



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



W2

FILE: WAC 07 163 51171 Office: CALIFORNIA SERVICE CENTER Date: AUG 05 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The 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 IT consulting company that seeks to employ the beneficiary as a software engineer-systems. 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 record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on four grounds: (1) that the petitioner had failed to demonstrate a reasonable and credible offer of employment exists; (2) that the petitioner meets the regulatory definition of an "employer" and that it will engage in an employer-employee relationship with the beneficiary; (3) that the petitioner had failed to demonstrate that it would employ the beneficiary in a specialty occupation; and (4) that the petitioner had not established that it would comply with the terms and conditions of the certified labor condition application (LCA).

On appeal, counsel contends that the director erred in denying the petition.

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.

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

[A]n 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 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 proposed position.

The term “employer” is defined at 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 director found that the record did not establish that the petitioner would be the beneficiary’s employer. The director’s decision indicated that the offer letter submitted with the petition was not signed by the petitioner and the beneficiary, and it did not identify the beneficiary specifically, her job title, duties, and annual wage. In addition, the director noticed a discrepancy in the salary offered to the beneficiary as indicated in the support letter and the Form I-129.

On appeal, counsel explains that “until the petitioner received an approved H-1B1 petition, it cannot issue an offer letter.” Counsel further stated that the petitioner submitted contractual agreements with clients “to illustrate it had sufficient work to warrant the offer of employment to the beneficiary.” The record contains a 2006 federal tax return, Form 1120, for the petitioner with an employer identification number. The 2006 tax return reflects that the petitioner had no employees in 2006. The petitioner submitted quarterly tax returns for 2007 indicating a range of 1-3 employees for the first and second quarters of 2007.

The AAO disagrees with the director's finding that the petitioner would not act as the beneficiary's employer. The evidence of record establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.¹ See 8 C.F.R. § 214.2(h)(4)(ii). In view of this evidence, the AAO finds that the petitioner will be the employer of the beneficiary and withdraws the director's decision to the contrary.

The petition may not be approved, however, as the petition does not establish that the beneficiary will be employed in a specialty occupation or that the LCA is valid for the proposed work location.

The director found that the petitioner did not establish that it would employ the beneficiary in a specialty occupation. The director concluded in her decision that the petitioner is an employment contractor. The director noted that the "entity ultimately employing the alien or using the alien's services must submit a description of conditions of employment, such as contractual agreements, statements of work, work orders, service agreements, and/or letters from authorized officials of the ultimate client companies where the alien will work that describe, in detail, the duties that the alien will perform and the qualifications that are required to perform the job duties."

On appeal, counsel for the petitioner asserts that the beneficiary will perform work "in-house." Counsel also states that the petitioner provided "contracts, statements of work, work orders and service agreements it has with its clients to illustrate that it did indeed have contracts with companies and end-clients." Counsel further states that the petitioner "did not provide specific work orders for the beneficiary as the first assignment is with the in-house AgentPro 360 Project."

Upon review of the record, the AAO agrees that the petitioner is an employment contractor and that the record establishes that it will place the beneficiary at third party locations to perform work for the third parties. In the initial petition, the petitioner submitted a support letter, dated March 30, 2007, that stated it is a "software development, consulting and staff augmentation company." The petitioner also stated that the projects with clients "can be performed on-site (client site) or off-site (at [the petitioner's] facilities)." The petitioner did not indicate whether the beneficiary would be assigned to a project on-site or off-site.

On June 12, 2007, the director requested additional evidence. The director stated that "if the petitioner is, in any way, engaged in the business of consulting, employment staffing, or job placement that contracts short-term employment for workers who are traditionally self-employed, submit evidence to establish that a specialty occupation exists for the beneficiary." The director requested a copy of the signed contract between the petitioner and the beneficiary; a complete itinerary of services or engagements that specify the dates of each service or engagement; and, copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies.

In response to the director's request for evidence, counsel submitted documentation and stated in its letter, dated August 30, 2007, that "the beneficiary will be required to assist in the completion of in-house

¹ See also 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).

projects requiring her skills as a Software Developer at the petitioner's offices. Furthermore, the beneficiary will be required to provide updates with respect to work and activities associated with the services of the Petitioner's IT contractual obligations." Counsel also submitted "copies of existing contracts, statements of works, task orders, which petitioner has with its clients wherein petitioner provides IT consulting and development services." Furthermore, counsel submitted a job description for the in-house project to which the beneficiary will be assigned, AgentPro 360. The job description states that "AgentPro 360 was created to help real estate agents and brokers to increase their marketing effectiveness and bottom-line profits."

In the initial petition, the petitioner did not indicate that the beneficiary would work in-house on the AgentPro 360 project, or describe the project the beneficiary would be working on or the client to whom he would be assigned. In response to the RFE, the petitioner submitted contracts with third parties, and a job description for the AgentPro 360 project. The petitioner did not submit further details of the AgentPro 360 project at its offices. There is no evidence of record indicating that the project is underway, how long it will take to develop, how many employees will be expected to work on it, the customer base that the petitioner intends to market the product to, or any other elements of its business prospects with respect to AgentPro 360. There are no descriptive materials, developmental illustrations or a business plan for further development. The petitioner has not established that it will employ the beneficiary to work on the AgentPro 360 contract. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner submitted two "sub-contract vendor agreements" between the petitioner and two separate companies.² The sub-contract agreement, under the section entitled "services", states that the petitioner, known as the "vendor" in this contract, "will make Vendor personnel ("consultant(s)") available to [the company] or to clients of [company] ("Third Party Client(s)") to perform the services ("Work") specific for the period(s) as set forth in each attachment hereto." The agreement further states that the "vendor shall be paid by [the company] in accordance with each engagement agreement attached hereto for each approved hour worked."

The petitioner submitted a third "subcontractor services agreement" that states, "[the company] is in the business of locating temporary personnel with information technology and other technical skills for its and its affiliates' various clients....This agreement allows supplier [the petitioner] to introduce its personnel candidates to [the company] in order that [the company] may propose the services of such personnel to a Client..."

The petitioner also submitted a fourth "subcontract agreement" that states the "subcontractor [the petitioner] will use its best efforts to ensure the continuity of Subcontractor's employees assigned to perform services under any Work Order."

² The petitioner blacked-out the names of the end-client companies for all submitted agreements, contracts and work orders.

The evidence of record establishes that the petitioner will provide its employees to third party companies and will not employ the beneficiary in-house. The subcontractor agreements indicate that the petitioner's personnel will be located at different work locations. The record does not corroborate counsel's claim that the beneficiary will only perform services on the AgentPro 360 contract at the petitioner's work site. Counsel does not submit evidence on appeal that the beneficiary will be working on this project. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Accordingly, the AAO concludes that, although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor in that the beneficiary will perform services established by contractual agreements for third-party companies.

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 when the beneficiary will be working in multiple locations. While the Aytes memorandum cited at footnote 1 broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. As the evidence contained in the record at the time the petition was filed did not establish that the petitioner had three years of work for the beneficiary to perform, the director properly exercised her discretion to require an itinerary of employment.³

In her June 12, 2007, request for additional evidence, the director requested an itinerary of definite employment for the beneficiary. In its August 30, 2007 letter in response to the director's request for additional evidence, counsel for the petitioner submitted the above-mentioned subcontractor agreements which do not identify any work for the beneficiary. The petitioner did not submit the requested itinerary. On appeal, counsel asserts that the beneficiary will only work in the main office of the petitioner, but does not submit documentation to support the claim that the beneficiary will only work at the petitioner's main office.

The record also does not establish that the proposed 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 proposed 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 proposed position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

In response to the director's request for evidence, the petitioner submitted five subcontractor agreements stating that the petitioner provides personnel for assignments with clients of the companies or other

³ 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."

parties being serviced by the company's clients. In addition, the petitioner submitted engagement agreements and works orders that were attached to the subcontractor agreements. However, none of these documents specifically request the services of the beneficiary, and do not indicate that the beneficiary was selected from the petitioner's qualified workers. The record contains no work orders with the beneficiary's itinerary. Absent such information, the petitioner has not established that it has three years worth of H-1B-level work for the beneficiary to perform.

Furthermore, the petitioner's generic description of the types of duties the beneficiary would perform upon his employment with the petitioner is insufficient to establish that the proffered position is a specialty occupation. The petitioner has not provided evidence discussing the details of the proffered position's specific duties. A petitioner cannot establish employment as a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title, e.g., a programmer writes programs; a computer system analyst designs and updates software; a computer software engineer designs, constructs, tests, and maintains computer applications software. Although the petitioner asserts that the beneficiary's duties would involve designing, developing, and delivering software systems and documenting application design, test cases, and test procedures, and deploying and maintaining software, the description is insufficient to show that the beneficiary's daily activities would include work as a software engineer-systems.

Each petitioner must detail its expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. In circumstances where the beneficiary will provide services to a third party, the third party must also provide details of its expectations of the position. Such descriptions must correspond to the needs of the petitioner and/or the third party and be substantiated by documentary evidence. To allow otherwise would require acceptance of any petitioner's generic description to establish that its proffered position is a specialty occupation. CIS must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business and what the third party contractor expects from the beneficiary in relation to its business and what the proffered position actually requires, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty.

In this matter, without a comprehensive description of the beneficiary's actual duties, the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).

In that the record does not offer a comprehensive description of the duties the beneficiary would perform for the petitioner, or the petitioner's client, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a detailed listing of the duties the beneficiary would perform under contract and/or in-house, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is

concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for any of 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 record also does not contain any documentation to indicate that the beneficiary will be working on projects in-house. Accordingly, the petitioner has not established that the proposed position qualifies for classification as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(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 director also determined that without an itinerary of employment, it could not be determined that the LCA was valid for the work location. As the record does not contain an itinerary for the period of employment, it cannot be determined that the LCA is valid for the work location(s). For this additional reason, the petition may not be approved.

The petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation, that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation, or that the LCA is valid for the work locations. Accordingly, the AAO will not disturb the director's denial of the petition.

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.