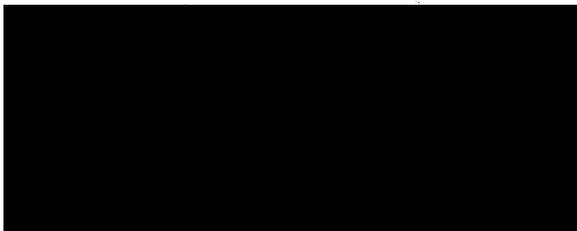




U.S. Citizenship
and Immigration
Services

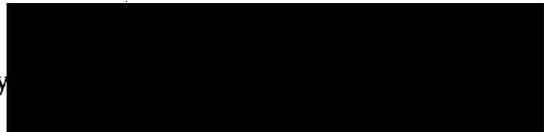
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FILE: LIN 02 168 50888 Office: NEBRASKA SERVICE CENTER

Date: SEP 07 2004

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:

SELF-REPRESENTED

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.

for Robert P. Wiemann, Director
Administrative Appeals Office

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Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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 computer consulting firm. It seeks to employ the beneficiary as an electronics engineer and 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 I-129 petition on the ground that the offered position did not qualify as a specialty occupation. On appeal, the petitioner submits a brief with additional information, and states that the proffered position is a specialty occupation.

The first issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in 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:

[A]n 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 are 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 proceedings before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's requests for additional evidence; (3) the petitioner's response to the director's requests; (4) the director's denial letter; and (5) the Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an electronics engineer. Evidence of the beneficiary's duties includes the I-129 petition with attachment and the petitioner's response to the director's requests for evidence. According to this evidence the beneficiary would: confer with data processing and project managers to obtain information on limitations and capabilities of existing systems and capabilities required for data processing projects and projected workloads; analyze information to determine, recommend, and plan the layout for the type of computers and peripheral equipment, or modifications to existing equipment and systems that will provide adequate capability for proposed projects or workloads, efficient operation, and effective use of allotted space; evaluate factors such as the number of departments serviced by data processing equipment, reporting formats required, volume of transactions, time requirements, cost constraints, the need for security, and access restrictions to determine hardware configurations and the feasibility of expanding or enhancing computer operations; enter data into the computer terminal to store, retrieve, and manipulate data for analysis of system capabilities and requirements; specify power supply requirements and configuration; recommend purchase of equipment to control dust, temperature, and humidity in the area of system installation; train users to use new or modified equipment; answer client inquiries; diagnose system hardware, software, and operator problems; recommend or perform minor remedial actions to correct problems based on knowledge of system operation; assign and coordinate work projects such as converting to new hardware or software; designate staff assignments; establish work priorities; evaluate cost and time requirements; review completed projects or computer programs to ensure that goals are met and that programs are compatible with other programs already in use; conduct fault diagnostics and basic troubleshooting on desktop products, file servers, web servers, and e-mail servers; install, test and configure desktop products including networked environments; install, test, and operate basic operating system software, and standard applications; perform integration tasks that include the installation/configuration of computer system hardware, operating system software, third party software, network related equipment, and ground based satellite systems including functional tests of hardware/software systems and seeking active resolution to problems; evaluate and test vendor supplied software packages for standalone and networked computers to determine compatibility with existing systems, ease of use, and whether the software meets user needs; consult with the customer concerning maintenance of the computer system; coordinate installation of various system components; assist in technical support of strategic programs, design, and the definition of networked computer system requirements for complex customer systems; and analyze existing networked computer systems and make

recommendations for improvement of infrastructure, technology, operational capability, reliability and performance including troubleshooting, and root cause analysis. The petitioner requires a university degree in a computing related field coupled with at least two years experience in computer hardware and networking systems for entry into the offered position.

The director found that the offered position did not qualify as a specialty occupation and failed to meet any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). On appeal, the petitioner submits a brief stating that the proffered position qualifies as a specialty occupation.

The director noted in his determination that the petitioner was twice requested to submit evidence in the form of contracts showing that it provides services to other businesses, and showing where and for whom the beneficiary will be working, and establishing the nature of the services that the beneficiary would be providing. The petitioner submitted only a detailed job description in response to the first request for evidence (RFE). In response to the second RFE, the petitioner claimed that it was "sending herewith . . . a copy of our information systems development agreement with a local Springfield, MO-based company;" however, no agreement was attached to the letter. In his decision, the director found that the petitioner had failed to provide the requested contract. All evidence submitted in response to a CIS request must be submitted at one time. The submission of only some of the requested evidence will be considered a request for a decision based on the record. 8 C.F.R. § 103.2(b)(11).

On appeal, the petitioner insisted that it had already submitted a contract in response to the second RFE, and provided two contracts; however, the validity of both contracts is in doubt. The first contract was dated and signed by the petitioner in "October 1999;" however, the customer's signature is dated April 29, 2002. Further, the petitioner's Federal Employer Identification Number (EIN) as listed on the contract does not match a second claimed EIN listed on the H-1B labor condition application Form ETA 9035 (LCA) or a third claimed EIN listed on the Form I-129.

The second contract is a development agreement that was "made the 5th day of February 2002 (the 'Effective Date')" between the petitioner and Q Resources, Inc.; however, the validity of this second contract is also in doubt. First, the petitioner's own public website (www.technocrest.com) indicates that its Chief Operating Officer holds an executive position at Q Resources, Inc. Accordingly, it is not clear that the petitioner is truly separate from its claimed client. Second, the petitioner's telephone number is listed on this contract as (417) 887-4744 and the fax is listed as (417) 886-5248; however, these do not match the petitioner's telephone and fax numbers listed on its stationary masthead.

On June 23, 2003, the Administrative Manager for the petitioner submitted a written case status request to CIS. He used stationary with a masthead for "Healthcrest Enterprises, Inc.", a separate company founded and run by the petitioner's Chief Operating Officer. The telephone and fax numbers listed on the petitioner's February 2002 contract match the telephone and fax numbers listed for Healthcrest Enterprises, Inc. According to information in the record, both organizations share identical premises and many of the same staff. Upon review of the entire record, it is unclear where the beneficiary would be working, for whom he would be working, or what services he would be performing. In fact, it is not clear that the petitioner is an actual U.S. business with any clients.

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). Based on the conflicting information provided by the petitioner, and without valid contracts documenting the kind of services that the beneficiary would be providing, the petitioner has failed to establish that the proffered position is a specialty occupation.

Beyond the director's decision, the petitioner has not established that it is a valid U.S. employer or that it has the ability to hire, fire, pay, supervise, or otherwise control the work of any of its employees within the meaning of 8 C.F.R. § 214.2(h)(4)(ii). As discussed above, the contracts that the petitioner submitted were not properly signed and dated and do not reflect the petitioner's EIN as stated on the LCA or on the Form I-129. Further, the record does not establish that the petitioner is an entity separate from its clients or from Healthcrest, Inc., the company with which it appears to share premises. In addition, without evidence of employment in the form of valid contracts, it is not possible to determine whether there is an actual job for the beneficiary upon his or her entry into the United States and whether the alien is coming temporarily to perform services in a specialty occupation. 8 C.F.R. § 214.2(h)(1)(ii)(B)(1).

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 failed to sustain that burden and the appeal shall accordingly be dismissed.

ORDER: The appeal is dismissed. The petition is denied.