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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 07 088 50878 Office: CALIFORNIA SERVICE CENTER Date: **SEP 30 2008**

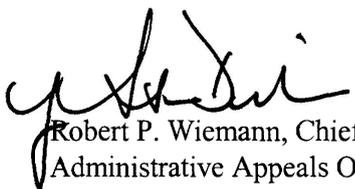
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

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, 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 The director's decision will be withdrawn and the matter remanded for entry of a new decision.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 and consulting services. It seeks to employ the beneficiary as a programmer/analyst. 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 August 17, 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 February 1, 2007 and supporting documents; (2) the director's April 3, 2007 request for further evidence (RFE); (3) the petitioner's June 1, 2007 response to the director's RFE; (4) the director's August 17, 2007 denial decision; and (5) the Form I-290B, Notice of Appeal or Motion, a brief, and supporting documentation. The AAO has considered the record in its entirety.

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 record does not establish that the petitioner had employment available for the beneficiary when the petition was filed, that the Form ETA 9035E, Labor Condition Application (LCA), submitted was valid for all work locations, 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. 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 petitioner stated in its response to the director's RFE, the beneficiary's intended place of employment is at ITECH, the petitioner in this matter, but that it is possible that he may handle work from his home in California. Thus, the record does not include a definitive location or description of the beneficiary's ultimate duties and the director properly exercised her discretion to require an itinerary of employment.² The AAO observes that the petitioner indicates it has two offices, an office in Vermont and 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 As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular

office in Sterling, Virginia. The AAO acknowledges the petitioner's claim on appeal that it does not need an end client contract in order to employ its employees, that "[i]f the employee is not on a client project, he may be on an internal project for [the petitioner], or may be improving his skills or interviewing for the next project." This statement confirms the need for a definitive itinerary, detailing the work to be performed and the length of the beneficiary's assignment, if the petition is to be approved. In addition, the record includes an LCA showing the beneficiary's work location as San Francisco, California. The petitioner, however, has not substantiated that this location will be the beneficiary's actual work location; thus, it is not possible to determine the validity of the LCA submitted with the petition. Further, the petitioner has not provided evidence of the actual duties comprising the beneficiary's services for the end user client or clients. The petitioner has provided a broad description of the beneficiary's duties. The record does not include a comprehensive description of duties the beneficiary would perform that is associated with a particular project or client; thus Citizenship and Immigration Services (CIS) 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.³ 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 this specific 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 the 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. The AAO also observes that the petitioner must establish the beneficiary's eligibility for a seventh-year extension of H-1B employment. 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 August 17, 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.

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."

³ The AAO notes that the Department of Labor's *Occupational Outlook Handbook (Handbook)* lists a number of computer-related positions, some of which require a four-year course of college-level education, some of which require a two-year associate's degree, and some of which only require experience.