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U.S. Citizenship
and Immigration
Services

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FILE: LIN 04 256 50393 Office: NEBRASKA SERVICE CENTER Date: SEP 13 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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner provides computer software development and consulting services. The petitioner seeks to employ the beneficiary as a programmer analyst. Accordingly, 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 record includes: (1) the Form I-129 and supporting documents; (2) the director's February 3, 2005 request for further evidence (RFE); (3) counsel's April 25, 2005 response to the director's RFE; (4) the director's June 7, 2005 denial decision; and (5) the Form I-290B and documents in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On June 7, 2005, the director denied the petition determining that the petitioner had failed to establish that it was a United States employer as contemplated by the regulation or that it had a specialty occupation position available for the beneficiary in the location identified on the Labor Condition Application (LCA).

On appeal, counsel for the petitioner submits a brief and attachments.

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.

When filing the Form I-129 petition, the petitioner averred that it employed 15 persons, provided computer software development and consulting services, and required the services of computer professionals to create, write, develop, and implement sophisticated application systems. In a September 14, 2004 letter submitted in support of the petition, the petitioner stated the specific job duties of the programmer analyst position included:

1. Analyzing the communications, informational and programming requirements of clients; planning, developing[,] and designing business programs and computer systems;
- ii. Designing, programming[,] and implementing software applications and packages customized to meet specific client needs;
- iii. Reviewing, repairing[,] and modifying software programs to ensure technical accuracy and reliability of programs;
- iv. Training of clients on the use of software applications and providing trouble shooting and debugging support.

The LCA that the petitioner filed with the Department of Labor (DOL) listed the beneficiary's place of work as Johnston, Iowa as a programmer analyst.

On February 3, 2005, the director requested additional evidence from the petitioner. The director noted that the petitioner would be the beneficiary's employer but that the beneficiary would be performing services at locations other than the petitioner's facility. The director requested, in accordance with the regulations, an itinerary of definite employment, listing the location(s) and organization(s) where the beneficiary would be providing services. The director stated that the itinerary should specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venue, or location where the service would be performed by the beneficiary and that the itinerary should include all service planned for the period of time requested - in this case until 2007. The director also requested copies of contractual agreements between the petitioner and the companies for which the beneficiary would be providing services, including copies of statements of work, work orders, and any other documents or appendices. The director noted that the documentation submitted should specify dates of services requested and the specific duties to be performed by the beneficiary at an identifiable location. The director further requested a copy of a legally binding contractual agreement between the petitioner and the beneficiary reciting the terms of the beneficiary's employment.

In an April 25, 2005 response, counsel for the petitioner attached a copy of a professional services agreement between [REDACTED] and the petitioner as subcontractor, dated December 17, 2003. The professional services agreement indicated that either party could terminate the agreement or a statement of work for any reason upon 30 days notice. The petitioner also provided a statement of work identifying the beneficiary and itself by name as a subcontractor and specified the start date for the statement of work as October 25, 2004 and statement of work's location as Johnston, Iowa. The statement of work indicated that the term "is expected to be 3 years," but that [REDACTED] makes no guarantee express or implied, that the engagement will endure 3 years." The petitioner further provided a copy of its offer of employment to the beneficiary as a programmer analyst. The offer of employment included the beneficiary's salary and hours of work but did not identify the beneficiary's specific duties.

The director denied the petition on June 7, 2005. The director noted the documentation submitted by the petitioner, specifically that the statement of work submitted suggested that the beneficiary would be working for a "client" of [REDACTED]. The director determined that the record did not contain an itinerary showing specifically where and for what company the beneficiary would be working. The director further determined

that the record did not contain evidence of the beneficiary's specific job duties so that the petitioner was precluded from demonstrating that the proffered position is a specialty occupation within the meaning of the regulation. The director concluded that the evidence did not substantiate that the petitioner was a qualified employer as [REDACTED] and its client(s) would supervise and control the beneficiary's work or that the petitioner had a specialty occupation position available for the beneficiary in the location identified on the LCA.

On appeal counsel for the petitioner asserts: the position of programmer analyst qualifies as a specialty occupation; that it is the actual employer; there is no doubt regarding the duties the beneficiary will perform; and that it is a viable business capable of offering the beneficiary a job in a specialty occupation. Counsel also adds to the petitioner's description of the beneficiary's proposed duties by indicating that the beneficiary will be working on a portal taxonomy project that requires him to perform highly sophisticated programming duties that demand knowledge of and insight into programming methodology and the architecture of advanced computer languages.

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.

Preliminarily, the AAO observes that the professional services agreement between the petitioner and IK Sol allows the petitioner to add "statements of work" for different beneficiaries and for different projects as needed by [REDACTED]. Thus, statements of work may be dated subsequent to the date of the professional services agreement as addendums to the professional services agreement.

The AAO finds that the evidence of record is sufficient to establish that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.¹ See 8 C.F.R. § 214.2(h)(4)(ii). In the February 3, 2005 RFE, the director requested an itinerary of definite employment, listing the location(s) and organization(s) where the beneficiary would be providing services. The Aytes memorandum cited at footnote 1, states that the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised her decision to request an employment itinerary as the initial record provided confusing evidence regarding the location(s) of the beneficiary's ultimate employment.

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).

When a petitioner is an employment contractor, the entity ultimately employing the alien or using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, Citizenship and Immigration Services (CIS) will determine whether the duties require 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.²

The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at multiple locations to perform services established by contractual agreements for third-party companies. The petitioner, however, has provided no contracts, work orders or statements of work describing the duties the beneficiary would perform for its clients and, therefore, has not established the proffered position as a specialty occupation.

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, a 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.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients, 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)(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).

The petitioner has provided a generic description of the types of duties the beneficiary would perform upon his employment with the company, but no evidence that establishes the specific duties. A petitioner cannot establish employment as a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title, e.g., a programmer writes programs; a computer system analyst design and update software; a computer software engineer design, construct, test, and maintain computer applications software. Although the petitioner asserts that the beneficiary's duties would involve designing, programming, and implementing software of some type, the

The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." See *id.* at 387.

description does not prove that he would perform the duties of a programmer analyst for the petitioner's client. Only a detailed job description from the entity that requires the alien's services will suffice to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO notes counsel's additional information submitted on appeal regarding the beneficiary's proposed work on a portal taxonomy project. However, such a vague reference does not provide sufficient evidence regarding the beneficiary's duties to consider. Moreover, the petitioner was put on notice of the required evidence regarding the beneficiary's ultimate employment and was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner's failure to timely submit the requested evidence requires the AAO to discount this vague reference as evidence on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Without a description of the beneficiary's actual duties from the entity utilizing the beneficiary's services, the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).³

In that the record offers no description of the duties the beneficiary would perform for the petitioner's client, or the petitioner's client's client, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a listing of the duties the beneficiary would perform under contract, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

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. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

³ The AAO observes that the *Handbook* reports that there are many training paths available for programmers and that although bachelor's degrees are commonly required, certain jobs may require only a two-year degree or certificate; that most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of a variety of computer systems and technologies for positions of computer software engineer; and that there is no universally accepted way to prepare for a job as a systems analyst, although most employers place a premium on some formal college education.

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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.