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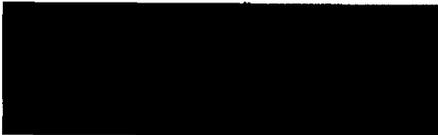
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FILE: LIN 04 031 53149 Office: NEBRASKA SERVICE CENTER Date: AUG 22 2005

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, Director
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, a company engaged in leather manufacturing, healthcare recruiting, and software consulting, 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 establish that a specialty occupation in fact exists.

Section 101(a)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(H)(i)(b), defines an H-1B nonimmigrant as an alien "who is coming temporarily to the United States to perform services . . . 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.

The petitioner proposes to hire the beneficiary as a programmer-analyst. In the letter of support submitted with the Form I-129 filing, the petitioner described the duties of the proposed position as follows:

[H]e will design and develop applications related to Visual Basic, MS-Access[,] and Oracle. In addition, [the beneficiary] will support database usage as an internal consultant, providing day-to-day consulting services and technical support. Finally, he will assist in the delivery and implementation of business software solutions tailored to meet our clients' needs.

The director issued an RFE, asking for additional evidence to support the petitioner's contention that a bona fide specialty occupation position was in fact being offered to the beneficiary. The director stated the following:

[A]lthough you are the employer, it appears that the beneficiary may be performing services at other locations (e.g., client work sites), rather than at just your facility. In accordance with the regulations **you must submit an itinerary of definite employment, listing the locations(s) and organization(s) where the beneficiary will be providing services.** The itinerary should specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishments, venue, or location where the service will be performed by the beneficiary. If services will be performed on site, specify that in the itinerary. The itinerary should include all service planned for the period of time requested—in this case until December 2006 (emphasis in original).

The director also requested copies of any contractual agreements between the petitioner and the companies to which the beneficiary would be providing services.

The itinerary submitted in the RFE response did not address the director's concerns. The itinerary discussed a project for the American Bar Endowment, as well as the duties that the beneficiary would perform at that site. The itinerary also addressed past projects for [REDACTED], and [REDACTED].

Image Marketing. However, no details regarding the beneficiary's future role at these three worksites were provided, other than a brief statement that the beneficiary would "support, enhance[,] and maintain these projects." This itinerary did not provide the locations where the beneficiary would provide his services, as was requested. Nor were any dates provided.

In response to the director's request for contractual agreements, the petitioner submitted three "service agreements." Each service agreement stated that the petitioner "desires to provide" and that the customer "desires to purchase, from time to time, data processing professional services." Each service agreement stated that the petitioner would send an employee to the customer's worksite to provide "professional data processing services" at a rate to be determined in a later "service order." Thus, no work was to be performed for any of these customers until a service order was issued. However, no service orders were submitted in the RFE response, which led the director to doubt the existence of any work for the beneficiary to perform.

The director denied the petition, stating the following:

The record indicates that [the petitioner] desires to employ the beneficiary at the unknown address of its client, the American Bar Endowment, for unspecified 'data processing' services pursuant to a "Service Order" that has not been submitted. However, the petitioner has failed to provide an *itinerary* of definite employment or sufficient documentation of the specific duties to be performed by the beneficiary while working for the petitioner's client. This raises questions as to whether the petitioner had a 'specialty occupation' (i.e., sufficient work at the H-1B level) available in the location identified in the Labor Condition Application, Form ETA 9035, at the time the petition was filed or, indeed, at the present time. For these reasons, the petition may not be approved.

On appeal, the petitioner contends that the proposed position in fact qualifies for classification as a specialty occupation, and that the director erred in denying the petition, stating the following:

The nature of the computer consulting business is such that projects vary in length from a few weeks to up to over a year. In most instances our clients realize that they are in immediate need of a consultant for an unexpected project and require our services at a moment's notice . . . The one consistent factor is the overwhelming demand for software consulting services . . . Therefore, to provide a detailed itinerary for the next three years with regard to every client and every project a consultant would be working for is just not possible.

On appeal, the petitioner submits a "service order" and two "work orders." The service order, for work to be performed at the American Bar Endowment is for an unspecified period of time (the "start date" is June 2003, but the "end date" field references a "proposal," a document not in the record). The first work order for [REDACTED] covers 100 hours, beginning February 4, 2004, and the second work order for the company covers the period September 4, 2003 through September 26, 2003.

The instant petition was received at the service center on November 14, 2003, so two of these three projects had likely been completed by the time the petition was filed. Since the appeal was filed March 4, 2004, the 100-hour period at Sapphire would have likely ended by that point. Thus, the petitioner has submitted no evidence on appeal to verify that it will have any work for the beneficiary to perform once he arrives in the United States, and has failed to support the assertions set forth in the appellate brief. If there is in fact "overwhelming demand" for the petitioner's services, it has failed to demonstrate as such, as the evidence

present in the record does not indicate that the beneficiary will have any work to perform upon his arrival to the United States.

In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now CIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the foreign aliens required a bachelor's degree for all employees in the position. The court found that the degree requirement should not originate with the employment agency that brought the aliens to the United States for employment with the agency's clients.

Although the record contains the expired work orders between the petitioner and its clients for whom the beneficiary was to work, the record does not contain a comprehensive description of the beneficiary's proposed duties from authorized representatives of any of these clients. Without such descriptions, the petitioner cannot demonstrate that the work that the beneficiary will perform at these sites qualifies as a specialty occupation.

The petitioner has not demonstrated that a specialty occupation in fact exists, and the director was correct to deny the petition. Accordingly, the AAO will not disturb the director's denial of the petition.

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.