by the Department of Labor prior to the filing of the Form I-129 petition. For this additional reason, the petition must be denied.

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 failed to sustain that burden.

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