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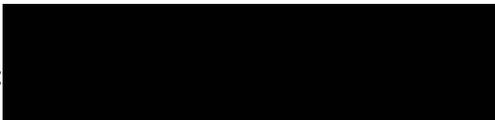
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FILE: LIN 04 252 51779 Office: NEBRASKA SERVICE CENTER Date: AUG 24 2006

IN RE: Petitioner:
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:



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 appeal will be dismissed. The petition will be denied.

The petitioner, a software consulting company, seeks to employ the beneficiary as a software engineer. The petitioner, therefore, endeavors to extend the beneficiary's classification 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, holding that the petitioner had not demonstrated it would have an employer-employee relationship with the beneficiary, that there had been a material change to the petition, that the petitioner had not submitted a clear address as to where the beneficiary would work, that there was no specific listing of duties to be performed at the worksite, and that no itinerary of definite employment had been submitted. The director found that without a contract with the actual duties to be performed pursuant to the contract, Citizenship and Immigration Services (CIS) could not determine whether the proposed position qualified for classification as a specialty occupation. The director also found that the petitioner had not submitted a certified labor condition application (LCA) for all the locations where the beneficiary would work.

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.

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:

- (I) 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 evidence of record establishes 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.¹ See 8 C.F.R. § 214.2(h)(4)(ii).

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 if the beneficiary’s duties will be performed in more than one location.

In his request for evidence, the director asked for the beneficiary’s employment itinerary. However, the record contains no documentation regarding the dates and locations of the beneficiary’s employment. Accordingly, the petitioner has failed to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition must be denied.² On appeal, counsel states that “it is impossible to adequately provide the service with a complete itinerary due to the very nature of the consulting industry.” However, such an

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 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.”

itinerary is required by the regulations, and the director properly exercised his discretion in requesting the itinerary. *See id.* As such, the petition was properly denied on this ground.

The AAO also notes that the record contains no evidence to demonstrate that an itinerary for the position existed at the time the petition was filed. The only contract contained in the record did not exist at the time the petition was filed, which precludes the petitioner from using it to establish that an itinerary for the position in fact existed at the time the petition was filed. The Form I-129 was received at the service center on September 13, 2004, and the petitioner signed the "Sub-Contractor Consulting Agreement" on September 20, 2004. The task order is also dated September 20, 2004, subsequent to the date the petition was filed. Therefore, it cannot use this agreement and task order to demonstrate that an itinerary for the position existed on September 13, 2004.

CIS regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm.). Moreover, as stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), "[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition." The record fails to establish that the petitioner had an itinerary of definite employment for the beneficiary at the time the instant petition was filed.

Therefore, the petitioner has not demonstrated that it had, on the date the petition was submitted, three years' worth of work for the beneficiary to perform.

The director also denied the petition because the petitioner had failed to submit a description of the work duties to be performed at the petitioner's client's place of business. The AAO agrees.

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered 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 proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for 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. On appeal, counsel submits a letter, dated December 15, 2004, from Rakesh Sanghvi, Partner – Delivery and Services, at Lodestar, the company for whom the beneficiary is to provide services. However, this letter contains no such description of the duties to be performed at the worksite; it simply states the "job role" that the beneficiary will hold – "Peoplesoft Application Time and Labor – Technical." As such, the record lacks a reliable description, from the client, of the duties to be performed at the client's worksite.

Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(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).

The director also noted the inconsistency in the record regarding the beneficiary's place of employment and the title of the proposed position. On the Form I-129, the petitioner stated that the beneficiary would work in Murray, Utah. On the certified LCA, the petitioner stated that the beneficiary would work in Daiton, Texas. In response to the director's request for evidence and on appeal, the petitioner states that the beneficiary will work in Washington, DC.

On the Form I-129, the petitioner stated that it was offering the beneficiary a position as a software engineer. On the LCA, it stated that it was offering the beneficiary a position as a systems analyst. In its September 27, 2004 letter of support, it stated that it was offering the beneficiary a position as a computer analyst/computer programmer.

On appeal, counsel states that positions as software engineers and systems analysts "reflect the same job duties, require the same education, and command the same rate of pay." However, counsel has offered no documentary evidence to support this statement, and the AAO does not agree with it. The Department of Labor's *Occupational Outlook Handbook*, a resource the AAO routinely consults for its information about the duties and educational requirements of particular occupations, contains separate passages for each position. Simply 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 Obaighena*, 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). Many positions combine the duties of several occupational groupings. However, counsel has made no such assertion; rather, he asserts that the job duties of software engineers and systems analysts are identical.

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).

The AAO agrees with the director that the LCA submitted by counsel in response to the director's request for additional evidence is defective. The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

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.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of an LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor

8 C.F.R. § 214.2(h)(4)(iii)(B)(1). CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12).

As the instant petition was received at the service center on September 13, 2004, for the LCA to be valid it would have had to have been certified prior to that date. The certified LCA submitted by counsel in response to the director's request for evidence was certified on November 17, 2004, over two months after the petition was filed. As there is no provision in the regulations for discretionary relief from the LCA requirements, the AAO may not consider this LCA for any reason.

Thus, the only valid LCA for this petition is the original LCA, which was certified only for employment in Daiton, Texas. As counsel has stated that the beneficiary is working in, and will continue to work in, Washington, DC, the petitioner is not in compliance with 8 C.F.R. § 214.2(h)(4)(i)(B)(1) and 8 C.F.R. § 214.2(h)(4)(iii)(B)(1).

The petitioner has not established that it will employ the beneficiary in a specialty occupation, has not submitted an itinerary of employment establishing it has three years' worth of H-1B-level work for the beneficiary to perform, or that the LCA is valid for the requested place of employment. Thus, the petition may not be approved.

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.