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U.S. Citizenship
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FILE: WAC 07 208 51682 Office: CALIFORNIA SERVICE CENTER Date: **NOV 10 2008**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

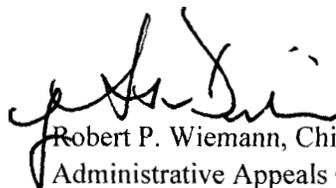
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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 of the service center 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 The director's decision will be withdrawn.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.

The petitioner is a software development and support business that is a subsidiary of Electronic Data Systems Corporation (EDS). It seeks to employ the beneficiary as a software 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, determining that the petitioner had not established that it qualifies as a U.S. employer or agent.

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) counsel's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before reaching 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

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

In a July 2, 2007 letter submitted in support of the petition, the petitioner described the proposed duties and time allocations of the proffered software engineer position, in part, as follows:

1. Analysis of the user needs, 30%;
2. Plan and coordinate the design and development of the modification of applications to meet the client's needs, 40%;
3. Test and implement the proposed modification and provide temporary support, if necessary, 20%;
4. Miscellaneous, 10%.

The record also includes a certified labor condition application (LCA) submitted at the time of filing, listing the beneficiary's work location in Kansas City, Missouri as a software engineer.

In an RFE, the director requested additional information from the petitioner, including an itinerary and copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or service agreements for the beneficiary.

In response to the RFE, counsel stated that the petitioner is a bona fide employer, as defined under 8 C.F.R. § 214.2(h)(4)(ii), with authority to pay, hire, fire, and have full authority of the beneficiary's duties at all times.

Counsel also stated that the beneficiary would work in Kansas City, Missouri for the petitioner's end-client, Sprint-Nextel, and that, due to confidentiality reasons, the contract between EDS and Nextel Finance Company (an affiliate of Sprint/United Management Company) would not be submitted. Counsel submitted various supporting documents, including a Master Professional Services Agreement, dated April 12, 2007, between the petitioner and EDS, for the petitioner to provide temporary technical professional services to EDS; an excerpt of a Business Partner Agreement between EDS and Sprint; work order excerpts "forming part of the projects for which the beneficiary is working"; another LCA, certified on February 19, 2007, listing the beneficiary's work location in New York, New York as a software engineer, in the event that the beneficiary's assigned project in Kansas City, Missouri is concluded prior to the requested period on the petition; and a confirmation letter from an EDS Service Delivery Executive, dated July 24, 2007, confirming that EDS has an agreement with Nextel Finance Company, that EDS utilizes resources obtained from the petitioner to provide services to Nextel Finance Company, and that the beneficiary is providing IT services for the client of the petitioner/EDS, Sprint-Nextel, in Kansas City, Missouri, pursuant to an existing service request between EDS and Nextel Finance Company.

The director denied the petition on the basis of her determination that the petitioner had not submitted a contract between EDS and Nextel Finance Company, the end-user of the beneficiary's services, and thus had not demonstrated the location and availability of a qualifying work project for the beneficiary. The director also determined that, without such a contract, the petitioner had not demonstrated its control over the beneficiary's work.

On appeal, counsel states, in part, that the petitioner is a bona fide employer, as defined under 8 C.F.R. § 214.2(h)(4)(ii), and has the full right to hire, pay, fire, supervise or otherwise control the work of the beneficiary. Counsel also states that the director failed to take into account the corporate relationship between the petitioner and its parent company, EDS, and that the beneficiary is assigned to a project for one of EDS's existing clients, Sprint-Nextel, located in Kansas City, Missouri, as listed on the original LCA. Counsel lists the documents that were submitted in response to the RFE, asserting that the director improperly requested the contract between EDS and Sprint-Nextel, and that: "Due to confidentiality agreement, EDS was not able to release a copy of the Master Service Agreement between EDS and Sprint/Nextel." As supporting documentation, counsel submits: copies of previously submitted documentation; the petitioner's business documents relating to its corporate relationships; an address verification of Sprint in Kansas City, Missouri; a printout from the "Sprint Nextel Company Directory of Manager-Level Contacts"; a printout from Sprint's website as evidence of its partnership with EDS, the petitioner's parent company; a copy of the petitioner's employee handbook; and printouts from the petitioner's website.

Preliminarily, the AAO finds that the evidence of record is sufficient to establish 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 as set out in the letters from the petitioner and counsel, dated July 2, 2007 and August 4, 2007, respectively.¹ See 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the AAO withdraws the director's contrary finding.

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).

The petition may not be approved, however, because the director has not determined whether the proffered position is a specialty occupation. In this case, counsel asserts that EDS was not able to release a copy of the Master Service Agreement between EDS and Sprint/Nextel due to confidentiality agreement, and submits a confirmation letter from the EDS Service Delivery Executive, confirming that EDS has an agreement with Nextel Finance Company, that EDS utilizes resources obtained from the petitioner to provide services to Nextel Finance Company, and that the beneficiary is providing IT services for EDS's client, Sprint-Nextel, located in Kansas City, Missouri, pursuant to an existing service request between EDS and Nextel Finance Company. Counsel, however, does not specify to which specific Sprint-Nextel project the beneficiary would be assigned. Nor does the record contain a comprehensive description of the proposed duties from the petitioner's end-client, Sprint-Nextel. Counsel's submission of work statements "forming part of the projects for which the beneficiary is anticipated to work" is insufficient, as the work statements are incomplete, missing attachments, and do not pertain to the beneficiary. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the proffered position is a specialty occupation, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record at it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's August 16, 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.