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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 131 51636 Office: CALIFORNIA SERVICE CENTER Date: **SEP 30 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:

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.

for
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO). The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner provides software development and consulting services. It seeks to employ the beneficiary as a software developer. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On September 13, 2007, the director denied the petition, determining that the petitioner failed to establish that it qualified as a United States employer or agent.

The record includes: (1) the Form I-129 filed April 2, 2007 and supporting documents; (2) the director's June 12, 2007 request for further evidence (RFE); (3) the petitioner's August 21, 2007 response to the director's RFE; (4) the director's September 13, 2007 denial decision; and (5) the Form I-290B, Notice of Appeal or Motion, brief, documentation submitted in support of the appeal.

The AAO has reviewed the record and finds the director erred when determining that the petitioner would not act as the beneficiary's employer. The evidence of record establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.¹ See 8 C.F.R. § 214.2(h)(4)(ii). In view of this evidence, the AAO finds that the petitioner will be the employer of the beneficiary and withdraws the director's decision to the contrary. The petition may not be approved, however, as the petition does not establish that the petitioner had employment available for the beneficiary when the petition was filed and that the beneficiary would be employed in a specialty occupation.

Although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor and that the petitioner will place the beneficiary at different work locations to perform services according to various agreements with third-party companies.² 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 in such situations. While the Aytes memorandum cited at footnote 1 broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. As the evidence contained in the record at the time the petition was filed did not establish that the petitioner had three years of work for the beneficiary to perform, the director properly exercised her discretion to require an itinerary of employment.³ As the petitioner has not submitted 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 The record includes contracts between the petitioner and third party companies located in Illinois, California, and Ohio.

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."

itinerary, the petition may not be approved. In addition, the petitioner has not provided evidence showing where the beneficiary would ultimately work;⁴ thus, it is not possible to determine the validity of the Form ETA 9035E, Labor Condition Application (LCA) submitted with the petition. Further, the petitioner has not provided evidence of the actual duties comprising the beneficiary's services⁵ for the end-user client or clients. Thus, the AAO is unable to determine whether the proffered position incorporates the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act. It is the substantive aspects of the specific work to be actually performed, and the type and educational level of highly specialized knowledge in a particular discipline that those substantive aspects require, that determine whether a proffered position qualifies as a specialty occupation in accordance with the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A). These elements cannot be established without particularized evidence from each of the petitioner's clients, or client's clients, that delineates the specific components of the work that they are generating for the beneficiary to perform. Accordingly, the petitioner has not established that the proffered position is a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(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)(ii)(I).

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline, that the petitioner had employment available for the beneficiary when the petition was filed, and that the LCA is valid for the beneficiary's actual work location. As the director did not deny the petition based on these grounds, the petitioner has not had opportunity to address these deficiencies on appeal. Thus, the petition will be remanded and the director shall render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's September 13, 2007 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.

⁴ The AAO acknowledges the petitioner's indication on appeal that the beneficiary would initially work on a project in-house; however, the petitioner does not indicate the duration of time the beneficiary would spend on this project. In addition, the petitioner did not initially state where the beneficiary would work and in response to the director's RFE indicated that it provides services both onsite and offsite subject to the requirements of its clients.

⁵ The description of duties associated with the in-house project provides only a general overview of the services the beneficiary would perform on this project and as the petitioner has not provided an itinerary, the AAO is unable to conclude that the beneficiary would only be assigned to this project.