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U.S. Citizenship
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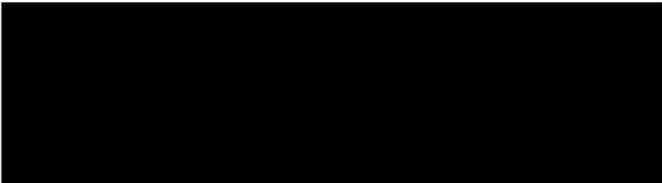


FILE: WAC 07 147 50830 Office: CALIFORNIA SERVICE CENTER Date: JUN 23 2008

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.

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 The director's decision is withdrawn and the petition remanded for entry of a new decision.

The petitioner is a software development company 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 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.

The director denied the petition on three grounds: (1) that the petitioner had failed to demonstrate that it meets the regulatory definition of an "employer" and that it will engage in an employer-employee relationship with the beneficiary; and (2) that the petitioner had not complied with the terms and conditions of the certified labor condition application (LCA) and the Form I-129.

On appeal, counsel contends that the director erred in denying the petition.

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). The petitioner submitted a letter of employment, signed by the petitioner and the beneficiary, indicating that the petitioner will hire, pay, fire and control the work of the beneficiary. 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 director’s decision indicated that in reviewing the petitioner’s 2006 Federal Income Tax Return, it does not appear that the petitioner can pay the beneficiary’s salary as indicated on the Form I-129 and the LCA. The AAO notes that a petitioner’s ability to pay the salary is not a regulatory requirement for H-1B

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).

eligibility. The record does not establish that the employer's statement that it will comply with the terms and conditions of the LCA is invalid. The AAO will withdraw the director's statements on this issue.

The petition may not be approved, however, as the petition does not establish that the beneficiary will be employed in a specialty occupation, that the employer has submitted an itinerary of employment, or that the LCA is valid for the proposed work location.

On appeal, counsel for the petitioner asserts that the beneficiary will perform work "in-house at their [the petitioner] location and not at a client site." Counsel contends that the director erred in finding that the petitioner subcontracts workers with a variety of computer skills to other companies that need these services. Counsel states that "one can review every work in every document which makes up the record in this matter and not find any information which could even arguably support this contention."

Upon review of the record, the AAO agrees with the director's findings. In response to the director's request for evidence, counsel submitted documentation and stated in its letter, dated July 11, 2007, that "attached please find a copy of the itinerary and standard service agreement detailing the terms and conditions for the beneficiary's work to be provided."

The petitioner submitted an agency agreement between the petitioner and Cognizant Technology Solutions. The agreement states that the petitioner "is in the business of providing its employees ("Consultants") to assist other companies with various technology related projects." The agreement further states that Cognizant is soliciting Agency [the petitioner] to provide Consultant with computer programming and analysis skills for assignments with clients of Cognizant or other parties being serviced by Cognizant's client. All such assignment will be under the direction and control of Cognizant."

The petitioner also submitted a purchase order between the petitioner and Third Screen Media. Under Section 2 of the purchase order, it states that the petitioner "agrees to provide personnel to perform work for Third Screen Media." Section 3 of the purchase order states the following:

For billing and payment purposes, Agency [the petitioner] shall submit a time record to SQA on Monday for the previous week's hours, signed by an authorized Client official verifying the number of hours of services provided by Agency's personnel to the Client. At the same time, Agency will submit an invoice to SQA for Agency personnel's services to the Client for those hours verified by the Client on time records. No payments will be made to Agency without such invoices. SQA will pay such invoices within 30 days of receipt of payment from Client for the invoice and signed timesheet for the period worked. Agency's personnel and the Client will discuss the hours and location where the work is to be performed and SQA shall not be involved.

In reviewing the agency agreement and the purchase order submitted by the petitioner, the AAO concludes that the petitioner will provide personnel to clients. The documentation indicates that personnel will be located at different work locations. The documentation does not corroborate counsel's claim that the beneficiary will only perform services at the petitioner's work site. Counsel does not submit evidence that the beneficiary will be working on in-house projects. The unsupported statements of

counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Furthermore, the petitioner submitted the purchase work order, however, it contained only page 6 out of a 9-page document. The petitioner does not explain why it did not submit the full nine pages. 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).

Accordingly, the AAO concludes that, although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor in that the beneficiary will 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 when the beneficiary will be working in multiple locations. 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.²

In her May 21, 2007, request for additional evidence, the director requested an itinerary of definite employment for the beneficiary. In its July 11, 2007, letter in response to the director's request for additional evidence, counsel for the petitioner submitted the above-mentioned agency agreement and purchase order. The petitioner did not submit the requested itinerary. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). On appeal, counsel asserts that the beneficiary will only work in the main office of the petitioner. However, as discussed above, the petitioner did not submit documentation to support the claim that the beneficiary will only work at the petitioner's main office.

The AAO finds that the petitioner's failure to comply with the itinerary requirement is a ground for denying the petition.

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."

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.

In response to the director’s request for evidence, the petitioner submitted the following: (1) an Agency Agreement between the petitioner and Cognizant Technology Solutions, Inc., stating that the petitioner will provide personnel for “assignments with clients of Cognizant or other parties being serviced by Cognizant’s client’s;” and, (2) a purchase order between the petitioner and Third Screen Media where the petitioner agrees to provide personnel to perform work for Third Screen Media.” However, none of these documents specifically request the services of the beneficiary, and do not indicate that the beneficiary was selected from the petitioner’s qualified workers. In addition, the petitioner is not a party to any of the contracts. Thus, the record does not contain any contracts, statements of work or agreements between the petitioner and a third-party company establishing the work to be performed. The record contains no work orders with the beneficiary’s itinerary. Absent such information, the petitioner has not established that it has three years worth of H-1B-level work for the beneficiary to perform.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for any of 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. The record also does not contain any documentation to indicate that the beneficiary will be working on projects in-house. 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)(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)(1).

Further, the petitioner failed to submit an LCA certified for the location of intended employment at the time of filing the instant petition. As the record does not contain an itinerary for the period of employment, it cannot be determined that the LCA is valid for the work locations. For this additional reason, the petition may not be approved.

As the director did not address these issues, the petition will be remanded in order for the director to determine whether the petition is a specialty occupation, whether the petition has submitted an itinerary of employment, or whether the petitioner submitted an LCA valid for the proposed work location. 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 position is a specialty occupation and that the beneficiary qualifies to perform the duties of the specialty occupation. The director shall then render a new decision based on the evidence of

record as it relates to the regulatory requirements for eligibility. The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's August 17, 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.