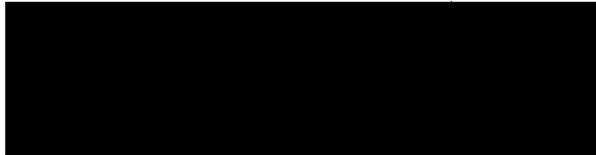




U.S. Citizenship
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FILE: SRC 05 217 51724 Office: TEXAS SERVICE CENTER Date: **MAR 07 2007**

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.

for
Robert P. Wiemana, Chief
Administrative Appeals Office

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 The director's decision will be withdrawn and the petition remanded to the service center for entry of a new decision.

The petitioner is a software development and consulting company that seeks to employ the beneficiary as a programmer analyst. The petitioner, therefore, endeavors to extend the beneficiary's classification 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 on the basis of her determination that the petitioner had failed to demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary.

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.

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) 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.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 beneficiary will be employed in a specialty occupation or that the employer has submitted an itinerary of employment, or that the petitioner will comply with the terms of the labor condition application (LCA).

The record is clear that the beneficiary would not perform his duties at the petitioner's place of business. Rather, the beneficiary would perform them for [REDACTED], a company located in Louisville, Kentucky.

The AAO concludes that, although the petitioner will act as the beneficiary's employer, the evidence of record, including the August 9, 2005 "Master Services Agreement" between the petitioner and [REDACTED] Inc. and counsel's appellate brief, 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 third-party companies.

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 if the beneficiary's duties will be performed in more than one location.

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).

While the Aytes memorandum cited at footnote 1 gives 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 neither the petitioner's contract with ██████████ or the Task Order provide a timeline of how long the engagement is expected to last, the director should exercise her discretion in this case to require an itinerary of employment for the three-year period of requested employment.²

The evidence contained in the record does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of the beneficiary's employment by the petitioner. The Master Services Agreement and Task Order do not state for how long the engagement is expected last. Thus, the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition, as presently constituted, must be denied.

The record also does not establish that the proposed position is 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 proposed 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 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 any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients, specifically Smart IMS, 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)(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). The petition, therefore, may not be approved.

The AAO notes further that the work order between the petitioner and Smart IMS indicates that the beneficiary will work at ██████████ "or some other suitable location that is mutually agreed to by the parties." The work location specified on the LCA is Louisville, Kentucky. If the petitioner will place the beneficiary at a work location other than Louisville, the LCA is not valid for the proposed work location. As the work order does not cover the entire period of employment, and is ambiguous about the location of work to be performed, it cannot be determined that the LCA is valid for the work location.

Based on the foregoing analysis, the AAO has determined that the record fails to establish that the beneficiary would be performing services in a specialty occupation, as defined in section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), that the employer has submitted an itinerary of employment, or that the LCA is valid for the work location. However, the director did not address these issues. Therefore, the director's decision will be withdrawn and the matter remanded for the entry of a new decision. The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the proposed

² 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."

position qualifies for classification as a specialty occupation and to provide an itinerary of services to be performed with the dates and locations of the proposed employment. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's November 3, 2005 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.