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U.S. Citizenship
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Services

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FILE: LIN 06 014 52260 Office: NEBRASKA SERVICE CENTER Date: JAN 31 2008

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 Director, Nebraska Service Center, 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 consulting company established in 2004 with an indeterminate gross annual income.¹ It seeks to employ the beneficiary as a computer programmer 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 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 two grounds: (1) that the petitioner had failed to demonstrate that it meets the regulatory definition of an "employer" and that it will engage in an employer-employee relationship with the beneficiary; and (2) that the petitioner had failed to demonstrate the existence of a specialty occupation, as it had not submitted an itinerary of services to be performed.

On appeal, the petitioner 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 On the Form I-129, the petitioner stated that its gross annual income is \$30,000. However, the petitioner's 2005 tax return lists its gross receipts or sales as \$13,640.

- (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 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.² 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 employer has submitted an itinerary of employment.

² 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).

The petitioner submitted an “independent contractor agreement” between the petitioner and [REDACTED]. According to the contract, [REDACTED] is hiring the petitioner as an independent contractor and the beneficiary as a “consultant.” Under Paragraph 1, Services, the contract states that the “Contractor will provide the consulting services (the ‘services’) described in any Work Memo (each, a ‘Work Memo’ the form of which is attached as Exhibit A) to the specific [REDACTED] client identified in such Work Memo (the ‘Assigned Client’).” However, under the same paragraph, the contract goes on to state that “the term ‘Assigned Client’ is defined to include not only those business entities at which the consultant is directly placed by [REDACTED], but also includes those business entities that may serve as intermediaries in placing the consultant, as well as business entities for which the consultant directly performs services pursuant to the terms of this Agreement.” Along with the independent contractor agreement, the petitioner included two work memoranda. One work memo is for the assigned client [REDACTED] and [REDACTED] with a start date of on or about October 24, 2005 and ending when the project is complete. A second work memo is for the assigned client [REDACTED] with a start date of December 27, 2005 and ending when the project is complete. Therefore, the petitioner’s agreement with [REDACTED] calls for the petitioner to offer the beneficiary’s services to [REDACTED] which will in turn place the beneficiary at the end user client sites.

The AAO agrees with the director that the petition does not establish that the beneficiary will be employed in a specialty occupation. The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at work locations to perform services established by contractual agreements for a third-party company.

The petitioner has not submitted a service agreement that provides a job description for the duties the beneficiary will perform for [REDACTED] and [REDACTED] or [REDACTED]. The petitioner has also not described the duties to be performed for the clients of [REDACTED] and [REDACTED], or [REDACTED]. 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 (the end user, in this case) 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.

As the record does not contain documentation that establishes the specific duties the beneficiary would perform under contract for [REDACTED] and [REDACTED], or [REDACTED] 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 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). Thus, the petition may not be approved.

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 in such situations. 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 his discretion to require an itinerary of employment.³ Furthermore, on appeal, the petitioner states that initially the assignment “was to last for a period of more than one year and with a definite possibility of further extension.” The petitioner may not be approved, as the record does not contain an itinerary of employment covering the period of expected work.

Beyond the decision of the director, the record does not establish that the LCA is valid for all work locations. The AAO is unable to determine the locations where the beneficiary will work. However, based on the record of proceeding, the beneficiary will work at various locations. The work memoranda state the “contractor will arrange with the Assigned Client its hours and the location where services will be performed.” The employment agreement between the petitioner and the beneficiary states that the “it may be necessary for the employee to work on assignment in different geographical areas from time to time. While [the petitioner] will make every effort to assure geographical continuity, employee may be posted on projects anywhere in the United States.” As the record does not contain an itinerary of employment, it cannot be determined that the LCA is valid for the work locations. For this additional reason, the petition may not be approved.

The petitioner has failed to establish that it has an itinerary of employment for the beneficiary, that the proposed position qualifies for classification as 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.

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.”