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U.S. Citizenship
and Immigration
Services

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FILE: LIN 05 228 52549 Office: NEBRASKA SERVICE CENTER Date: AUG 20 2007

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 black ink, 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 is an engineering service company that offers engineering software solutions and advanced engineering services in the field of CAD, CAM, CAE, CFD, and PDM. It states that it employs 6 personnel and had gross annual revenue of approximately \$500,000 when the petition was filed. It seeks to employ the beneficiary as a project engineer. 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 filed July 28, 2005 and supporting documents; (2) the director's November 3, 2005 request for further evidence (RFE); (3) counsel's December 30, 2005 response to the director's RFE; (4) the director's March 8, 2006 denial decision; and (5) the Form I-290B, counsel's brief, and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

On March 8, 2006, the director denied the petition. The director determined that the petitioner is a consulting firm providing contract employees to other businesses and thus the director must determine whether the petitioner had sufficient work at the H-1B level to employ the beneficiary at the work location listed on the Labor Condition Application (LCA). The director determined, based on the documentation in the record, that the petitioner had not established the proffered position met the regulatory requirements of a specialty occupation.

On appeal, counsel for the petitioner asserts that the proffered position of "project engineer" *per se* is a specialty occupation as evidenced by advertisements, a client letter, and the Department of Labor's *Occupational Outlook Handbook (Handbook)* and the *Dictionary of Occupational Titles (DOT)*.

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.

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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

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.

In a July 27, 2005 letter appended to the petition, the petitioner indicated the primary daily functions of the position included the following responsibilities:

1. Performing various engineering designs, analysis, testing, simulations and modeling to meet different project requirements (approximately 20% of daily work time);
2. Applying the techniques and principles of engineering and mathematical analysis to resolve technical issues related with computer aided engineering (CAE/CAM/CAE) and dimensional measurement software that are used in industrial production (approximately 15% of daily work time);
3. Confer with design engineers in the industrial production process, and provide with CFD and CAD analysis (approximate 10% of daily work time);

4. Coordinate and perform activities associated with supplier quality programs, such as analyzing current layout of industrial and mechanical resources, including designing computer software/applications to facilitate optimal layout of both (approximately 20% of daily work time);
5. Using mathematical and engineering analysis, analyze and design database for the utilization of clients' production costs, process flow charts and production schedules, and design software to arrive at the most cost efficient use of clients' resources (approximately 10% of daily work time);
6. Use software tools and packages such as Fortran, I-deas, CAD, FEA/FEM, CAE and CATDADS, etc. (approximately 10% of daily work time); and
7. Development, support and integration of CAE tools for production systems simulation (approximately 10% of daily work time).

The record also includes an LCA listing the beneficiary's work location in Livonia, Michigan and an indication from the petitioner that the beneficiary would perform services in-house.

On November 3, 2005, the director noted that the petitioner was a new entity and requested that the petitioner submit contracts between the petitioner and the company for which the beneficiary would provide services, including copies of statements of work, work orders, or any other documents or appendices. The director noted that the contracts should specify dates of services requested and specific duties to be performed by the beneficiary at an identifiable location.

In a December 30, 2005 response, the petitioner provided, among other things, a purchase order for CAE meshing services valid from September 30, 2005 through September 30, 2006. The director noted that the purchase order was dated after the petition had been filed and concluded that the petitioner had not established it had work sufficient to employ the beneficiary in a specialty occupation at the location designated on the LCA. The director also noted that without a contract from the actual employer stating the duties to be performed pursuant to the contract, the director could not determine that the proffered position qualified as a specialty occupation.

On appeal, counsel for the petitioner asserts that the position of project engineer is a specialty occupation according to the *Handbook* and as documented by advertisements for the position. Counsel includes its advertisements for engineering positions requiring a bachelor's of science degree. Counsel also submits a July 20, 2005 letter from a third party, Continental Design and Engineering, (Continental) located in Anderson, Indiana with an office in Detroit, Michigan, indicating that the beneficiary will work at Continental's company site per its service agreement with the petitioner. The president of Continental indicates in the letter: "it is mutually agreed that the position for the Consultant is a specialty occupation (Project Engineer)." Counsel attaches additional purchase orders for CAD cleanup and meshing and CAD/CAE services in various locations. Counsel asserts that the petitioner has plenty of work for the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien,

and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO finds that the record presents confusing information regarding the beneficiary's work location. Although the petitioner initially indicated that the beneficiary would work "in-house" the work orders and contracts submitted suggest that the beneficiary will work in multiple locations. In addition, the petitioner does not provide any information pertaining to its in-house projects. The evidence of record establishes that the petitioner is an employment contractor and suggests 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 detailed work the beneficiary would perform for its clients and, therefore, has not established the proffered position as a specialty occupation. 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 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.

When a petitioner is acting as an employment contractor, the entity ultimately 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.

In this matter the petitioner provided an overview of the types of duties the beneficiary might be required to provide as a project engineer. The purchase orders submitted identify only generally that the petitioner agrees to provide CAD cleanup and meshing and CAD/CAE and FAE services. The July 20, 2005 letter from Continental does not provide a description of duties that the beneficiary will perform but rather notes that the petitioner had promised the services of a competent engineer specializing in engineering software development, analysis, design and testing with at least a BS degree and experience. However, there is no description of proposed duties for CIS to analyze and thus CIS is unable to discern whether the duties of the proffered position actually comprise the duties of a specialty occupation. 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 is also unable to analyze whether the duties of the proposed position 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)(1).

Each petitioner must detail its expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. In circumstances where the beneficiary will provide services to a third party, the third party must also provide details of its expectations of the position. Such descriptions must correspond to the needs of the petitioner and/or the third party and be substantiated by documentary evidence. To allow otherwise would require acceptance of any petitioner's generic description to establish that its proffered position is a specialty occupation. CIS must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business and what the third party contractor expects from the beneficiary in relation to its business and what the proffered position actually requires, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty.

In this matter, the AAO is unable to conclude that the requirements of third party employers will include duties that incorporate the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a bachelor's degree or higher degree in the specific specialty or its equivalent as a minimum for entry into the occupation in the United States. The Department of Labor's *Occupational Outlook Handbook (Handbook)* indicates there are 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. Without a detailed job description from the entity that requires the alien's services, the petitioner has not provided evidence sufficient to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Again, 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. at 165.

In that the record does not offer a comprehensive description of the duties the beneficiary would perform for the petitioner'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 has not established 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 detailed listing of the duties the beneficiary would perform under contract, the petitioner has not established that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither has the petitioner satisfied 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.

Beyond the decision of the director, the petitioner has not established that the Labor Condition Application (LCA) is valid for the work location. As noted above, the LCA specifies Livonia, Michigan as the work location for the employment. The third party letter does not indicate which of its offices the beneficiary will work at. While the Detroit office would be covered by the LCA of record, the Anderson, Indiana office is not. As the evidence does not establish where the beneficiary will be performing the job duties, the petitioner has not established that the LCA is valid for the work location. For this additional reason, the petition will be denied.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.