

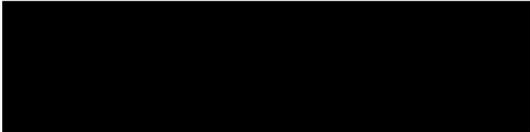
PUBLIC COPY

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

DQ

U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 MASS, 3/F
Washington, DC 20536



File: SRC 01 267 50276 Office: TEXAS SERVICE CENTER Date: 0000 00 00

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

SELF REPRESENTED

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision will be withdrawn and the case remanded to the director for entry of a new decision.

The petitioner is a Georgia technology services and software development company. It has 20 employees and a gross annual income of \$1,200,000. It seeks to temporarily employ the beneficiary as a systems analyst for a period of three years.

The director determined that the petitioner had not indicated that a baccalaureate degree was the requisite educational minimum for entry into the job. On appeal, counsel asserts that it erred in not noting the minimum educational qualifications on the initial filing and submits an amended cover letter.

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.

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 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.

The issue in this proceeding is whether the petitioner has established that the proffered position is a specialty occupation. In the original petition received by the Texas Service Center on September 4, 2001, the petitioner described the duties of the proffered position as follows:

- a) Analyze, design, develop and maintain various applications systems using VB, Java, XML, HTML.
- b) Expertise in data modeling and process requirements at enterprises and at project levels. Experience with open interface and other information tools.
- c) Develop applications using open system tools on web servers including client/server, processing, multi-threading, IPCs, shared memory, NT servers.
- d) Experience designing and developing applications in diverse industries including software, internet based financial and manufacturing industry.
- e) Develop test suites for performing regression testing, and for integration testing and prepare user documentation for installing system software.

The petitioner also stated the following:

To perform the above mentioned duties, a strong background in client/server business systems and extensive systems and application programming is required because the worker must understand the business systems in order to do an objective analysis of the system, convert the system to it[s] logical mathematical model and appropriate physical model and develop the necessary application software. For this position of system analyst, we require, at the minimum, two years of industry experience in systems software development in the above-mentioned job duties.

On October 9, 2001, the director asked for further information with regard to whether the proffered position was a specialty occupation. Since the petitioner had indicated that the minimum requirement for the position was two years of experience, the

director requested more evidence that the proffered position was a specialty occupation.

In response, on October 15, 2001, the petitioner submitted a copy of the Labor Condition Application (LCA) that it submitted to the U.S. Department of Labor prior to submitting the instant petition to the Bureau. The petitioner noted that the LCA was for a systems analyst occupation that required a bachelor's degree in engineering along with at least two years of relevant work experience. The petitioner submitted other documentation with regard to the beneficiary's academic credentials and prior work experience, including an educational equivalency document that stated the beneficiary's university studies in India were the equivalent of a bachelor's degree in instrumentation engineering from a regionally accredited U.S. college or university.

On December 13, 2001, the director denied the petition. The director noted that the petitioner had not provided to the Bureau any documents that it had submitted to the Department of Labor, and that the petitioner had not established that the position of systems analyst required at least a baccalaureate degree for entry into the profession.

On appeal, the petitioner states that the omission of the minimal educational requirements in the original cover letter for the petition was an oversight, and submits a second cover letter that was identical in contents to the initial cover letter with one exception. The petitioner added the phrase "A bachelor's degree in engineering" to the following sentence:

To perform the above mentioned duties, a bachelor[']s degree in engineering and a strong background in client/server business systems and extensive systems and application programming is required because the worker must understand the business systems in order to do an objective analysis of the system, convert the system to it[s] logical mathematical model and appropriate physical model and develop the necessary application software.

Upon review of the record, the director's statement with regard to the lack of evidence as to the LCA submitted to the Department of Labor appears to be unfounded. The record contains a copy of the 3-page certified LCA submitted by the petitioner to the DOL. The record reflects that the petitioner faxed this document to the director on October 15, 2001, in its response to the Bureau's request for further evidence. The LCA clearly indicates that the petitioner identified the position as a systems analyst, although the document does not list any specific educational requirements. The record is not clear as to why either the petitioner or the director would view the DOL document as probative in the present proceeding.

With regard to the director's comment that the record does not establish that the position of systems analyst is a specialty occupation, the record as presently constituted has yet to establish the actual position in the instant petition. For example, the job description submitted by the petitioner is a generic one, with no particular references to any specific job, work project, location of work, or level of responsibility of the beneficiary. In addition, based on information on the petitioner's website, the petitioner appears to be an agent who hires individuals for placement with other firms needing computer and system analyst skills on a contract, contract-to-hire or permanent employee basis. The petitioner also refers to its employees as "consultants" on its website. See consulting and staff augmentation sections at <http://unilinxinc.com> (available as of May 21, 2003.)

If the petitioner is the hiring agent for other firms and not the actual employer of the beneficiary, the Bureau must examine the ultimate employment of the alien, and determine whether the actual position qualifies as a specialty occupation. Cf. *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000).¹ Without more persuasive evidence, the Bureau cannot determine whether the petitioner has established the regulatory criteria of 8 C.F.R. 214.2(h)(2)(i)(F). This regulation states, in part:

A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, in place of, the employer as its agent. A petition filed by a United States agent is subject to the following conditions;

(1) An agent performing the function of an employer must guarantee the wages and other terms and conditions

¹ In *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), the court held that the Bureau reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing foreign nurses require a bachelor's degree for employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the nurses to the United States for employment with the agency's clients. While this decision was directed at nurses, it can be applied to other employment classifications.

of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.

(2) A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.

Since the issues of the actual position and the actual employer were not addressed by the director in her denial of the instant petition, the case will be remanded to the director for further examination of these issues prior to the issuance of a new decision. The petitioner should be provided the opportunity to provide further evidence with regard to the actual employer and with regard to whether the actual position is a specialty occupation.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The decision of the director is withdrawn. The case is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.