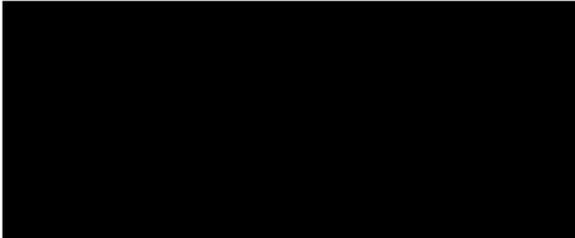


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FILE: WAC 04 224 53852 Office: CALIFORNIA SERVICE CENTER Date: **JUN 23 2008**

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:

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, 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 appeal will be dismissed. The petition will be denied.

The petitioner is a software consulting and development company that 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 because the petitioner failed to establish that the offered position is a specialty occupation. The director raised the issue, without deciding, whether the petitioner is the employer or agent. The petitioner submits a timely appeal.

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)(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 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 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.

Pursuant to 8 C.F.R. § 214.2(h)(2)(i)(F):

A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, in place of, the employer as its agent. A petition filed by a United States agent is subject to the following conditions:

- (1) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.
- (2) A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.
- (3) A foreign employer who, through a United States agent, files a petition for an H nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274a.

In denying the petition, the director found that the petitioner did not establish the offered position as a specialty occupation. The director stated that the record contained no written contract between the petitioner and the beneficiary as to the beneficiary's job duties and terms of employment, and no comprehensive description of the beneficiary's duties from an authorized representative of the petitioner's client, where the beneficiary will ultimately perform the proposed duties.

On appeal, the petitioner states that it is a software consulting and development company and that the beneficiary is not using the petitioner for short-term employment. According to the petitioner, it will employ the beneficiary as a full-time employee at its corporate office and if the beneficiary transfers to a client site or to another project, the petitioner states that it will comply with governmental regulations. According to the petitioner it will hire, compensate, provide medical coverage, supervise, and otherwise control the beneficiary's work. The petitioner asserts that it develops in-house business solutions/tools/software that industries use to increase their resources and plan for their future. The petitioner discusses the proposed duties and the beneficiary's educational evaluation. The petitioner states that AAO decisions and CIS memoranda indicate that a beneficiary's itinerary is not needed, and that the director's request for contracts entered into with the beneficiary and contracts relating to the beneficiary's work site are not in conformity with CIS guidelines.

Based on the evidence in the record, the AAO concurs with the director's conclusion that the petitioner failed to establish that the beneficiary will ultimately perform a specialty occupation.

In the denial letter, the director stated that the record contained no written contract between the petitioner and the beneficiary as to the beneficiary's job duties and terms of employment. The AAO finds that the evidence of record establishes that an employer/employee relationship will exist between the petitioner and beneficiary. Nevertheless, the evidence of record does not establish that the beneficiary will actually perform a specialty occupation.

The information in the record about the petitioner indicates that the petitioner provides "a full range of staffing services, for both temporary and permanent employees, in the IT field," and the submitted contracts with other companies confirm that the petitioner provides consulting services. The August 5, 2004 letter from the petitioner indicates that the beneficiary will be located at its 2118 Walsh Avenue office, which is located in Santa Clara, California. The December 20, 2004 letter from the petitioner states "if the scheduled project is completed before the expiration of requested time, the company will assign [the beneficiary] to one of the company's other ongoing project(s) thus remaining on the company's payroll." The AAO notes that the petitioner does not describe in any detail the beneficiary's "scheduled project."

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 nurses 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 nurses to the United States for employment with the agency's clients.

With the situation here, the director's request for evidence sought evidence of the contractual agreements between the petitioner and the companies for which the beneficiary would provide consulting services. Although the petitioner asserts that the beneficiary will work at the petitioner's office, the evidence in the record indicates that the beneficiary will provide consulting services for the petitioner's clients, whether from the petitioner's or the client's office. The AAO notes that no evidence in the record demonstrates that the beneficiary has been specifically assigned to provide services for the petitioner's client(s). None of the contracts submitted in response to the request for evidence identifies the beneficiary as assigned to provide services for a client(s). Thus, the record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of a client company. Without this evidence, the petitioner cannot demonstrate that the work that the beneficiary will ultimately perform will qualify as that of a specialty occupation.

Based on the evidence of record, the AAO concludes that the petitioner satisfied none of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO notes that there are inconsistencies in the list of employees as set forth in the document entitled "Payroll as of December 02, 2004," which describes the employees' name, status, priority number, position, work location, visa category, degree, and annual salary, and the submitted Forms W-2. A comparison of the payroll listing with the submitted W-2 forms indicates that some of the employees have not been issued the Form W-2, and some of the employees that have been issued a Form W-2 have not received the salary as shown in the payroll list. 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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Beyond the decision of the director, the AAO finds that the petitioner failed to provide an itinerary of employment. As the beneficiary will be placed at multiple work locations established by contractual agreements between the petitioner and third-party companies, the petitioner is also an agent, as described at 8 C.F.R. § 214.2(h)(2)(i)(F):

A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent

The regulation governing agents at 8 C.F.R. § 214.2(h)(2)(i)(F)(1) requires the submission of an itinerary of definite employment to cover the entire period of time requested in the petition. Employers, pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), must also 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 contractual agreements between the petitioner and the companies for which the beneficiary will provide consulting services. However, the record contains no documentation regarding the contracts of work to be performed. Accordingly, the petitioner has failed to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and 8 C.F.R. § 214.2(h)(2)(i)(F)(I) and the petition must be denied for this additional reason.¹

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition on this ground.

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.

¹ 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.”