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U.S. Citizenship
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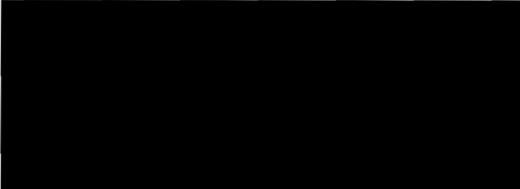
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FILE: WAC 07 148 54470 Office: CALIFORNIA SERVICE CENTER Date: **SEP 30 2008**

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

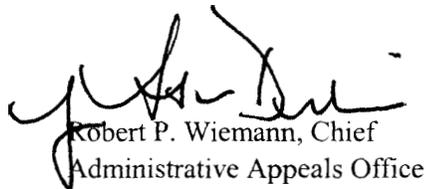
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



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 The director's decision will be withdrawn and the matter remanded for entry of a new decision.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 consulting and development services. It seeks to employ the beneficiary as a systems 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 April 2, 2007 and supporting documents; (2) the director's June 4, 2007 request for further evidence (RFE); (3) the petitioner's July 22, 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 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 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.² The AAO acknowledges the petitioner's claim in response to the director's RFE and on appeal that the beneficiary would be assigned to work on an in-house project. The AAO observes, however, that the petitioner initially provided a Form ETA 9035E,

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 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."

Labor Condition Application (LCA) for work to be performed in Troy, Michigan and submitted a new LCA, certified subsequent to the date of filing the petition, for work to be performed in Farmington, Michigan. The change in work location suggests that the petitioner did not have a credible offer of employment when the petition was filed. In addition, the petitioner has not provided evidence of the actual duties the beneficiary would perform for the in-house project. The petitioner provides an overview of the duties of a systems analyst without detailing the actual duties the beneficiary would be required to perform and a general outline of the "Online A&L Management Tool" product. The petitioner does not provide sufficient information describing how the beneficiary's actual duties correlate to the different phases of the petitioner's in-house project. The record is insufficient 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 the beneficiary when the petition was filed, and that the initial 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. 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.

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.