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U.S. Citizenship and Immigration Services

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FILE: WAC 07 148 51039 Office: CALIFORNIA SERVICE CENTER Date: NOV 10 2008

IN RE: Petitioner: [redacted]
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:

[redacted]

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 The director's decision will be withdrawn.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 consulting business that 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, or that it had complied with the terms and conditions of employment, as the evidence of record is insufficient to show that the petitioner can support the increased level of its petition filings in FY 2008.

Regarding the director's determination that the evidence of record is insufficient to show that the petitioner can support the increased level of its petition filings in FY 2008, the AAO finds that the director erred when referencing evidence not in the record of proceeding. The AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Furthermore, 8 C.F.R. § 103.2(b)(16)(i) requires the director to advise the petitioner "if a decision will be adverse to the . . . petitioner and is based on derogatory information considered by the Service and of which the ... petitioner is unaware," and give the petitioner "an opportunity to rebut the information in his/her own behalf before the decision is rendered." The director's reference, although not a basis of denial in this matter, will be withdrawn.

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

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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 March 23, 2007 letter submitted in support of the petition, the petitioner stated that it needed the proffered software engineer position for a major project involving the development of device drivers and complex networked software under various operating systems to meet the specific needs of its client. The petitioner further described the proposed duties of the proffered position, in part, as follows:

Prepare technical documentation and detailed specifications of operations; test, debug, and implement software products; transform software-based environments into a more event-driven environment.

> Work with [the petitioner] in-house, performing proprietary software design and development. Thereafter, [the beneficiary] may be transferred to a client site to provide computer consulting services.

The record also includes a certified labor condition application (LCA) submitted at the time of filing, listing the beneficiary's work location in Los Angeles, California 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. The director also requested the petitioner's 2006 federal income tax return, quarterly wage reports for all the petitioner's employees for the last three quarters, an organizational chart, a lease agreement, and a floor plan.

In response to the RFE, the petitioner's former counsel stated that the petitioner is a traditional employer with sole control of its employees, including hiring, firing, and the payment of benefits. She also stated that the beneficiary would be employed in-house as a software engineer. As supporting documentation, she submitted: the petitioner's profile; job announcements; statements of work or purchase orders for the petitioner's other employees; the petitioner's application for an extension of time to file its 2006 federal income tax return; the petitioner's 2005 federal income tax return; the petitioner's quarterly wage and withholding reports for the last quarter of 2006 and the first and second quarters of 2007; a list of the petitioner's employees; an organizational chart; and a lease agreement.

The director denied the petition on the basis of her determination that the petitioner had not submitted any evidence of the actual in-house projects on which the beneficiary would work, or any contracts with the petitioner's end-clients for whom the beneficiary would be performing services. The director also determined that the petitioner's lease agreement and floor plan show limited space - 1,174 square feet – in which to conduct software engineering work.

On appeal, counsel states, in part, that the petitioner at all times controls the location and the nature of the work of its H-1B employees. Counsel also states that the petitioner's open-ended contracts with its clients, including the City of Los Angeles, 21st Century Insurance, Toyota Motor Credit Corporation, Spirent Communications, and Thought Genesis Corporation, show the petitioner's position as an "agent" for the purposes of the instant petition. Counsel states further that it is the petitioner's practice of orientating new hires with a Training and Orientation Program and, as such, the beneficiary would be assigned in-house at the site of the petitioner upon approval of the instant petition. As supporting documentation, counsel submits: a contract between the petitioner and the City of Los Angeles (City), signed by both parties in 2005, for the petitioner to provide contract employees for computer-related positions; a master agreement for consulting services between the petitioner and 21st Century Insurance and its affiliates, dated April 26, 2004, for the petitioner to provide services as described in the attached schedules; an agreement between the petitioner and Toyota Motor Credit Corporation, signed in 2006, for the petitioner to provide suitable candidates for employment; an agreement, dated September 24, 2004, between the petitioner and Spirent Communications, Inc. for the petitioner to provide personnel to render consulting services; an agreement for services between

the petitioner and Thought Genesis Corporation, dated June 12, 2006, for the petitioner to provide the services of its "W2 Employee(s)"; a copy of the petitioner's "New Employee Training & Orientation Program"; purchase orders; the petitioner's 2006 federal income tax return; and the petitioner's business plan.

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 petitioner's March 26, 2007 offer of employment.[1] *See* 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the AAO withdraws the director's contrary finding.

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 states that it is the petitioner's established policy that new hires are not placed on any external projects until after they complete a Training and Orientation Program, and counsel's submission of the petitioner's two-week "New Employee Training & Orientation Program." While the petitioner may require that the beneficiary complete a two-week training and orientation program, the petitioner is not relieved of its regulatory obligation to provide an itinerary of services or engagements as an employer who will employ the beneficiary in multiple locations.[2] In addition, in the petitioner's March 23, 2007 letter, the petitioner's human resources manager asserts that the beneficiary would work in-house performing proprietary software design and development. This information conflicts with the information provided in the petitioner's former counsel's August 14, 2007 letter that the petitioner does not make any products to sell to its clients and that the petitioner does not have any products of its own. 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. at 591.

In addition, the petitioner has not demonstrated compliance with the terms and conditions of the LCA. The LCA submitted at the time of filing lists the work location as Los Angeles, California, the location of the petitioner. As the beneficiary's actual duties and ultimate worksite are unclear, however, it has not been shown that the work would be covered by the location on the LCA.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issues of whether the proffered position is a specialty occupation and whether the petitioner has not demonstrated compliance with the terms and conditions of the LCA, 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

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[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).

[2] The AAO notes that the employer of a beneficiary who will work in multiple locations is required to submit an itinerary of services with the dates and locations of services. 8 C.F.R. § 214.2(h)(2)(i)(B).

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 September 4, 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.