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U.S. Citizenship and Immigration Services

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FILE: WAC 04 800 59996 Office: CALIFORNIA SERVICE CENTER Date: FEB 0 2 2007

IN RE: Petitioner:
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, Chief
Administrative Appeals Office

DISCUSSION: The service center director 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 The director's decision will be withdrawn.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 to the director for entry of a new decision.

The petitioner is a software services company and subsidiary of [redacted] of India. It seeks to employ the beneficiary as a programmer analyst and endeavors to classify him 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 present petition is a petition for continuation of previously approved employment without change.

The director determined that the petitioner did not qualify as a United States employer and accordingly denied the petition. On appeal, counsel submits a brief and additional information stating that the petitioner qualifies as a United States employer.

Specifically, the director found that the petitioner did not establish that it was a firm, corporation, contractor, or other association or organization qualified to file the Form I-129 petition on behalf of the beneficiary. The director stated the following: public records indicate that at the time of incorporation, the petitioner's business description was "prepackaged software;" that at least six other organizations have used the petitioner's address; that at least 113 petitions were filed by the petitioner at the California Service Center; that there were discrepancies in the record as to the actual number of employees employed by the petitioner; and that the petitioner had not established that it was a credible organization and that an employee/employer relationship existed between the petitioner and the beneficiary. On appeal, counsel addressed the director's concerns and submitted the following: employee quarterly earnings and tax reports for: Connecticut; Florida; Maine; New York; Texas; Virginia; Wisconsin; Tennessee; Massachusetts; Michigan; Minnesota; and Colorado; a statement concerning a perceived discrepancy as to the petitioner's gross annual income on the Form I-129 petition which was estimated to be over $9,000,000 (the petitioner provided an audit of financial statements for 2003 and 2004 which indicate that the petitioner had revenues in 2003 of $4,263,425, and $11,420,506 in 2004); a hard copy of a business information sheet from D & B Small Business Solutions showing that the petitioner was engaged in custom computer software programming services; the annual report of the petitioner's parent company detailing the services provided by the petitioner; and a letter from the petitioner's landlord indicating that the petitioner had solely leased its business premises since 1999. The record also establishes that the beneficiary was employed by the petitioner since 1994 in an H-1B capacity.

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.

The record establishes that the petitioner is the employer of the beneficiary, and the director's finding to the

contrary shall be withdrawn. The petitioner's quarterly wage reports establish that it engages people to work in the United States. The record further establishes that an employee/employer relationship exists between the petitioner and beneficiary. The petitioner hired the beneficiary, pays the beneficiary, has the right to fire the beneficiary and otherwise has control over the beneficiary's work. The petitioner will engage the beneficiary to work in the United States, has an employer-employee relationship with the beneficiary, and has an Internal Revenue Service Tax identification number. The petitioner qualifies as a United States employer in this instance, and the director's finding to the contrary is withdrawn.

The petition may not be approved, however, as the record does not establish that the petitioner will employ the beneficiary in a specialty occupation. The record reflects that the petitioner is an employment contractor in that it will place the beneficiary in multiple work locations. The petitioner, however, has provided no contracts, work orders or statements of work describing the duties the beneficiary would perform for its clients and, therefore, has not established the proffered position as 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 proffered 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 proffered 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 any documentation that establishes the specific duties the beneficiary would perform under contract for 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. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(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)*(1)* The record also does not contain an itinerary of proposed employment.

This matter is remanded to the director to issue a new decision determining whether the proffered position qualifies as a specialty occupation. The director may request such additional evidence as he deems necessary in rendering his decision.

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 decision is withdrawn. The petition is remanded to the director for entry of a new decision commensurate with the directives of this opinion, which, if adverse to the petitioner is to be certified to the AAO for review.