

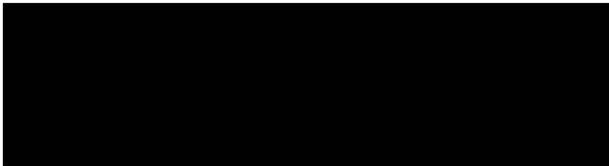
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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
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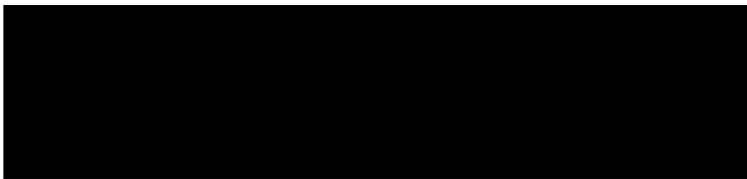
FILE: WAC 07 139 51935 Office: CALIFORNIA SERVICE CENTER Date: OCT 27 2008

IN RE: Petitioner:
Beneficiary:



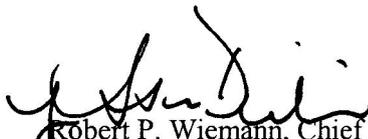
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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 The director's decision will be withdrawn. The petition will be remanded.

The petitioner is a professional placement services business that seeks to employ the beneficiary as an engineer. 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

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) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with the petitioner's brief and documentation in support of the appeal. 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 an April 24, 2007 letter submitted in response to the director's RFE, the petitioner described the proposed duties of the proffered engineer position as working at the Toyota Information Technology Center in Palo Alto, California in the following:

Summarize, communicate and develop WAVE/DSRC standards strategy for Toyota. Collaborate with U.S. universities and ITC researchers to create new vehicle communication protocol and algorithms.

The record also contains a one-page job description for an "Engineer (VII)" position from the Toyota InfoTechnology Center, U.S.A. It is noted that this document is unsigned and does not include the beneficiary's name.

The record also includes a certified labor condition application (LCA) submitted at the time of filing, listing the beneficiary's work location in San Francisco, California as an engineer.

In an RFE, the director requested additional information from the petitioner, including a new LCA for the beneficiary's work location in Palo Alto, California (SMSA Code 7400), correcting the beneficiary's work location, which was listed as San Francisco, California (SMSA Code 7360) on the LCA submitted at the time of filing. The director also requested 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, the petitioner submitted a new LCA, certified on April 20, 2007, listing the beneficiary's work location in Palo Alto, California as an engineer. The petitioner also submitted printouts from the Google website pertaining to the Toyota InfoTechnology Center, U.S.A., Inc.

The director denied the petition on the basis of her determination that the petitioner had not submitted any contracts with the petitioner's end-clients, for whom the beneficiary would be performing services.

On appeal, the petitioner's president states that the petitioner qualifies as a U.S. employer under 8 C.F.R. § 214.2(h)(4)(ii), as it guarantees the employees' wages and other terms and conditions of employment by contractual agreement, and is solely responsible for the employees' hiring and firing at any client site. As supporting documentation, the petitioner submits: a June 21, 2007 letter from the general manager of human resources and administration at Toyota InfoTechnology Center U.S.A., stating that the center "researches, evaluates, and develops new information technologies, devices and software with special interest in application to the automotive industry"; business documents pertaining to the petitioner and Toyota InfoTechnology Center U.S.A.; a copy of the previously submitted job description for an "Engineer (VII)" from Toyota InfoTechnology Center, U.S.A.; a copy of the previously submitted resume for the beneficiary; a copy of the petitioner's employee handbook; and a Professional Placement Services Agreement, effective July 25, 2001, between the petitioner and Toyota InfoTechnology Center U.S.A., for the petitioner to provide information technology services to clients, including professional personnel placement and procurement services.

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's March 30, 2007 and June 18, 2007 letters.¹ See 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the petitioner has overcome the director's objection.

The petition may not be approved, however, because the director has not determined whether the proffered position is a specialty occupation. In this case, the petitioner did not submit the evidence requested by the director pertaining to contracts, statements of work, work orders, and/or service agreements between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work, work orders, or service agreements for the beneficiary. The petitioner asserts on appeal that sufficient documentation has been submitted to show the specific duties to be performed by the beneficiary while working for the petitioner's client. It is noted that the record contains a Professional Placement Services Agreement, effective July 25, 2001, between the petitioner and Toyota InfoTechnology Center U.S.A., for the petitioner to provide information technology services to clients, including professional personnel placement and procurement services. Such agreement specifies that the petitioner and Toyota InfoTechnology Center U.S.A. will also execute a written "Addendum A" with each specific assignment for the provision of actual client services. The record, however, does not contain a written "Addendum A" or any other purchase order for the beneficiary, with a comprehensive description of the proposed duties from the end-client for whom it is

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).

asserted that the beneficiary will provide such services. 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 director also has not determined whether the petitioner has demonstrated compliance with the terms and conditions of the LCA. In this case, the petitioner's LCA submitted in response to the RFE was certified on April 20, 2007, listing the beneficiary's work location in Palo Alto, California. Nevertheless, the LCA was certified subsequent to April 6, 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.)

The director must afford the petitioner reasonable time to provide evidence pertinent to the issues of whether the proffered position is a specialty occupation, whether the petitioner has complied with the terms and conditions of the LCA, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record at it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's June 7, 2007 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.