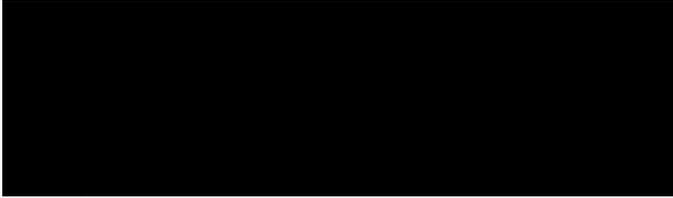


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U.S. Citizenship
and Immigration
Services

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FILE: WAC 04 090 51377 Office: CALIFORNIA SERVICE CENTER Date: OCT 28 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:

SELF-REPRESENTED

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 service center 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 software consulting firm. It seeks to employ the beneficiary as a software engineer and endeavors to classify him 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 because: the petitioner did not establish that the beneficiary was coming to the United States to work in a specialty occupation; Citizenship and Immigration Services (CIS) could not verify the terms and conditions of the beneficiary's employment in relation to the Labor Condition Application (LCA) since the petitioner did not establish that it had a valid contract under which the beneficiary would work and because the petitioner did not provide an itinerary covering the beneficiary's employment while in the United States; and the beneficiary was not qualified to perform the services of a specialty occupation.

On appeal, the petitioner provides a contract and work order indicating that the petitioner will no longer be working in San Jose, California as indicated with the filing of the Form I-129 petition. The petitioner now states that the beneficiary will be employed in New York and submits a new LCA covering that employment.

The issue to be discussed in this proceeding is whether a certified LCA covering intended employment was obtained prior to the filing of the I-129 petition.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 101(a)(15)(H) of the Act defines an H-1B nonimmigrant as:

[A]n alien who is coming temporarily to the United States to perform services . . . in a specialty occupation . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary of Labor an application under section 212(a)(n)(1)

Title 8, Code of Federal Regulations, part 214.2(h)(4)(iii)(B)(1) provides that the petitioner shall submit with an H-1B petition "a certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." The regulations further provide:

Before filing a petition for H-1B classification in a specialty occupation the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

8 C.F.R. § 214.2(h)(4)(i)(B)(1).

Pursuant to 8 C.F.R. § 103.2(b)(12), "an application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. . . ." The Form I-129 petition was filed February 11, 2004, accompanied by an LCA certified on November 25, 2003 and valid from November 25, 2003 through November 24, 2006. On appeal, the petitioner indicates that the terms of the petitioner's employment have changed and that he will now be

employed in New York under an employment contract dated August 26, 2002, and associated purchase order dated February 6, 2004. The LCA covering the intended employment was certified by the Department of Labor on July 2, 2004, subsequent to the filing of the Form I-129 petition. The petition must, accordingly, be denied because certification was not obtained prior to the filing of the H-1B petition.

It is further noted that the neither the employment contract, nor the related purchase order under which the beneficiary would be employed in New York, contain a detailed description of the work to be performed by the beneficiary. The purchase order states that the beneficiary would perform work for the client and accomplish the following end result on the client's project: "Oracle Applications Developer." This limited description of the work to be performed by the beneficiary is insufficient to establish that the work would qualify as a specialty occupation. 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 an alien require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the alien to the United States for employment with the agency's clients.

The record does contain an agency service agreement between the petitioner and its client, where the beneficiary will work. As previously noted, however, the record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of the client. Without such a description, the petitioner has not demonstrated that the work that the beneficiary will perform for the client will qualify as a specialty occupation.

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 failed to sustain that burden.

ORDER: The appeal is dismissed. The petition is denied.