

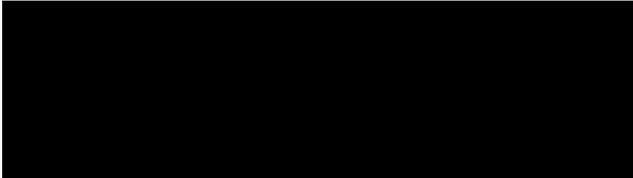
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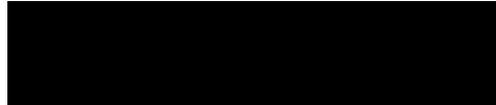


*Dr*

FILE: WAC 04 163 50781 Office: CALIFORNIA SERVICE CENTER

Date: DEC 22 2005

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

*Robert P. Wiemann*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a software consulting company. It seeks to employ the beneficiary as a software engineer and to classify him 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 petition on the ground that the record failed to establish that 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.

As provided in 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 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 proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, a letter from the petitioner on appeal, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner describes itself as a company that provides software development and consulting services to businesses and individuals. In a letter accompanying Form I-129, which was filed on May 17, 2004, the petitioner stated that it wished to hire the beneficiary as a software engineer and described the duties of the position as follows:

[The beneficiary] will be involved in developing applications providing solutions to customized management functions, availability checks, collective billing, billing according to customer schedules and material pricing according to customer's requirement. He will make use of C, C++, VC++, TCP/IP, Object Oriented Analysis & Design, Operating System Internals, Shell Scripting and Perl Programming along with his other software development skills.

The beneficiary has the requisite educational degree for the position, the petitioner indicated, by virtue of his bachelor of technology in electrical engineering from the Indian Institute of Technology in Kanpur, India, granted on May 29, 1999. The petitioner also submitted its offer of employment letter to the beneficiary (dated April 26, 2004 and signed by the beneficiary on May 3, 2004) which states that the beneficiary would "provide software consultancy services to our prestigious clients," without identifying any specific clients. The certified Labor Condition Application (LCA) submitted with the petition identifies San Jose, California, as the beneficiary's work location and has a validity period of April 1, 2004 to March 31, 2007.

In its response to the RFE, filed on July 6, 2004, the petitioner provided a more comprehensive listing of the duties of the proffered position, which include the following:

- Design and develop various software modules in C, C++ and Java using Object Oriented Analysis & Design.
- Investigate and analyze systems for problems and develop solutions for advanced programming glitches.
- Review system requirement, specifications and design to assure functionality.
- Design and develop Device Drivers for Windows and Unix/Linux platforms.
- Design and develop software modules for Windows Embedded Operating System.
- Network protocol implementations on Windows and Unix/Linux platforms.
- Web-enabled on-line application development.
- Design and develop complex multi-threaded industry standard software solutions.
- Debugging various software modules using Microsoft Visual Studio debugger and Microsoft WinDbg.
- Provide solutions to customer issues.

The petitioner submitted a second LCA with its response to the RFE, identifying the beneficiary's work location as New York City. The second LCA, dated June 11, 2004, has a validity period of June 11, 2004 to March 31, 2007. The petitioner also submitted a "purchase order" contractual agreement with one of its clients which provides that the petitioner is to complete a project ("Devise Driver Developer") for the client and identifies the beneficiary as the individual the petitioner will furnish to "work on the project," beginning around October 11, 2004. The purchase order was signed by the petitioner on June 11, 2004 and by a representative of the client on June 15, 2004. The document is unclear, however, as to the identity of the client. The purchase order appears on the company letterhead of [REDACTED] located in

Hopewell Junction, New York, and is signed by a representative of [REDACTED]. In the body of the document, however, the client is identified as [REDACTED].

In his decision the director found that there was no written contract between the petitioner and the beneficiary stating his job duties and terms of employment. The petitioner's identification of San Jose and New York as the location of the beneficiary's employment, the director declared, did not substantiate the actual address of the place the beneficiary would be working. The director also found that there was no comprehensive description of the beneficiary's proposed duties from an authorized representative of the client for whom the work would be performed. Based on these evidentiary shortcomings, the director determined that the petitioner had failed to establish that the proffered position meets the statutory definition of a specialty occupation.

On appeal the petitioner has resubmitted copies of its offer of employment letter to the beneficiary and the purchase order contract between the petitioner and the client for whom the beneficiary would perform the project entitled "Devise Driver Developer." Based on the contents of the offer of employment letter – which lists six duties of the position to be performed for the petitioner's clients; references the forthcoming H-1B visa application; states the terms of employment including compensation, benefits, proprietary information restrictions, and other matters; and is signed by the petitioner's representative and by the beneficiary – the AAO concludes that the letter constitutes an employment contract between the petitioner and the beneficiary.

The AAO agrees with the director, however, that the employment contract does not identify the location of the beneficiary's employment. Nor is the purchase order between the petitioner and the client clear in this regard. As previously discussed, the document identifies both [REDACTED] and [REDACTED] as the client, and the petitioner has provided no explanation for the conflicting information nor specifically named the client in any of its letters to the service center and the AAO. While the purchase order is on letterhead of [REDACTED] located in Hopewell Junction, New York, the document does not otherwise identify that address as the work location. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92, (BIA 1988). The AAO concludes that the purchase order document does not establish the work location where the beneficiary would be performing his services, and also fails to properly identify the client for whom the services will be performed. Accordingly, the AAO cannot verify that the information provided by the petitioner in the LCA(s) as to the work location of the beneficiary is correct.

The AAO also agrees with the director that there is no description of the beneficiary's job duties from the client for whom they would be performed. In *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000), a federal appeals court held that the Immigration and Naturalization Service (now Citizenship and Immigration Services) reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the alien workers in a particular position require a bachelor's degree for all employees in that position. The court determined that the degree requirement should not originate with the employment agency that brought the aliens to the United States for employment with the agency's clients. In the instant petition, the record contains a purchase order contract between the petitioner and its client [REDACTED] for whom the beneficiary would work, but no description of the beneficiary's proposed duties from an authorized representative of the client. Without such a description, the petitioner has not demonstrated that the work the beneficiary

would perform for the client requires a bachelor's degree in a specific specialty, thereby qualifying the position as a specialty occupation.

Based on the foregoing analysis, the AAO determines that the record fails to establish that the beneficiary would be performing services in a specialty occupation, as defined in section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1).

Furthermore, the instant petition may not be approved because the certified LCA identifying New York as the work location was dated June 11, 2004 (with a validity period from that date through March 31, 2007). The instant H-1B petition was filed on May 17, 2004, nearly a month before the certification date of the LCA. As provided in the regulation at 8 C.F.R. § 214.2 (h)(4)(i)(B)(1), however, the petitioner must obtain the requisite labor certification "[b]efore filing a petition for H-1B classification." Since the requisite labor certification was not obtained before the instant H-1B petition was filed, the petition must be denied on this basis as well.

For the reasons discussed above, the petitioner has failed to establish the beneficiary's eligibility for classification as a nonimmigrant worker employed in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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