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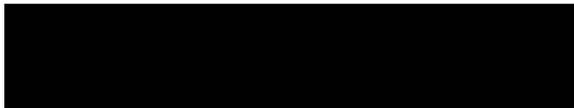
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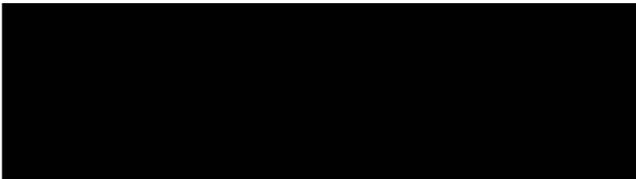
FILE: WAC 07 146 51610 Office: CALIFORNIA SERVICE CENTER Date: OCT 02 2008

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:



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 director of the 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 an information technology services provider that seeks to employ the beneficiary as a 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 director denied the petition, determining that the petitioner had not established that it qualifies as a U.S. employer or agent, or that the labor condition application (LCA) is valid.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

*Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

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.

In a March 23, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered programmer analyst position as follows:

Plan, develop, test, and document computer programs; evaluate user requests for new or modified programs to determine feasibility, cost, time required, and compatibility with current systems and computer capabilities; and consult with users to identify current operation procedures, and formulate plans outlining steps to develop the programs.

The record also includes a certified LCA submitted at the time of filing, listing the beneficiary's work location in Bensenville, Illinois as a programmer/analyst.

In an RFE, the director requested additional information from the petitioner, including an itinerary and copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or service agreements for the beneficiary.

In response to the RFE, counsel stated that the petitioner was the employer with authority to hire, pay, fire, supervise and control the work of the beneficiary. As supporting documentation, counsel submitted the following: a master services agreement, dated March 19, 2007, between the petitioner and [REDACTED] and its subsidiaries, for the petitioner to provide consulting services in accordance with attached schedule: "Schedule No. 1" dated March 19, 2007, naming the beneficiary and other employees to work on-site at a [REDACTED] facility, from October 1, 2007 through October 1, 2009; the petitioner's quarterly federal tax returns for 2005, 2006, and 2007; the petitioner's federal income tax returns for 2005 and 2006; and the petitioner's lease.

The director denied the petition on the basis of her determination that the petitioner does not have actual control over the beneficiary's work or duties, as the master services agreement, dated March 19, 2007, between the petitioner and ██████████ under section 13 states: "Consultant [the petitioner] shall not have the right or ability to assign, transfer or subcontract this Agreement or any obligations under this Agreement without the prior written consent of JAI, including to any successor in interest by merger or law." The director also determined that the same master services agreement lists the beneficiary's work site as Tallahassee, Florida, which is not reflected on the LCA, and thus the LCA is not valid.

On appeal, counsel states, in part, that the petitioner is the employer and that the consulting contract allows for work to be performed by one of the petitioner's employees in both Bensenville and Tallahassee. Counsel also states as follows:

The Center Director ignores Section 2(a) which reads in pertinent part: "[N]othing contained in this Agreement shall be construed to imply that Consultant or any of Consultant's . . . employees . . . is an employee or agent of ██████████...", and paragraph 2(b) which reads in pertinent part: "Any Consultant employees assigned to perform Services hereunder shall be and remain employees of Consultant . . . and are not and shall not for any purpose be considered JAI's employees. Moreover, the Center Director ignores Section 8 which requires the petitioner to pay all employer-related insurance costs such as Worker's Compensation, etc., and Section 9 which allows ██████████ to request REPLACEMENT of a petitioner's employee, not TERMINATION.

As supporting documentation, counsel submits: copies of the previously submitted master services agreement, dated March 19, 2007, between the petitioner and ██████████, and the corresponding "Schedule No. 1"; and a new, certified LCA listing the beneficiary's work locations in Bensenville, Illinois and Tallahassee, Florida as a programmer/analyst.

Preliminarily, the AAO finds that the evidence of record is sufficient to establish that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary as set out in the petitioner and counsel's letters, dated March 23, 2007 and July 30, 2007, respectively.<sup>1</sup> See 8 C.F.R. § 214.2(h)(4)(ii). It is also noted that, as stated by counsel on appeal, the petitioner's master services agreement with ██████████, in sections 2(a) and (b), 8, and 9, also establishes that the petitioner will act as the beneficiary's employer. Accordingly, the AAO withdraws the director's contrary finding.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

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<sup>1</sup> 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).

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation. . . .

The director also found that the LCA submitted at the time of filing does not reflect the beneficiary's work location of Tallahassee, Florida, and therefore is not valid. The AAO acknowledges counsel's assertion on appeal that the consulting contract allows for work to be performed by one of the petitioner's employees in both Bensenville and Tallahassee. However, as the "Schedule No. 1" indicates that the beneficiary will provide services and deliverables on-site at a JAI facility and off-site from the petitioner's facility, it has not been shown that the work would be covered by the location on the certified LCA submitted at the time of filing. The AAO also acknowledges the new, certified LCA submitted on appeal, listing the beneficiary's work locations in Bensenville, Illinois and Tallahassee, Florida. Nevertheless, the new LCA was certified on September 24, 2007, a date subsequent to April 2, 2007, the filing date of the visa petition. The petitioner should have obtained the certification from the DOL prior to filing the instant petition. The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(I) provides that *before filing a petition for H-1B classification in a specialty occupation*, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. (Emphasis added.) Since this has not occurred, the petition may not be approved.

Beyond the decision of the director, the petitioner has also failed to establish that the proffered position is a specialty occupation. The record does not contain a comprehensive description of the proposed duties from the petitioner's end-client, [REDACTED]. It is noted that CIS must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business, 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. 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)). For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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