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U.S. Citizenship
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Services

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DA



FILE: WAC 04 167 50956 Office: CALIFORNIA SERVICE CENTER Date: DEC 23 2008

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:



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 California Service Center 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 business providing professional engineering and consulting services, with four employees. It seeks to employ the beneficiary as a network systems and data communications analyst 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 because he determined the petitioner had failed to establish the proffered position as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B, with counsel's brief and previously submitted documentation. The AAO reviewed the record in its entirety prior to reaching its decision.

The record contains two Labor Condition Applications (LCA), the first submitted at the time of filing and the second in response to the director's request for evidence. The petitioner's initial LCA indicates that the beneficiary's work would be performed at its Thousand Oaks headquarters rather than the client's Pasadena office. The second LCA corrects that oversight, indicating both locations as work sites. Although this second LCA was submitted in response to the director's request, it must be discounted. As it was certified by the Department of Labor subsequent to the date the petitioner filed the Form I-129, it fails to satisfy the filing requirements for H-1B petitions. 8 C.F.R. § 214.2(h)(4)(i)(B).

The AAO will, however, accept the petitioner's first LCA. Although it fails to identify both work sites, each of these offices is located in the Los Angeles commuting area and shares the same prevailing wage. Accordingly, the deficiency in the petitioner's first LCA does not prevent it from supporting the Form I-129 filed by the petitioner.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a 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 Act, 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

- (1) the theoretical and practical application of a body of highly specialized knowledge,
and
- (2) 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 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 term "degree" in the above criteria is interpreted by Citizenship and Immigration Services (CIS) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. 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 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.

The petitioner states that it is seeking the beneficiary's services as a network systems and data communications analyst. Evidence of the beneficiary's duties includes: the Form I-129; a May 17, 2004 letter of support from the petitioner accompanying the Form I-129; and the petitioner's July 15, 2004 response to the director's request for evidence.

As stated by the petitioner at the time of filing, the duties of the proffered position would require the beneficiary to:

- Analyze and develop various network systems/data communications to satisfy user requirements and procedures;
- Design and test operational procedures, identifying and troubleshooting problems to automate processing or to improve existing systems;
- Upgrade systems and correct errors to maintain systems after implementation; and

- Prepare technical reports, serving as liaison between U.S. clients and the Indian Software Development Company.

To determine whether the employment just described qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

At the time of filing, the petitioner indicated that the beneficiary would work off-site for one of its major clients in Pasadena, California. In its response to the director's request for evidence, the petitioner expanded on its description of the beneficiary's responsibilities for this client, indicating that the beneficiary would work only one day a month at its headquarters, spending the rest of his time in Pasadena. It described three specific contracts under which the beneficiary would provide support services to the Pasadena client and noted that he would also assist with other projects related to this client, as well as provide in-house assistance on software applications.

As outlined by the petitioner, the beneficiary's services would be instrumental in the deployment of two specific software applications it has developed for its Pasadena client, requiring him to:

- Provide user support for these software applications;
- Write queries and manage the two databases developed by the petitioner's software;
- Provide the client's management with reports on the software applications;
- Manage and support the LAN and workstations where the petitioner's software is installed;
- Interface with the client's software development team, as well as that at the petitioner's location in India;
- Compile client user and management requests into documents for the development team; and
- Provide any LAN/WAN maintenance necessary to keep the two software applications functioning.

In support of its description of its business dealings with its Pasadena client, the petitioner submitted copies of the contracts under which it has developed the software applications noted above, as well as a maintenance contract for another of its software applications that, it states, covers the type of services to be provided by the beneficiary. However, neither these contracts, nor the petitioner's preceding description of the duties the beneficiary would perform for its Pasadena client establish the proffered position as a specialty occupation.

To determine whether a proffered position qualifies as a specialty occupation, CIS must examine the ultimate employment of an alien. *Cf. Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000). However, the record offers no documentation of the duties to be performed by the beneficiary for the petitioner's Pasadena client. There is no statement of work, executed in conjunction with a maintenance agreement, or letter of agreement that documents the specific duties the beneficiary would be required to perform.

In *Defensor v. Meissner*, the court held that the Immigration and Naturalization Service, now CIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the alien beneficiaries required a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the alien beneficiaries to the United States for employment but with the agency's clients. As the record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of the petitioner's client, the petitioner has not demonstrated that the work that the beneficiary would perform at the client site would qualify as a specialty occupation. The AAO notes that, at the time it responded to the director's request for evidence, the petitioner and its client had not yet signed maintenance agreements for the two software applications that would be supported by the beneficiary.

Without documentation of the duties the beneficiary would perform for the petitioner's client, the AAO is unable to determine whether they represent employment that would normally impose a degree requirement on the beneficiary, as required to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). This lack of evidence also prevents the petitioner from establishing that its degree requirement is the norm within its industry or that the proffered position imposes a degree requirement based on its unique nature or complexity, the two prongs of the second criterion. Without a list of duties, no employment can be compared to the proffered position, nor can it be established as unique or complex.

The third and fourth criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) allow a petitioner to qualify a proffered position as a specialty occupation based on its normal hiring practices or the exceptional specialization and complexity of its duties. However, even if the petitioner had previously hired degreed individuals to fill the proffered position, it could not establish the position as a specialty occupation on this basis. Without evidence of the proffered position's duties, the petitioner would be unable to prove that it would require the theoretical and practical application of a body of highly specialized knowledge, as required for classification as a specialty occupation. The same holds true for the fourth criterion. Without a statement of work or letter of agreement documenting the beneficiary's employment with the Pasadena client, the petitioner cannot establish that the duties of the proffered position are either specialized or complex. Accordingly, the proffered position has not been established as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel contends that the proffered position's research and analysis duties establish a degree requirement and that the evidence submitted by the petitioner qualifies it as a specialty occupation under all four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). She references the petitioner's submission of a letter from the chair of the computer science department at Seattle Pacific University as proof of the proffered position's complexity, as well as to establish the petitioner's degree requirement as the norm within the computer information systems industry. However, counsel's assertions and the opinions of the Seattle Pacific University professor are based on the petitioner's description of the duties to be performed by the beneficiary, a description that has been discounted by the AAO. Accordingly, neither is persuasive in establishing the proffered position as a specialty occupation.

The AAO notes that the basis for its decision differs from that relied upon by the director. However, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

For reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation. Therefore, the AAO shall not disturb the director's denial of the petition.

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.