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U.S. Citizenship
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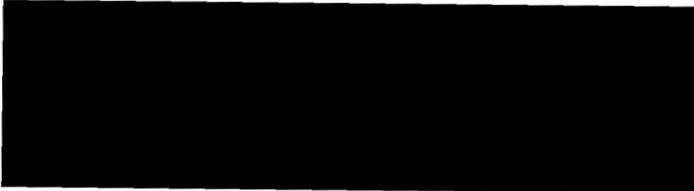
FILE: WAC 04 205 53779 Office: CALIFORNIA SERVICE CENTER Date: **AUG 24 2006**

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 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 a computer project services and software consulting company that seeks to employ the beneficiary as a QA 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, finding that the petitioner was not the employer of the beneficiary, and that the petitioner has not established the validity of the labor condition application (LCA). The director also found that the petitioner had not established that it would employ the beneficiary in a specialty occupation.

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 RFE response and supporting documentation; (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.

While the Form I-129 and the labor condition application (LCA) titled the proposed position QA engineer, the petitioner’s June 18, 2004 letter of support titled the position programmer-analyst. In its letter of support, the petitioner stated that the duties of the proposed position would include custom program design, development, and implementation of software applications and systems to meet clients’ needs and specifications. The beneficiary would analyze users’ requirements, procedures, and problems to automate processing or improve existing customer systems; confer with personnel involved to analyze current operational procedures and identify problems; write detailed descriptions of user needs, program functions, and the steps required to develop or modify computer programs; review system capabilities, workflow, and study existing information processing systems to evaluate their effectiveness and develop new systems to improve productivity; provide software support, including testing, debugging, and modifying software according to the needs of clients.

In the director’s September 13, 2004 request for evidence, he requested an itinerary of definite employment, which was to include the names and addresses of the organizations where the beneficiary would be working during the three-year period of requested nonimmigrant classification. If any duties were to be completed at the petitioner’s place of business, the petitioner was to submit evidence that it required other programmer-analysts working in-house to possess the same skills as those working at client sites. The director requested copies of any contractual agreements between the petitioner and the beneficiary, as well as any contractual agreements between the petitioner and companies for whom the beneficiary would be providing services.

In response, the petitioner submitted its May 21, 2004 offer of employment letter to the beneficiary, an “Itinerary of In-House Projects,” a “Statement of Work” agreement between the petitioner and Accruent Inc., and a “Master Software Consulting Agreement” between the petitioner’s predecessor and SRA Systems.

Counsel’s October 5, 2004 response to the director’s request stated that the beneficiary “will be working on the IN-house project until October 1, 2007” (emphasis in original), and the projects named on the itinerary were described as being in-house projects. However, the offer of employment letter stated that the beneficiary would be working *either* at the petitioner’s office or at a client site. The letter further noted that such client sites could be anywhere in North America. No independent information was submitted to resolve this contradiction.

The director noted this discrepancy, and ultimately found that the petitioner had not established that it would be the employer of the beneficiary:

Since the petitioner has provided conflicting information, it has not met the burden in proving that the petitioning entity is in fact the beneficiary’s employer. There may be no QA Engineering position for beneficiary when he/she enters the United States. In effect

the beneficiary may be coming to the United States and be waiting (not employed) in a specialty occupation, until such employment has been secured.

On appeal, counsel states the following:

The contract between the [p]etitioner and the beneficiary was submitted which clearly stated that he is offered a job as programmer [a]nalyst and services will be utilized in developing/maintaining applications/systems at our office [emphasis in original]. . . .

The AAO will first consider the issue of whether the petitioner meets the definition of a United States employer. The term “employer” is defined at 8 C.F.R. § 214.2(h)(4)(i):

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.

As noted previously, the employment offer letter stated that the beneficiary would work at the petitioner’s office or at client sites. Counsel’s statement on appeal that this letter “clearly stated” that the beneficiary would work in the petitioner’s office contradicts the plain language of the letter. The itinerary submitted by the petitioner indicated that all of the beneficiary’s work would be performed in-house. Counsel’s appeal first claims that all work would be performed at the petitioner’s office, and then later claims that the beneficiary will work at the petitioner’s office and on the SRA project in Arlington, Virginia. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply 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)).

Moreover, according to the Statement of Work agreement between the petitioner and Accruent, Inc. (the only independent evidence regarding the beneficiary’s proposed work contained in the record), the petitioner would provide services at Accruent’s office and in Chennai, India. The agreement does not mention any work to be performed at the petitioner’s office.

The evidence of record establishes 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.¹ See 8 C.F.R. § 214.2(h)(4)(i).

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).

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.

In his request for evidence, the director asked for the beneficiary's employment itinerary. This itinerary was to list the locations and organizations where the beneficiary would be providing services. The itinerary was to specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venue, or location where the service would be performed. The itinerary was to include all service planned for the period of requested employment—through December 2007.

In response to the director's request, the petitioner submitted an "Itinerary of In-House Projects." The petitioner's statement on the itinerary that the beneficiary would work on the Accruent project from 2002 through 2007 is not supported by the record. According to the Statement of Work agreement submitted by the petitioner, the petitioner would provide services at Accruent's office and in Chennai, India. The agreement does not mention any work to be performed at the petitioner's office. According to this agreement, there would be two projects at Accruent's office: one lasting from January 1, 2004 through May 31, 2004, and another lasting from January 1, 2004 through December 31, 2004. The "Master Services Agreement" with SRA provides no dates, as no work is to be performed until "project requests" are issued. No such project requests were submitted.

Moreover, the AAO notes that the offer of employment letter stated that the beneficiary would work for the petitioner for a period of 18 months.

Pursuant to the Aytes memorandum cited at footnote 1, the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised his discretion to request an employment itinerary. The itinerary submitted by the petitioner 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. As the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), the petition must be denied.

Thus, the petitioner has not demonstrated that it had, on the date the petition was submitted, an itinerary of services or engagements for the three years covered by the petition. Accordingly, the itinerary submitted by the petitioner does not satisfy 8 C.F.R. § 214.2(h)(1)(B)(I). As the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(1)(B)(I), the petition must be denied.

The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at multiple work locations to perform services established by contractual agreements for third-party companies. 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 proposed 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)(I).

The director also found that the petitioner had not established the validity of the LCA, which was certified for work in Cerritos and Los Angeles, California. However, as noted previously, the petitioner has not established where the beneficiary would provide his services. As such, the AAO agrees with the director's findings regarding the validity of the LCA.

The petitioner has failed to submit an itinerary, proof that the position is a specialty occupation, and a valid LCA, as required by the regulations and requested by the director.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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