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FILE: WAC 04 241 52612 Office: CALIFORNIA SERVICE CENTER Date: OCT 06 2006

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, 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 is a software design, systems integration, and custom software 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, stating the following:

In this case, although the record contains signed agreements for software development services between the petitioner and one software company, there is no written contract between the petitioner and the beneficiary as to his job duties and terms of employment. In addition, there is no comprehensive description of the beneficiary's proposed duties from an authorized representative of the petitioner's client where the beneficiary will ultimately perform the proposed duties. Without such [a] description, the petitioner has not demonstrated that the proposed position meets the statutory definition of [a] specialty occupation.

On appeal, counsel contends that the director erred in denying the petition.

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:

- (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 proposed position.

In its July 29, 2004 letter of support, the petitioner stated that the duties of the proposed position would include analyzing user requirements, procedures, and problems so as to automate processing or improve existing computer systems; conferring with personnel of involved organizational units so as to analyze current operational procedures, identify problems, and learn specific input requirements, such as forms of data input, how data is to be summarized, and formats for reports; writing descriptions of user needs, program functions, and steps required to develop or modify the computer program; reviewing computer system capabilities, workflow, and scheduling limitations to determine if requested programs or program changes are possible within the existing system; studying existing information processing systems to evaluate their effectiveness; developing new systems to improve production or workflow as required; preparing workflow charts and diagrams to specify, in detail, the operations to be performed by equipment and computer programs and operations to be performed by personnel in the system; conducting studies pertaining to the development of new information systems to meet current and projected needs; planning and preparing technical reports, memoranda, and instructional manuals as documentation of program development; and upgrading systems and correcting errors so as to maintain them after implementation.

In his October 27, 2004 request for additional evidence, the director requested, among other items, an itinerary of employment, which was to include the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venue, or location where the beneficiary’s services would be performed. If services were to be performed at the petitioner’s worksite, the petitioner was to indicate as such on the itinerary. The itinerary was to include all service planned for the entire requested period of employment—October 1, 2004 through August 1, 2007.

In his January 14, 2005 response to the director’s request for additional evidence counsel stated the following with regard to this portion of the director’s request:

Please find attached . . . a copy of the letter between the Petitioner, [REDACTED] and the [REDACTED], where the Beneficiary would be working. It is anticipated that the [REDACTED] needs the services of the Beneficiary for a period of 24-months and that this project is likely to be extended for another 12-months.

Therefore, the Beneficiary would continue to provide services pursuant to this Agreement until August 1, 2007, the period for which classification as an H-1B employee is requested. As per the current practice, it is anticipated that that Beneficiary would continue to work at this location for the period of validity of the H-1B.

The referenced from [REDACTED], which is undated, states the following:

This is to certify that subsequent to the agreement between [REDACTED] and [REDACTED], dated July 5, 2004,¹ [REDACTED] [has] been providing services to us. These services have been provided to us in the areas of Software Application Development.

These services are provided based on individuals [sic] purchase orders and statement[s] of works [sic] that are issued from time to time. Based on our current requirements we will have an immediate requirement for 3 software professionals to provide services at our site in, California. We have requested Quintegra for the services of these professionals.

We anticipate that we will need the services of these professionals for a period of 24 months and the projects are likely to be extended for another 12 months.

The AAO will first consider the issue of whether the petitioner meets the definition of a United States employer. 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.² 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.

¹ The July 5, 2004 agreement between the petitioner and Ramco referenced here is not contained in the record.

² See also Memorandum from [REDACTED] 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).

As noted previously, the director asked for the beneficiary's employment itinerary in his request for evidence. The itinerary was to include the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venue, or location where the beneficiary's services would be performed. If services were to be performed at the petitioner's worksite, the petitioner was to indicate as such on the itinerary. The itinerary was to include all service planned for the entire requested period of employment— October 1, 2004 through August 1, 2007.

Pursuant to the Aytes memorandum cited at footnote 2, the director has the discretion to request that that an employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised his discretion to request this information. However, the record contains no documentation regarding the dates and locations of the beneficiary's proposed service. The letter from Ramco states that it will have an immediate requirement for three software professionals for a period of 24 months and "likely" for an additional 12 months, and that its need is "immediate." As the letter is undated, the AAO cannot determine when this immediate need was to begin.

Nor did the letter from _____ provide the location of the beneficiary's intended employment, other than that it would be somewhere in the State of California. The documents contained in the record of proceeding do not establish an itinerary of employment. Accordingly, the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), and the petition must be denied.³

For the foregoing reasons, the petitioner has not demonstrated that it had, on the date the petition was submitted, an itinerary of employment for the three-year period requested.

The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at multiple work locations to perform services established by contractual agreements for third-party companies. The petitioner, however, has provided no contracts, work orders, or statements of work describing the duties the beneficiary would perform for its clients and, therefore, has not established the proposed position as a specialty occupation.

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proposed 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, or clients of the petitioner's clients (i.e., the end-users), 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. For

³ 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."

example, the petitioner indicates that the beneficiary will work on a project for [REDACTED]. However, the record contains no information regarding the beneficiary's duties from [REDACTED] or any other end-user of the beneficiary's services.⁴ 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)(I).

On appeal, counsel asserts that *Defensor* is not applicable here. The AAO disagrees. As was the case with the petitioner in *Defensor*, the petitioner here is the "token employer" in that it is acting as an employment contractor, while Ramco Systems, the entity for whom the beneficiary will perform services, is the "more relevant employer." The AAO does not find counsel's attempts to distinguish the two cases persuasive.

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)(I).

The petitioner has not established that it will employ the beneficiary in a specialty occupation and has not submitted an itinerary of employment. Accordingly, 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.

⁴ The undated letter from Ramco states that it will have an immediate requirement for "3 software professionals." No job description was given, nor was the beneficiary mentioned by name.