

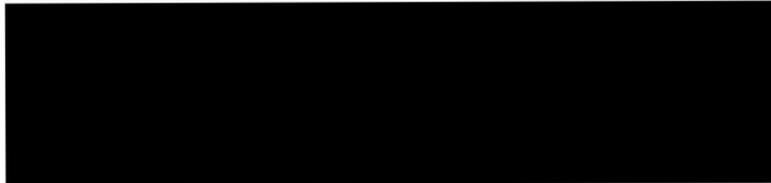
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**U.S. Citizenship
and Immigration
Services**

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FILE: LIN 05 001 52433 Office: NEBRASKA SERVICE CENTER

Date: **AUG 24 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:



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 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 software consulting and development company that seeks to employ the beneficiary as a systems analyst. The petitioner, therefore, endeavors to classify the beneficiary 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, finding that the petitioner had failed to submit evidence that a position involving work at an H-1B level actually exists. The director found that the petitioner had not provided a contract of definite work and implicitly found that the petitioner had failed to provide an itinerary of services or engagements. The director also found that the petitioner had not established that the petitioner would employ the beneficiary at the location listed on the certified labor condition application.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's RFE response and supporting documentation; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n 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, 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 proposed position.

In its November 23, 2004 response to the director’s request for evidence, the petitioner stated that the duties of the proposed position would include writing logical and physical data base descriptions involving location, space, access method, and security; analyzing software requirements to determine the feasibility of the design within time and cost constraints; formulating and designing new software systems using scientific analysis and mathematical models; developing applications and specifying identifiers to manage the system; implementing and conducting unit and system testing for quality assurance; reviewing project requests describing user needs, estimating time and costs required for accomplishing completion of projects; and providing technical training to users and information technology staff.

In his October 7, 2004 request for evidence, the director requested an itinerary of definite employment, which was to include the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venue, or location where the beneficiary’s services would be performed. If services were to be performed at the petitioner’s worksite, the petitioner was to indicate as such on the itinerary. The itinerary was to include all service planned for the entire requested period of employment—November 1, 2004 through November 1, 2007.

In order to ascertain whether a position actually existed, the director also requested copies of any contractual agreements, as well as any related work orders between the petitioner and the companies for whom the beneficiary would provide services. The director also requested a copy of the beneficiary’s most recent tax return and a copy of each employee’s Form W-2.

In response, counsel submitted a letter from the petitioner, a copy of a “Master Sub-Contractors’ Agreement,” a “Contract Agreement” between the petitioner and the beneficiary, copies of the petitioner’s tax returns, a copy of the petitioner’s business plan, and a letter from Automatic Data Processing, Inc. (ADP), which indicated that the petitioner had contracted with ADP to provide payroll services for the petitioner.

The director denied the petition, essentially finding that the petitioner had not demonstrated that it would employ the beneficiary in a specialty occupation, and that the petitioner had failed to submit an itinerary of services or engagements.

On appeal, counsel asserts that the proposed position qualifies for classification as a specialty occupation, and submits evidence to demonstrate that the duties of the proposed position qualify for such classification. For example, counsel submits job postings from various companies to prove that the petitioner’s baccalaureate degree requirement is an industry standard.

Counsel also resubmitted the certified labor condition application on appeal. However, the director's denial did not state that the record lacked this document.¹ Rather, the director found that the petitioner had not demonstrated that there was a full-time position available at the location listed on the labor condition application—Leawood, Kansas.

The AAO will first consider the issue of whether the petitioner meets the definition of a United States employer. The term "employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii):

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 evidence of record establishes 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.² 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.

As noted previously, the director asked for the beneficiary's employment itinerary in his request for evidence. The itinerary was to include the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venue, or location where the beneficiary's services would be performed. If services were to be performed at the petitioner's worksite, the petitioner was to indicate as such on the itinerary. The itinerary was to include all service planned for the entire requested period of employment—November 1, 2004 through November 1, 2007.

The itinerary submitted by the petitioner is deficient, as the record does not demonstrate that the proposed position existed at the time the petition was filed. As noted by the director in his denial, the "Master Sub-Contractors' Agreement" submitted by the petitioner in response to the director's request for evidence did not identify any specific work to be completed. This agreement clearly stated that "[a]ll services to be performed by Subcontractor shall be described in a Purchase Order." However, no purchase orders (other than a blank form) were submitted. Moreover, the director noted that both parties to the agreement had not signed it.³

¹ In his appellate brief, counsel stated the following: "Since your decision seems to indicate that the certified ETA 9035 was missing or misplaced, I have enclosed a duplicate copy of the document."

² 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).

³ Counsel submits a signed copy of this agreement on appeal. The AAO notes that the representative of Infinite Computer Solutions' signature is dated November 3, 2004. However, when this agreement was

The AAO notes further that this contract did not exist at the time the petition was filed, which precludes the petitioner from using it to establish that a position in fact existed at the time the petition was filed. The Form I-129 was received at the service center on September 30, 2004, and the petitioner signed the "Master Sub-Contractors' Agreement" on November 3, 2004. Therefore, it cannot use this agreement to demonstrate that an itinerary of employment existed on September 30, 2004.

CIS regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm.). Moreover, as stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), "[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition." The record fails to establish that the petitioner had an itinerary of services or engagements for the beneficiary at the time the instant petition was filed.

Counsel submits a work order on appeal. However, that work order is also dated November 3, 2004, subsequent to the date the petition was filed, so the petitioner cannot use this work order to establish an itinerary of services or engagements.

The director also implicitly found that the petitioner would not employ the beneficiary in a specialty occupation. The AAO agrees with the director that the record does not establish that the beneficiary would be employed in a specialty occupation. There is no description of the beneficiary's job duties from the client company, as required to show that the beneficiary would be performing services that require a baccalaureate or higher degree in a specific specialty.

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th 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.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I).

Accordingly, the petitioner has not demonstrated that, on the date the petition was submitted, it would employ the beneficiary in a specialty occupation for the three years specified on the petition. The record fails to establish that the petitioner had an itinerary of services or engagements for the beneficiary at the time the petition was filed. For these reasons, the petition must be denied.

first submitted to CIS on December 1, 2004, this signature was not present.

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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.