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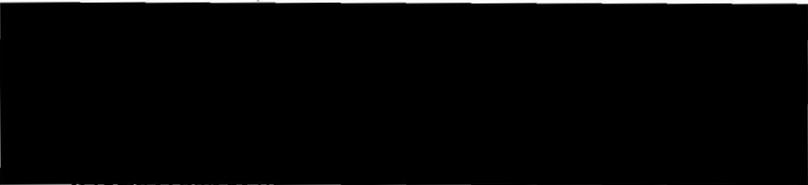
FILE: LIN 03 276 52253 Office: NEBRASKA SERVICE CENTER Date: **SEP 29 2006**

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 director of the service center 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 an information technology-consulting firm that seeks to extend the employment of the beneficiary as a computer hardware engineer. The petitioner, therefore, 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 director denied the petition because the proffered position is not a specialty occupation. Counsel submits the petitioner's reasons for appeal on the Form I-290B, along with a brief.

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 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 attachments. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a computer hardware engineer. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company

support letter; and the petitioner's response to the director's request for evidence. In the initial petition, the petitioner stated that the duties of the proffered position entail researching, designing, developing and testing computer systems and networks, solving operating problems and supervising its installation and maintenance.

The director issued a request for evidence noting that the petitioner is a consulting company and specifically requested contracts and work orders. The director requested a detailed description of the specific projects that would require the beneficiary's services. In response, the petitioner provided a listing of companies and systems descriptions which it called projects. The petitioner stated that the beneficiary has been primarily tasked to perform maintenance and revisions on various internal and external projects. The petitioner provided a list of sixteen employees currently assigned to its corporate office. The petitioner provided photographs of its office's exterior and interior. The petitioner acknowledged the director's statements regarding the number of H-1B petitions submitted by the petitioner. The director noted that the petitioner had filed in excess of 270 petitions in the previous two years. The petitioner stated that it had withdrawn eight petitions and that not all of the beneficiaries are assigned to the corporate office. The petitioner asserts that some of its employees have LCA's for different work locations.

In his decision, the director noted that the petitioner is an employment agency or consulting firm. The director referred to *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) and noted that the court found that the degree requirement should not originate with the employment agency that brought the aliens to the United States for employment with the agency's clients. The director referred to the general list of projects for various clients provided by the petitioner and noted that the petitioner did not submit any contracts or work orders. The director noted that absent any actual contracts or work orders, the director could not make a determination that the beneficiary would be performing any of the duties claimed.

The director also found that the record did not support the petitioner's claims that the beneficiary would be working in-house. The director noted that the petitioner submitted photographs of the petitioner's office which included eight workstations. The director noted that in fiscal year 2003 the petitioner submitted 226 petitions for non-immigrant workers and four petitions for immigrant workers. The director noted that as of the date of the decision in 2004, the petitioner had submitted petitions for 45 nonimmigrant workers and one immigrant worker petition. The director found that eight workstations are insufficient for the 271 nonimmigrants and five immigrants working for the petitioner. The director noted that the petitioner claimed that not all employees work at the company offices and provided a list of sixteen employees currently working at the company offices. The director found that the eight work stations were insufficient to house the in-house employees. Additionally, the director noted that he requested a list of the petitioner's employees and their locations of employment and that the petitioner did not provide this evidence. The director determined that the petitioner has not established that the proffered petition is a specialty occupation.

On appeal, counsel contends that the petitioner is unable to provide more details about the duties of the proffered position. Counsel refers to the contract with QualxServ and the attached "Statement of Work," and notes "it is hardly an accurate reflection of the duties and responsibilities of the position." Counsel states that the statement of work simply refers to duties or procedures which are essential for the "efficient execution of the broader service of voice and data telecommunications installation and related services therefrom." Counsel asserts that the duties of the proffered position exceed those listed in the QualxServ statement. Counsel explains that the petitioner is unable to describe all of the duties of the proffered position because the "sophisticated and specialized responsibilities cannot be simplistically itemized in a contract nor would it be advisable to include them in the contract." Counsel concludes "from a legal standpoint it would be bad practice to include too much detail in a contract since such could expand the grounds and possibilities

of litigation.” Counsel states that the proposed duties for the electronics engineer position include research, design, development, and testing of computer systems and networks, and analysis and resolution of operations problems. Counsel contends that the position includes the supervision of the installation and maintenance of these systems and networks. Counsel concludes by stating that this description matches the description of electronics engineer found in the Department of Labor’s *Occupational Outlook Handbook (Handbook)* and therefore the proffered position is a specialty occupation.

In response to the director’s concerns about the petitioner’s number of visa petitions, counsel reiterates that the petitioner is a consulting firm and that it places its employees at client sites. The petitioner did not address the director’s concern about the number of nonimmigrant petitions it has filed which exceeds the number of employees listed in the Form I-129 and the number of employees listed in its invoices. As noted by the director, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO prefaces its analysis by noting that the record lacks evidence of specific projects and specific tasks and an explanation from the petitioner indicating that such tasks would require the theoretical and practical application of a bachelor’s degree level of highly specialized engineering knowledge. The descriptions of the proposed duties are exclusively generic and do not persuade the AAO that their actual job performance would require more than the level of knowledge usually associated with the duties of engineering technicians.

The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at multiple work 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, 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.

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 AAO considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(I) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 812 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

On appeal, counsel states that the petitioner derived its job description from and tracks the language of the *Handbook* section on computer hardware engineers. The *Handbook* states that computer hardware engineers research, design, develop, test, and oversee the installation of computer hardware and supervise its manufacture and installation. Hardware refers to computer chips, circuit boards, computer systems, and related equipment such as keyboards, modems, and printers. The work of computer hardware engineers is very similar to that of electronics engineers, but, unlike electronics engineers, computer hardware engineers work exclusively with computers and computer-related equipment. The rapid advances in computer technology are largely a result of the research, development, and design efforts of computer hardware engineers.

The petitioner has not described the hardware that has been or will be designed, developed, or tested by the beneficiary. The petitioner has not provided a contract from its client describing the hardware to be designed. The beneficiary's resume that has been submitted by the petitioner states that the beneficiary provides PC and Satellite support and his duties includes the following:

- Maintains and conducts fault diagnostics and troubleshooting on Hughes Network Systems VSAT and DirecWay Satellite Systems; performs hardware swap-outs from radio frequency units to cables to VSAT system boxes and auxiliary devices, dish pointing, and peaking; configures VSAT boxes according to customer installation specifications;
- Responds to Hughes Trouble Tickets and resolves trouble in timely manner to minimize downtimes;
- Maintains and conducts fault diagnostics and troubleshooting on Sirius Satellite Radio Terrestrial Transmitters; performs hardware swap-outs;
- Conducts fault diagnostics and trouble shooting on desktop and portable products; installs, tests, and configures desktop and portable products including networked environments.

A thorough review of the *Handbook* discloses that the duties of the proffered position are performed by engineering technicians. As discussed in the *Handbook*, engineering technicians use the principles and theories of science, engineering, and mathematics to solve technical problems in research and development,

manufacturing, sales, construction, inspection, and maintenance Many engineering technicians assist engineers and scientists, especially in research and development. The *Handbook* further specifies:

Electrical and electronics engineering technicians help design, develop, test, and manufacture electrical and electronic equipment such as communication equipment; radar, industrial, and medical monitoring or control devices; navigational equipment; and computers. They may work in product evaluation and testing, using measuring and diagnostic devices to adjust, test, and repair equipment.

The *Handbook* reports the following about the training requirements for engineering technicians:

Although it may be possible to qualify for a few engineering technician jobs without formal training, most employers prefer to hire someone with at least a 2-year associate degree in engineering technology.

The petitioner fails to establish the first criterion because the *Handbook* states that employers of engineering technicians prefer, but do not require, applicants with bachelor's degrees with an engineering emphasis. Accordingly, the petitioner has not established that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

The petitioner provided no evidence to establish the first alternative prong of the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a specific degree as required by the second alternative prong of the second criterion.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3): that the petitioner normally requires a degree or its equivalent for the position. The petitioner asserts that it offers the computer hardware engineer position only to individuals with a bachelor's degree in this field. 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)). To determine a petitioner's ability to establish that it normally requires a degree or its equivalent when filling its proffered position, as required by the third criterion, the AAO generally reviews the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the absence of an employment history for the proffered position, the petitioner cannot establish that its proffered position qualifies as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. On appeal, counsel contends that the beneficiary will research and design computer hardware for the petitioner's clients. The record contains no evidence of designing hardware. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N

Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel has not differentiated the duties of the proffered position from those normally found in an engineering technician position. Counsel contends that it is impossible to have a detailed description in the contract from QualxServ. Counsel asserts that the duties include research, designing and developing and testing of computer hardware. The petitioner has not provided a job description from the party, QualxServ, that will be utilizing the services of the beneficiary that describes or includes these duties. To the extent they are described in the record, the duties do not appear so specialized or complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The *Handbook* reveals that the proffered position is performed by an engineering technician, an occupation that does not require a bachelor's degree in a specific specialty.

As related 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.

Beyond the decision of the director, the AAO notes that the petitioner generally stated that the beneficiary will be working in Springfield, MO. The Labor Condition Application (LCA) certified by the Department of Labor indicated a worksite of Springfield, MO. The contract between the petitioner and QualxServ indicates that QualxServ is based in Tewkesbury, Massachusetts. The contract does not specifically state a location or address where it requires the service of the beneficiary. The contract indicates that the work location may be anywhere in the United States. Pursuant to 8 C.F.R. § 214.2(h)(4)(i)(B), petitions involving a specialty occupation require the following:

(1) Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

The evidence of record does not allow CIS to determine that the petitioner has provided a certified LCA for all the worksites, as required by the above cited regulation. For this additional reason the petition may not be approved.

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.