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U.S. Citizenship  
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Services

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*Dr*

FILE: LIN 04 259 50147 Office: NEBRASKA SERVICE CENTER Date: **AUG 07 2006**

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.



Robert P. Wiemann, Chief  
Administrative Appeals Office

**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 software consulting business that seeks to employ the beneficiary as a programmer analyst. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 the petitioner has not demonstrated that an employer-employee relationship exists or that it has a specialty occupation available for the beneficiary at the location specified on the Labor Condition Application (LCA). On appeal, the petitioner submits a letter.

The AAO will first address the director's conclusion that the petitioner has not demonstrated that an employer-employee relationship exists.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), a United States employer is defined as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The director found that a bona fide employer-employee relationship does not exist because the petitioner has not provided contractual agreements between the petitioner and its clients that specify the beneficiary as the person to be performing the services.

The record contains evidence including a sample employment agreement, which is signed by the petitioner and its employees after such employees are approved for H-1B status, and a quarterly federal tax return with the petitioner's Employer Identification Number, to show that it meets the definition of U.S. employer, pursuant to 8 C.F.R. § 214.2(h)(4)(ii). In view of the foregoing, the petitioner has established an employer-employee relationship with the beneficiary. The petitioner, therefore, has overcome this portion of the director's objections.

The AAO will now address the director's conclusion that the petitioner has not demonstrated that the proffered position is 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.

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 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 additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a programmer analyst. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's September 16, 2004 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to the petitioner's September 16, 2004 letter, the beneficiary would perform duties that entail: requirement analysis; function design; software development; software testing; software implementation; and software maintenance. In its response to the director's request for evidence, the petitioner also described the proposed duties as follows:

- Carry out design of the system/application at a high level and finalization of the same with the client/stake holders;
- Carry out detailed system design and generate inputs for the software development phase;
- Develop the software using the specifications generated in the detailed design stage;
- Carry out unit, system, regression, and acceptance testing on the application developed;
- Deploy the software and provide implementation support to the client; and

- Provide support on the application as per user requirements.

The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in information systems, computer science, or an equivalent thereof.

The director found that the proffered position was not a specialty occupation because the petitioner had not provided sufficient documentation of the beneficiary's specific duties to be performed while working for the third party end-client.

On appeal, the petitioner states, in part:

We know for sure that Hoffman Estates is one place where the beneficiary will perform work. Hence the LCA states the same. . . . It is not possible to specify the exact places and times where the beneficiary will work besides at Hoffman Estates, since clients themselves cannot project their specific requirements so much ahead of time, and whether the work has to be carried out at our offices or theirs, let alone the fact that neither they nor we can fix professional assignments ahead of time for a person who is not yet a legal worker in the US, It should also be recognized that as we obtain new corporate clients new workplaces will come up; When the beneficiary has to move to a new place we will obtain a fresh LCA for the same.

At the outset, the record contains deficiencies regarding the petitioner's claimed revenue. The petitioner's president asserts on appeal that the petitioner's revenue for 2004 was \$3.7 million. He, however, does not provide any evidence in support of his assertion such as federal income tax returns. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, information on the petition that was signed by the petitioner's president on September 17, 2004, reflects the petitioner's gross annual income as \$0.925 million. The record contains no explanation for this inconsistency. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with the petitioner that the proffered position is a specialty occupation. A review of the Computer Programmers job qualifications in the *Handbook*, 2006-2007 edition, finds that there are many training paths available for computer programmers, and the associate degree is a widely used entry-level credential. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a programmer/programmer analyst job. Further, although the petitioner asserts that the beneficiary will perform work at its premises in Hoffman Estates, the proposed duties indicate that he will also be performing duties for the petitioner's clients. As such, the petitioner must provide a comprehensive description of the proposed duties from an authorized representative of the petitioner's client, where the beneficiary will ultimately perform the proposed duties. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000) held that for the

purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a “token employer,” while the entity for which the services are to be performed is the “more relevant employer.” The *Defensor* court recognized that evidence of the client companies’ job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. Without a comprehensive description of the proposed duties from an authorized representative of the petitioner’s client, where the beneficiary will ultimately perform the proposed duties, it cannot be determined whether the beneficiary will work in a specialty occupation.

The evidence of record, including the subcontractor agreements and work orders, establish that the petitioner will act as the beneficiary’s employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.<sup>1</sup> *See* 8 C.F.R. § 214.2(h)(4)(ii).

Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment if the beneficiary’s duties will be performed in more than one location.

In his request for evidence, the director asked for copies of contractual agreements and the beneficiary’s employment itinerary, listing the locations and organizations where the beneficiary would be providing services. In the Aytes memorandum cited at footnote 1, the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised his discretion to request contracts reflecting the dates and locations of employment and an employment itinerary. The itinerary submitted by the petitioner does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of the beneficiary’s employment by the petitioner. As the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), the petition must be denied.

The director also found that the LCA was not valid for all work locations. The AAO agrees. The LCA lists the work location as Hoffman Estates, Illinois. The letter of support filed with the petition indicates that the beneficiary will work both on-site and off-site. When the beneficiary is working off-site, the petitioner has not demonstrated that he will be working within the geographical area covered by the LCA. The record contains contracts and work orders for various locations including Oklahoma, Missouri, and Maryland. To the extent that beneficiary will provide services in locations such as those reflected in the contracts and work orders, the work would not be covered by the Hoffman Estates location on the LCA.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director’s denial of the petition.

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<sup>1</sup> *See also* Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term “Itinerary” Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

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.