

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D2

FILE: LIN 03 208 53771 Office: NEBRASKA SERVICE CENTER Date: **APR 21 2005**

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:

[REDACTED]

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, Director
Administrative Appeals Office

DISCUSSION: The director of the 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 information technology (IT) consulting firm, headquartered in Chicago, Illinois. It provides IT services and personnel to its clients and seeks to hire the beneficiary as a Senior Consultant for its enterprise software business. The director denied the petition because he determined the certified Labor Condition Application (LCA) submitted by the petitioner did not identify the specific location(s) where the beneficiary was to perform the duties of the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief and additional evidence. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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, a petitioner must establish that its position meets one of four 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 to extend its employment of the beneficiary as an “SAP BW Solution Lead, Senior Consultant.” Evidence regarding the proffered position and the duties associated with that position include: the Form I-129; the petitioner’s June 16, 2003 letter of support accompanying the Form I-129; and counsel’s November 17, 2003 response to the director’s request for evidence. As stated by the petitioner at the time of filing, the duties of the proffered position require the beneficiary to provide functional and technical leadership for SAP BW and general business intelligence consulting services, with the following specific responsibilities:

- Project management of SAP BW engagements;
- BW Solution Architecture;
- Full life cycle project implementation work, including project preparation, requirements capture, design, blueprinting, testing, data conversion, ABAP development, training, documentation, end user support and upgrade;
- Sales and marketing support; and
- Recruiting support.

To determine whether a particular job qualifies as a specialty occupation, 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 specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. 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.

In the instant case, the petitioner is a business providing contracted IT services to a range of business clients. Petitioners that seek to employ H-1B beneficiaries for contract work with other businesses must submit the contracts and/or statements of work under which the services of these beneficiaries will be provided, to ensure that the employment to be performed qualifies as a specialty occupation. *See Defensor v. Meissner*. However, at the time of filing, the petitioner did not identify the business(es) for which the beneficiary would perform services, nor submit any contracts or statements of work identifying the specific tasks to be performed by the beneficiary for such businesses.

The director’s request for evidence identified this deficiency and specifically asked the petitioner to provide an “itinerary of definite employment, listing the location(s) and organization(s) where the beneficiary [would] be providing services” and “copies of contractual agreements between the petitioner and the companies for

which the petitioning organization (the beneficiary) [would] be providing services.” In counsel’s response to the director, she identified a Trenton, New Jersey business at which the beneficiary was then working, but stated that the petitioner could not provide an employment itinerary, as it could not predict where the beneficiary might be sent at the conclusion of his assignment. Counsel provided no contract or statement of work covering the beneficiary’s New Jersey employment, although she did submit invoices related to that employment. The AAO notes that counsel did not submit, nor mention, the contract signed by the petitioner with a Chicago firm for the beneficiary’s services, dated November 17, 2003 -- the same date as counsel’s response to the director -- and offered on appeal.

As the beneficiary was working in New Jersey, the director denied the petition because the certified LCA submitted by the petitioner at the time of filing listed Chicago as the beneficiary’s sole employment site. Citing the regulatory requirements at 29 C.F.R. § 730(c)(1)(v), the director determined that the petitioner had failed to submit a certified LCA valid for all intended locations of H-1B employment. He also noted that, although the petitioner had filed an amended Form I-129, with a new LCA, to reflect the change in worksite, the new LCA had not been submitted in response to his request for evidence.

On appeal, counsel submits a certified LCA covering the beneficiary’s work locations in Chicago and Trenton. However, she contends that the beneficiary’s primary employment location is Chicago, supporting her statements with evidence documenting the beneficiary’s residence and work in the Chicago area. Included within the materials submitted by counsel is a copy of the consulting agreement with a Chicago business just noted.

Based on the record before it, the AAO finds the director to have correctly identified the deficient nature of the LCA submitted by the petitioner at the time of filing. Moreover, the petitioner’s failure to submit any contracts and/or statements of work under which it intended to provide the beneficiary’s services or to adequately describe any of the beneficiary’s non-IT responsibilities precludes it from establishing its proffered position as a specialty occupation, as discussed below.

The record offers little information regarding the duties of the proffered position. The beneficiary’s employment contract provides no information on his specific duties, stating only that he will perform “all of the duties that may be required as a(n) Senior SAP Consultant . . . and perform such other duties as they are assigned” The responsibilities listed in the petitioner’s June 16, 2003 letter of support offer little more, providing only an overview of the position’s duties. While the AAO understands Systems, Applications, and Products in Data Processing (SAP) programs to provide integrated software to support data sharing within businesses, the petitioner’s general references to the position’s SAP-related responsibilities do not describe the duties of the beneficiary’s ultimate employment. They cannot substitute for the specific job descriptions provided by the contracts or work statements that would control how the beneficiary’s IT skills would be used within a particular client’s business. Further, although it appears that the position’s non-IT duties -- sales, marketing and recruitment support -- would be performed directly for the petitioner, rather than under contract, the AAO finds the petitioner has failed to indicate how the beneficiary would be involved with these responsibilities. As a result, there can be no identification of the specific tasks the beneficiary would be expected to carry out.

To make a determination as to whether employment qualifies as a specialty occupation, the AAO requires a task-specific description of a position's duties. In the instant case, the AAO has no such description, either of the beneficiary's contract IT assignments -- as described in client contracts and/or statements of work -- or of the position's non-IT responsibilities. As a result, the AAO is precluded from conducting an analysis of the proffered position under the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and must conclude that the petitioner has failed to establish its employment as a specialty occupation. Moreover, the petitioner's failure to submit requested evidence that precludes a material line of inquiry -- the employment itinerary and contracts requested by the director -- is, itself, a basis for denying the instant petition. 8 C.F.R. § 103.2(b)(14).

Although on appeal counsel submits a contract and work statement covering the petitioner's employment with a Chicago-based firm, these documents cannot be used to establish the duties of the proffered position. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and the AAO will not now consider it on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The AAO also notes counsel's submission of a new certified LCA on appeal, covering both of the beneficiary's work locations. A new LCA cannot, however, remedy the deficient LCA submitted with the Form I-129 at the time of filing. Although the director indicated a new LCA had not been submitted in response to his request for evidence, the AAO notes that the purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit existed at the time of filing. 8 C.F.R. § 103.2(b)(8). Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether a proffered position is a specialty occupation. *See Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Therefore, an LCA that was certified subsequent to the filing of the instant petition will not be considered on appeal, nor could it have been considered by the director, even if submitted in response to his request for evidence.

The AAO is aware that the beneficiary has previously been approved for H-1B status. However, the approval of prior H-1B petitions filed on behalf of the beneficiary do not provide a basis on which to approve this petition. CIS is not bound to approve applications or petitions where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d). Further, the AAO's authority over the director is comparable to the relationship between a court of appeals and a district court. Even if a director had approved a nonimmigrant petition on behalf of a previous beneficiary, the AAO would not be bound to follow that decision. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D.La.), *aff'd*, 248, F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

For the reasons already discussed, the AAO concurs with the director's finding that the petitioner has failed to establish that its position of senior consultant is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

LIN 03 208 53771

Page 6

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.