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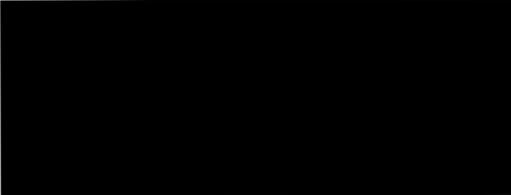
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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FILE: WAC 07 114 51634 Office: CALIFORNIA SERVICE CENTER Date: **APR 30 2008**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

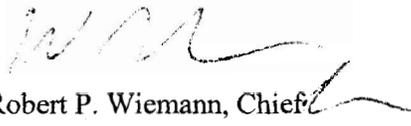
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



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 design consultant business that seeks to employ the beneficiary as a quality assurance/software tester. 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 determining that the petitioner had not established that it qualifies as a U.S. employer, that its labor condition application (LCA) is valid, or that it would comply with the terms and conditions of 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 response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

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.

In a February 12, 2007 job offer to the beneficiary, the petitioner's managing director stated, in part:

You will be working as a full time employee with the [petitioner] starting from February 19, 2007 and will be providing consulting services for our clients spread over in United States [sic].

The record also includes an LCA submitted at the time of filing listing the beneficiary's work location in Stamford, Connecticut as a quality assurance/software tester.

In the RFE, the director requested additional information from the petitioner, including copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or service agreements for the beneficiary.

In response to the RFE, counsel for the petitioner stated that the petitioner did not commence business operations until 2006, and that the beneficiary would be performing duties for the contractual end user, the State of Ohio Department of Taxation. As supporting documentation, counsel submitted a Master Services Agreement, dated

June 1, 2007, between the petitioner and FCS Software Solutions, and "Appendix A," which specified the end-client company as "State of Ohio, Department of Taxation," named the beneficiary as the contractor, and described the scope of responsibilities as "Websphere Administrator."

The director denied the petition on the basis that the petitioner's contract between itself and FCS Software Solutions was signed after the filing of the petition. The director also found that the record contained no contract between the petitioner and the end user, State of Ohio, Department of Taxation, and thus the petitioner had not shown that there was an actual employment offer or that the petitioner had control over the beneficiary's work. The director also found that the beneficiary's Columbus, Ohio work location was not covered by the LCA. The director also referenced the terms and conditions of employment of previous beneficiary's and indicated that the petitioner did not comply with the terms and conditions detailed on the Form I-129. The director observed, based on her analysis of the petitioner's employment practices, Citizenship and Immigration Services (CIS) could not reasonably expect that the petitioner would comply with the terms and conditions of employment as shown on the Form I-129 in the instant matter.

On appeal, counsel states, in part, that it is apparent the petitioner is the beneficiary's employer, as demonstrated by the petitioner's February 12, 2007 employment offer and the LCA. Counsel also asserts that, as stated in the RFE, the work will be performed remotely at the petitioner's location, not at the worksite in Columbus, Ohio, and therefore there is no inconsistency between the LCA and the content of the petition. Counsel notes that the director did not provide any evidence that the petitioner has not complied with the terms and conditions of employment. Counsel contends that the director's consideration of evidence outside of the petition in this matter has tainted the director's decision making process.

Preliminarily, the AAO finds that the director erred when referencing evidence not in the record of proceeding. The AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Furthermore, 8 C.F.R. § 103.2(b)(16)(i) requires the director to advise the petitioner "if a decision will be adverse to the ... petitioner and is based on derogatory information considered by the Service and of which the ... petitioner is unaware," and give the petitioner "an opportunity to rebut the information in his/her own behalf before the decision is rendered." The director's reference, although not a basis of denial in this matter, will be withdrawn.

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.

The AAO finds that the evidence of record is sufficient to establish 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 as set out in the petitioner's February 12, 2007 employment offer.¹ See 8 C.F.R. § 214.2(h)(4)(ii). The petitioner therefore has overcome this portion of the director's objections.

The petition, however, may not be approved. The AAO concludes that, although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at work locations² to perform services established by contractual agreements for third-party companies. In this matter, as the director determined, the petitioner did not present evidence that it had work for the beneficiary when the petition was filed. As noted above, the contract submitted to establish that the petitioner would employ the beneficiary for work to be performed on behalf of third party companies was dated subsequent to the filing date of the petition. The petitioner cannot use this contract to establish that work existed for the beneficiary at the time the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Moreover, the AAO reiterates that the record does not contain consistent information establishing the beneficiary's work location. The Appendix "A" to the petitioner's June 1, 2007 contract with FCS Software Solutions identifies the beneficiary's work location as Columbus, Ohio. As footnoted above, counsel asserts on appeal that the beneficiary's work location will be in Stamford, Connecticut, the petitioner's place of business and the work location identified on the LCA. Counsel does not provide any documentary evidence to explain or otherwise clarify the information listed on the Appendix "A" of the statement of work listing the beneficiary's proposed services. 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)).

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 The AAO acknowledges counsel's assertion on appeal that the director mistakenly presumed that the beneficiary's work would be done at the place of the project as identified on the June 1, 2007 appendix "A" to the petitioner's contract with FCS Software Solutions. However, 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 Obaigbena*, 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). Moreover, the AAO observes that the Appendix "A" is for a year-long project and that the petitioner has requested the beneficiary's services for a three-year period.

The petitioner has not provided consistent evidence establishing that it has complied with the terms and conditions of the LCA. For these reasons, the petition may not be approved.

The director determined that the Columbus, Ohio work location reflected on the contract and/or work order is not covered by the LCA, and thus the LCA cannot be considered to be valid.

As discussed above, counsel asserts on appeal that, as stated in the RFE, the work will be performed remotely at the petitioner's location, not at the worksite in Columbus, Ohio, and therefore there is no inconsistency between the LCA and the content of the petition.

As the beneficiary's ultimate worksite is unclear, it has not been shown that the work would be covered by the location on the LCA. Of further note, although information on the petition that was signed on March 2, 2007, reflects that the petitioner has seven employees, the petitioner's quarterly federal tax return for the first quarter of 2007 reflects only two employees. The record contains no explanation for these inconsistencies. 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). 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. *Matter of Ho*, 19 I&N Dec. at 591.

Beyond the decision of the director, the petitioner has not established that the proffered position is a specialty occupation, as the record does not contain substantive evidence that the duties of the proffered position incorporate the theoretical and practical application of a body of highly specialized knowledge that requires the 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. As the information in "Appendix A" indicates that the beneficiary would be working at an end-client as a "Websphere Administrator," only a detailed job description from the entity that requires the alien's services, in this case, "State of Ohio, Department of Taxation," will suffice to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). For this additional reason, the petition will not be approved.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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