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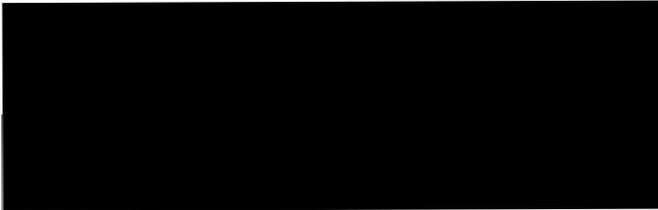
U.S. Department of Homeland Security
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Washington, DC 20529 -2090



U.S. Citizenship
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Services

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FILE: WAC 07 149 51601 Office: CALIFORNIA SERVICE CENTER Date: OCT 29 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO). The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner provides software development and consulting services. It seeks to employ the beneficiary as a programmer analyst. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On September 24, 2007, the director denied the petition, determining that the petitioner failed to establish that it qualified as a United States employer or agent.

The record includes: (1) the Form I-129 filed April 2, 2007 and supporting documents; (2) the director's June 11, 2007 request for further evidence (RFE); (3) the petitioner's August 30, 2007 response to the director's RFE; (4) the director's September 24, 2007 denial decision; and (5) the Form I-290B, Notice of Appeal or Motion and supporting documents. The record has been considered in its entirety.

The AAO has reviewed the record and finds the director erred when determining 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 petitioner had employment available for the beneficiary when the petition was filed and that the beneficiary would be employed in a specialty occupation.

Although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor and that the petitioner will place the beneficiary at different work locations to perform services according to various agreements with third-party companies.² 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 her discretion to require an itinerary of employment.³ In this matter, the petitioner submitted an

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).

² The record includes contracts between the petitioner and third party companies located in Illinois, California, and Ohio.

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."

itinerary and provided sufficient information to determine that the beneficiary would primarily work in the petitioner's offices in Elk Grove Village, Illinois. The itinerary indicates that the project on which the beneficiary would be expected to work is scheduled to begin in the middle of October 2007 for a likely period of 24 months. The work statement attached to the March 15, 2007 contract with a third party for services to be performed on a specific project indicates the effective date of the work to be performed is October 20, 2007. The work statement also provides an overview of the work to be performed for the third party; however, the work statement does not identify the project and does not list or otherwise include the beneficiary's specific duties in relation to the proposed project. The record is thus, insufficient to enable the adjudicator to determine whether the proffered position incorporates the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act. Accordingly, the petitioner has not established that the proffered position is 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)(ii)(I).

In addition, the beneficiary's proposed employment, as set out by the work statement is for a time period beginning subsequent to the dates of intended employment. The record does not establish that the petitioner had employment available for the beneficiary when the petition was filed. Moreover, the regulation at 8 C.F.R. § 214.2(h)(9)(i)(B) indicates that a petition may not be filed or approved earlier than six months before the date of actual need for the beneficiary's services or training. As the work statement is for work to be performed beginning October 20, 2007, more than six months after the petition was filed on April 2, 2007, the petitioner has failed to comply with this regulation. Further, the record does not include transcripts of the beneficiary's foreign education.

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 and that the petitioner had work available for the beneficiary to perform when the petition was filed. As the director did not deny the petition based on these grounds, the petitioner has not had opportunity to address these deficiencies on appeal. Thus, the petition will be remanded and the director shall render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's September 24, 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.