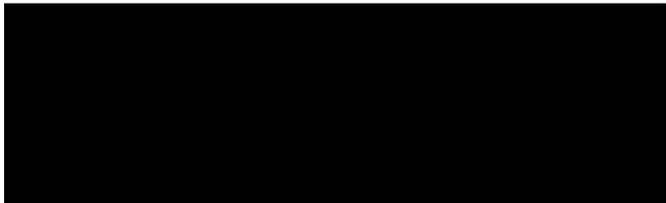


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FILE: WAC 07 130 53360 Office: CALIFORNIA SERVICE CENTER Date: NOV 05 2008

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 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 privately held information technology (IT) services firm that seeks to employ the beneficiary as a network engineer. 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 director determined that the petitioner did not establish that the proffered position qualified as a specialty occupation, and that the petitioner had not submitted a valid Labor Condition Application (LCA) for the place of intended employment since the place of employment could not be determined without contracts detailing the beneficiary's ultimate work site. On appeal the petitioner submits a brief and additional information contending that: the proffered position qualifies as a specialty occupation and that the LCA submitted with the filing of the Form I-129 petition was valid for the intended place of employment.

The first issue to be determined is whether the proffered position qualifies as a specialty occupation.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields 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.

The petitioner seeks the beneficiary’s services as a programmer analyst. Evidence of the beneficiary’s duties is set forth in the Form I-129 petition and supporting attachment. According to evidence provided by the petitioner the beneficiary would:

- Install and maintain computer and network hardware and software;
- Configure system services;
- Configure secure access to servers and networks;
- Provide telecommunication links and purchase network equipment;
- Diagnose, analyze and resolve problems with networking equipment and servers;
- Report and coordinate problem resolution with telecommunication and hardware vendors;
- Provide technical support for problem resolution and remote offices;
- Instruct users in the use of equipment;
- Prepare reports, analyze data and report results to management and plan corrective action;
- Develop network standards and policies;
- Monitor security and access to IT infrastructure;
- Monitor LAN and WAN usage;
- Conduct long range planning for network maintenance and expansion; and
- Schedule and monitor backup of data stored on servers, manage backup media, and evaluate and execute ad-hoc requests for restoration of data from backup media.

The petitioner requires a minimum of a bachelor’s degree in computer science, management information systems, business administration, electrical engineering, electronics engineering, mechanical engineering, “economic[s],” or a relative analytic or scientific discipline for entry into the proffered position.

In the director's decision, she noted that the petitioner had not provided contracts or other documentary evidence to establish the duties to be performed by the beneficiary for the ultimate user of his services, and that the petitioner had not provided an itinerary<sup>1</sup> for the beneficiary's services during the course of his intended stay in the United States (from 10/1/07 – 9/19/10). 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 if the beneficiary's duties will be performed in more than one location.

The petitioner provided sample copies of contracts between it and various clients for whom the beneficiary may perform services. The petitioner indicated that the beneficiary would perform some work at the petitioner's business location, but would also be available for work on various client projects at multiple, but unspecified, locations. In the Aytes memorandum cited at footnote 1, the director has the discretion to request that the employer, who will employ the beneficiary in multiple locations, submit an itinerary. The documentation contained in the record does not establish a complete itinerary for the beneficiary from October 1, 2007 through September 19, 2010. According to the petitioner, the beneficiary would work for a period of time in Oregon at the petitioner's offices, and at other unspecified locations as client needs dictated. Accordingly, the petitioner has failed to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition must be denied.<sup>2</sup>

As noted above, the petitioner provided copies of sample contracts that it has entered into with various clients. The petitioner did not provide a specific contract with an associated work order under which the beneficiary would work. Thus, it cannot be determined from the record precisely what duties the beneficiary would perform for the end user of his services, and it cannot accordingly be determined that the offered position qualifies as a specialty occupation. The petitioner indicates that the beneficiary will also perform labor on in-house projects at its Oregon offices, but it has failed to provide evidence of any such in-house projects; it is impossible to determine the nature or complexity of the duties to be performed. Simply going on the 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 190 (Reg. Comm. 1972)).

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> 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

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<sup>1</sup> See 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).

<sup>2</sup> 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."

documentation from the end users of the beneficiary's services (the petitioner's clients) that establish the specific duties the beneficiary would perform under contract, 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). As such, the petition must be denied.

The director also denied the petition because the petitioner had not filed an LCA valid for all locations of employment. The AAO agrees. The petitioner filed an LCA valid for Beaverton, OR. The petitioner stated that the beneficiary will initially work at its offices in Beaverton, OR, although the record does not establish that the petitioner has in-house employment available for the beneficiary. The record establishes, based upon the nature of the petitioner's business, that the beneficiary will work at various unidentified locations for the petitioner's clients. Without an itinerary of employment covering the entire period of employment requested, the record does not establish that the petitioner has filed an LCA valid for all locations of employment. For this additional reason, the petition may not be approved.

The burden of proof in this proceeding 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.