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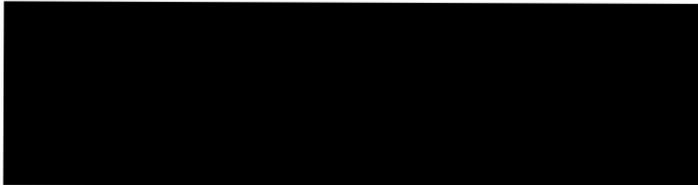


FILE: LIN 04 257 51521 Office: NEBRASKA SERVICE CENTER Date: SEP 18 2006

IN RE: Petitioner: [Redacted]
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:



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.

A handwritten signature in ink, appearing to read "Robert P. Wiemann".

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 custom software and consulting firm that seeks to employ the beneficiary as a programmer analyst. 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 had failed to submit evidence that a position involving work at an H-1B level existed at the time the petition was filed. The director also found that the petitioner had not established that the petitioner would employ the beneficiary at the location listed on the certified labor condition application.

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.

In its September 13, 2004 letter of support, the petitioner stated that the duties of the proposed position would include planning, developing, testing, and documenting computer programs, applying the beneficiary’s knowledge of programming techniques and computer systems; evaluating user requests for new or modified programs; formulating plans outlining the steps required to develop programs using structured analysis and design in addition to preparing flowcharts and diagrams to convert project specifications into detailed instructions and logical steps for coding into languages processed by computers; writing manuals and documenting operating procedures; assisting users to solve problems; replacing, deleting, and modifying codes to correct errors; analyzing, reviewing, and altering programs to increase their operating efficiency and adapt systems to new requirements; overseeing the installation of software; providing technical assistance to clients; analyzing and evaluating the deployment of local area networks and wide area networks to provide internet connectivity and support to the computer infrastructure; maintaining client networks and software builds; coordinating with various locations during transitioning; overseeing network administration; and creating test scripts and applications to manage and test the various functionalities of builds and network administration.

In his February 8, 2005 request for evidence the director requested, among other items, documentation of client contracts related to the services to be performed by the petitioner for actual end-user clients.

In response, the petitioner submitted a “Consultant Agreement” between the petitioner and [REDACTED] a work order stating that the beneficiary would work for [REDACTED] from August 25, 2004 until December 25, 2004, a letter from [REDACTED] dated March 17, 2005, stating that [REDACTED] was in the process of extending the beneficiary’s contract, a professional services agreement between the petitioner and [REDACTED] a vendor agreement between the petitioner and [REDACTED] and an accompanying statement of work, and a consulting agreement between the petitioner and the [REDACTED]

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)(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 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)(ii).

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.

As noted previously, the director requested documentation of client contracts related to the services to be performed by the petitioner for actual end-user clients; i.e., an itinerary of employment. 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 this information. The information 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: the "Statement of Work" submitted by the petitioner provides that the beneficiary will perform services for the Eaton Corporation from August 25, 2004 through December 25, 2004 (the period of requested employment is March 9, 2005 through March 8, 2008). The record contains a March 17, 2005 letter stating that the beneficiary is still working at [REDACTED] and that the contract is in the process of being extended. However, 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)). 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.

The director also noted that while the labor condition application (LCA) submitted by the petitioner was certified for employment in Lombard, Illinois, the petitioner states that the beneficiary is working in Galesburg, Michigan. Accordingly, the record does not contain a certified LCA valid for the location of intended employment. For this additional reason, the petition may not be approved.

Finally, the AAO turns to counsel's assertion that the director violated a "fundamental law of fairness" by failing to issue a request for additional evidence before denying the petition. However, this assertion is not persuasive. The record clearly establishes that the director issued a request for additional evidence on February 8, 2005. Counsel's own April 21, 2005 response to the director's request for evidence is a part of the record as well.

Beyond the decision of the director, the petitioner has failed to demonstrate that the proposed position is a specialty occupation because it has not provided contracts, work orders or statements of work describing the duties the beneficiary would perform for the entity actually receiving the beneficiary's services.

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

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).

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.

In this case, the petitioner has submitted no contracts, work orders or statements of work describing the duties the beneficiary would perform for the entity that will receive the beneficiary’s services. Thus, as the record contains insufficient documentation establishing 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)(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)(I).

Accordingly, the petitioner has not demonstrated that, on the date the petition was submitted, it would employ the beneficiary in a specialty occupation for the three years specified on the petition. The record fails to establish that the petitioner had an itinerary of services or engagements for the beneficiary at the time the petition was filed. The petitioner has also failed to submit a certified LCA for the location of intended employment. For all of these reasons, the petition must be denied.

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.