

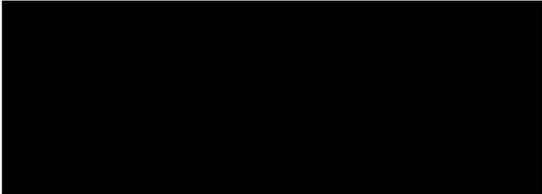
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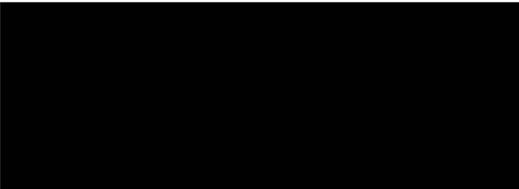
FILE: LIN 04 187 50025 Office: NEBRASKA SERVICE CENTER Date: AUG 10 2006

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 service center director 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 information technology consulting company that seeks to employ the beneficiary as a programmer/analyst. The petitioner 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 petition was initially submitted on June 16, 2004. In a request for additional evidence dated October 15, 2004, the director noted that the petitioner is an employment contractor that provides contract employees to other businesses and requested evidence of the actual duties to be performed by the beneficiary for the petitioner's client(s). In addition, the director stated that if the petitioner's "contract [was] with another contracting firm," the petitioner was to "submit evidence from the actual end user client establishing the duties to performed...." In a response dated November 11, 2004, the petitioner submitted a contract dated June 26, 2003 and work order dated July 14, 2003 between itself and third party [REDACTED] indicating that the beneficiary was to be contracted to third party [REDACTED], a client of [REDACTED] located in [REDACTED].

The director denied the petition in a decision dated February 14, 2005 on the ground that the petitioner had not submitted sufficient evidence of the duties the beneficiary would perform for the company ultimately employing the beneficiary and, therefore, had failed to demonstrate that the proffered position is a specialty occupation. The director also denied the petition for violation of 8 C.F.R. § 214.2(h)(4)(iii)(B) and 29 C.F.R. § 730(c)(1)(v), in that the intended place of employment listed in the labor condition application certified by the Department of Labor is Kansas City, Kansas and not St. Cloud, Minnesota as indicated in the evidence submitted by the petitioner.

On appeal, the petitioner submits a brief and additional evidence. Counsel states that in response to the director's request for additional evidence, the petitioner "inadvertently submitted an incorrect work order from Solutions [REDACTED]. On appeal, petitioner submits a contract dated October 21, 2003 with accompanying work order dated April 18, 2004 between itself and third party [REDACTED] a software development and consulting company located in Overland Park, Kansas. Counsel asserts that the beneficiary will work for DSC pursuant to this contract and work order.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a programmer/analyst. Evidence of the beneficiary's duties includes: the I-129 petition and supporting documents, the petitioner's response to the director's request for further evidence, and the contract between the petitioner and third party [REDACTED] submitted on appeal. According to this evidence, the beneficiary would perform duties as follows:

- Data and information gathering for the clients' business software needs

- Be able to administer and apply GUI and other back end tools for gathering downsizing
- Develop appropriate solutions using algorithms and flow charts
- Utilize the knowledge of real time experience in handling large databases
- Use software tools and other development methodologies
- Undertake program flowcharting and develop appropriate problem solving methods
- Responsible for coding, testing and implementing the various software applications

According to a work order attached to the contract between the petitioner and ██████████ the beneficiary would also perform the following specific duties: conduct Integration Test Planning and Execution for the Customer Connection project; create test plans for a product implemented with componentized architecture; and work with business analysts and software engineers to plan and conduct tests.

Section 214(i)(1) of 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)(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 criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The duties described by the petitioner indicate that the proffered position is for a programmer/analyst. The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at another location or multiple locations to perform services established by contractual agreements for

third-party companies. The petitioner has submitted inconsistent evidence concerning the intended employment of the beneficiary. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As stated above, counsel asserts that the documentation submitted in response to the director's request for additional evidence did not reflect the facts as they existed at that time and was submitted inadvertently. Even accepting counsel's assertions, the evidence submitted by the petitioner on the appeal fails to overcome the primary basis for the director's denial of the petition: the petitioner has not provided contracts, work orders or statements of work describing the duties the beneficiary would perform for the entity actually receiving the beneficiary's services.

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

In this case, the petitioner has submitted a contract and work order with third party [REDACTED] which the record indicates is an employment contractor like the petitioner. The work order, which covers a period of only one year, specifies that the beneficiary will work on the "Customer Connection" project, but provides no details concerning the entity for which this project is being completed and only scant details concerning the beneficiary's duties in relation to this project. Thus, as the record contains insufficient documentation establishing the specific duties the beneficiary would perform under contract for the petitioner's clients, or in this case, the clients of the petitioner's client, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as 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)(I).

As demonstrated in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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