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U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 033 51854 Office: CALIFORNIA SERVICE CENTER Date: **OCT 27 2008**

IN RE: Petitioner:
Beneficiary:



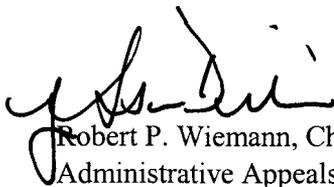
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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 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 development and consulting services provider that seeks to extend its authorization to employ the beneficiary as a programmer analyst, to work off-site at the Wells Fargo Bank in San Francisco, California. 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 submitted the requested quarterly wage documents for all its employees for the last eight quarters, and thus had not demonstrated compliance with the terms and conditions of employment reflected on their respective petitions. The director also found that the petitioner had filed an extraordinarily high number of H-1B nonimmigrant I-129 petitions as compared to the number of employees reported on the instant petition, and that during January, February, April, July, October, and November of 2006, the beneficiary may not have worked the hours originally specified on the I-129 petition filed on his behalf.

Regarding the director's determination that the petitioner had not demonstrated compliance with the terms and conditions of employment of its H-1B employees other than the beneficiary, 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.

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 notice of intent to deny (NOID); (5) the director's denial letter; and (6) the Form I-290B, with counsel's brief and documentation in support of the appeal. The AAO reviewed the record in its entirety before reaching 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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 above criteria 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.

In an October 30, 2006 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered programmer analyst position as follows:

Analysis, design, development and testing of specific modules which will aid in the development and implementation of web development applications for [the petitioner] using Java, Java Beans, Servlets, HTML and JSP, ADO.Net, DHTML, XML, IIS4.0/5.0, VB Script and Java Script. Supervise, coordinate, and maintain applications and implementation of ongoing projects for [the petitioner] and its clients.

The record also includes a certified labor condition application (LCA) submitted at the time of filing, listing the beneficiary's work locations in Norcross, Georgia and San Francisco, California as a programmer analyst.

In an 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. The director also requested the petitioner's last two federal income tax returns, quarterly wage reports for all the petitioner's employees for the last eight quarters, copies of the approval notices for all of the petitioner's H or L nonimmigrant employees, a payroll summary, and an explanation for filing such an unusually high number of petitions in proportion to the petitioner's low number of employees.

In response to the RFE, the petitioner submitted a verification letter from the U.S. Department of Labor (DOL) pertaining to a pending labor certification filed by the petitioner on the beneficiary's behalf.

In a NOID, the director explained that the petitioner had not submitted the additional information requested in the RFE and allowed the petitioner an additional 30 days in order to do so.

In response to the NOID, counsel submitted the following: an "Assignment Memorandum/Statement of Work" dated March 27, 2007 from Wells Fargo, naming the beneficiary to "[p]rovide support and development for SDD application" in the capacity of "Application Systems Engineer 4," at the primary worksite in San Francisco, California, from April 1, 2007 through September 30, 2007; a Subcontracting Agreement, dated March 1, 2006, between the petitioner and Compusys Computer Consultants, Inc., naming the beneficiary to perform services for the client, Wells Fargo Services & Company; an employment agreement, dated March 1, 2006, between the petitioner and the beneficiary; the petitioner's quarterly state reports of wages paid to each employee for the quarter ending on March 31, 2007, including the State of California quarterly wage and withholding report for the beneficiary; the petitioner's Annual Statement of Deposits and Filings for the tax year 2006; and the petitioner's federal income tax returns for 2003, 2004, and 2005.

The director denied the petition on the basis of her determination that the petitioner had not submitted all of the requested documentation, namely the requested eight quarters of the petitioner's quarterly wage reports, and thus had not demonstrated compliance with the full terms and conditions of employment as reflected on the beneficiary's petition.

On appeal, counsel asserts, in part:

The State of California withheld a portion of [the beneficiary's] salary during the months of January, February, April, July, October and November 2006 because [the beneficiary] is a

salaried employee who is paid on a bi-weekly basis, [the beneficiary's] 2006 W-2 shows that the State of California withheld \$1,573.34 from his 2006 earnings; and Form 941 for 2006 provides the total amount of [the petitioner's] total withholdings from the State of California.

A synthesized reading of these facts provide the basis for the conclusion that [the beneficiary] was [an employee of the petitioner] during the months in question because California state taxes have been withheld from [the beneficiary]. Furthermore, although these documents do not specify the amount of California state taxes withheld in a particular month, the documents provide a strong presumption that [the beneficiary] was employed during these months because he is a salaried employee who is paid on a bi-weekly basis. Because he is a salaried employee who is paid on a bi-weekly basis and he has been employed since 2001, the inference that [the beneficiary] may have been "benched" during these months in 2006 can be defeated.

Counsel submits the following supporting documentation on appeal: the petitioner's statement of federal tax deposits and filings for the first quarter of 2007; the petitioner's statements of federal tax deposits and filings for all quarters of 2006; the petitioner's Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2006; the petitioner's Form W-2, Wage and Tax Statement for 2006; the petitioner's wage and tax statement totals for the 2006 tax year, reflecting California wages in the amount of \$85,656.26 in wages and \$2,468.94 in California income tax; the petitioner's state and federal tax information for 2005; the petitioner's payroll for May 2007; the beneficiary's Form W-2, Wage and Tax Statement for 2006, reflecting \$53,303.82 in "wages, tips, other comp." and \$1,573.34 in California State income tax; and a list of the petitioner's active employees.

The AAO acknowledges counsel's assertion on appeal that the petitioner has overcome the director's finding that during January, February, April, July, October, and November of 2006, the beneficiary may not have worked the hours originally specified on the I-129 petition filed on his behalf, because the beneficiary is a salaried employee who is paid on a bi-weekly basis and he has been employed since 2001. The petitioner, however, has not submitted all of the documentation requested by the director, such as the petitioner's Form 941 quarterly wage reports for the last eight quarters. As stated by the director in her decision, the ADP tax filing service documentation submitted by the petitioner does not list each individual employee including individual wages paid per quarter and cannot be verified as being true exact copies that were submitted to each respective state agency and the IRS. In addition, the petitioner has not submitted the 2005 W-2 forms for the petitioner and the beneficiary, the petitioner's 2006 W-3 form, or the petitioner's payroll summary evidencing wages paid to the beneficiary for the last two years, as requested by the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Moreover, although counsel asserts that the beneficiary is a salaried employee who is paid on a bi-weekly basis, the payroll information submitted on appeal reflects the period covered as May 1, 2007 through May 31, 2007, and the check date as June 19, 2007. The record does not contain any explanation for this discrepancy. 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. As the record contains the unresolved discrepancies discussed above, the petitioner has not demonstrated compliance with the terms and conditions of the beneficiary's employment.

In view of the foregoing, the petitioner has not overcome the director's objection. For this reason, the petition may not be approved.

Beyond the decision of the director, the beneficiary does not appear to be qualified to perform the duties of a specialty occupation. The record does not contain university transcripts for the beneficiary, or an evaluation of the beneficiary's credentials from a service that specializes in evaluating foreign educational credentials as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). For this additional reason, the petition may not be approved.

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).

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.