

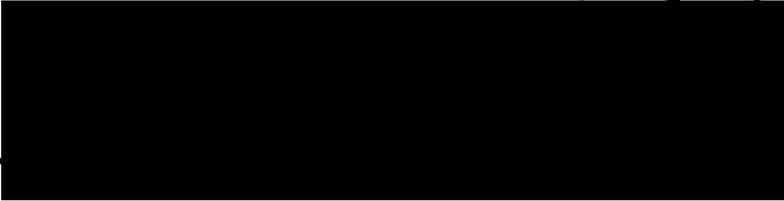
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U.S. Citizenship
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Services

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MAR 30 2005

FILE: LIN 04 167 50609 Office: NEBRASKA SERVICE CENTER Date:

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 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.

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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 consulting firm, providing contract employees to its clients. It seeks to hire the beneficiary as a programmer analyst. The director denied the petition because he determined the petitioner had not established that the contract position to be filled by the beneficiary qualified as a specialty occupation. He also noted that the certified Labor Condition Application (LCA) submitted by the petitioner did not cover the contract employment.

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 for evidence; (3) the director's denial letter; and (4) Form I-290B, with a letter from the petitioner 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 the beneficiary's services as a programmer analyst. Evidence regarding the proffered position and the duties associated with that position include: the Form I-129; the petitioner's May 4, 2004 letter of support accompanying the Form I-129; the petitioner's October 1, 2004 response to the director's request for evidence; and the Form I-290B, with a November 9, 2004 letter from the petitioner. As stated by the petitioner, the duties of the proffered position would require the beneficiary to:

- Develop, test and document computer programs, applying a high-level knowledge of programming techniques and computer systems;
- Convert project specifications and statements of problems and procedures to detailed logical flow charts for coding into computer language; and
- Develop and write computer programs to store, locate, and retrieve specific documents, data and information.

However, the petitioner's statement that it is seeking a programmer analyst and its generic description of the duties to be performed by the beneficiary do not establish the proffered position as a specialty occupation. To determine whether a particular job qualifies as a specialty occupation, CIS does not rely on a position's title or a generic position description. Instead, 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.

To establish that a contract position qualifies as a specialty occupation, a petitioner must submit evidence documenting the specific duties to be performed by a beneficiary for a client that has contracted for his or her services. However, at the time of filing, the petitioner in the instant case provided no evidence concerning the client for which the beneficiary would perform work, nor any indication of the specific duties involved. As already noted, the petitioner is a consulting firm that provides contract employees to meet its clients' technology needs. 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*.

The director's request for evidence identified this deficiency and specifically asked the petitioner to provide the "documentation entered into or issued by your client(s) which will establish the actual duties to be performed" by the beneficiary. In response, the petitioner provided a letter of intent from Borganism, LLC indicating that the beneficiary would perform services for one of Borganism's clients in Albany, New York. However, the letter of intent supplied by Borganism stated only that the beneficiary would work as a contractor for the "Sidney on SQL (SOS)" project. It provided no listing of the duties required by the SOS project, nor any contract with its unnamed client that identified these duties. Accordingly, the director denied the petition because he had no information allowing him to determine whether the beneficiary's specific employment qualified as a specialty occupation. While it did not provide a basis for his denial, the director also noted that the beneficiary's ultimate employment in Albany, New York was not covered by the certified LCA submitted by the petitioner, which identified employment in the Kansas City metropolitan area.

On appeal, as the employment opportunity with Borganism no longer exists, the petitioner submits another consulting contract for the beneficiary's services. This contract with Dynamic Software Consultants, Inc. (DSC) now identifies a Kansas City, Kansas employment location and is accompanied by a basic description of the duties to be performed. However, on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may also not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). As a result, the AAO will not consider the new employment the petitioner has found for the beneficiary, nor whether the duties outlined for this position meet the requirements for a specialty occupation. When there are material changes in the terms and conditions of a beneficiary's employment, a petitioner must file a new or amended Form I-129 with the service center where the original petition was filed. *See* 8 C.F.R. § 214.2(h)(2)(i)(E).

The AAO notes the petitioner's statements in the record regarding the approval of other Form I-129s that it has filed with CIS. However, such approvals do not provide a basis on which to approve the instant 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).

The AAO also notes the evidence submitted by the petitioner regarding its degree requirement for the position of programmer analyst, including the documentation submitted to establish that other of the petitioner's employees hold baccalaureate degrees and the Internet job postings for programmer analysts. However, the AAO finds this evidence, which was submitted prior to the director's decision, insufficient to establish the proffered position as a specialty occupation when the record lacks a description of the duties of the proffered position. As already noted, CIS does not rely on the title of a position, but on its specific duties, to determine

whether it qualifies as a specialty occupation, i.e., requires the theoretical and practical application of a body of specialized knowledge and the attainment of a baccalaureate or higher degree, or its equivalent, for entry into the occupation.

For the reasons already discussed, the AAO concurs with the director's finding that the petitioner has failed to establish that its position of programmer analyst is a specialty occupation. Accordingly, 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.