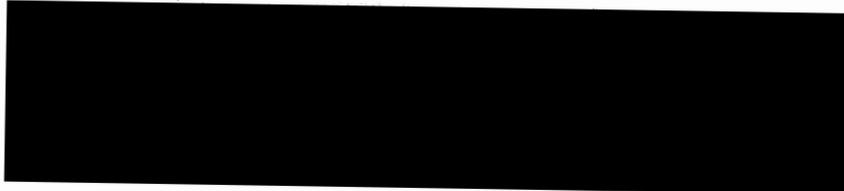




U.S. Citizenship
and Immigration
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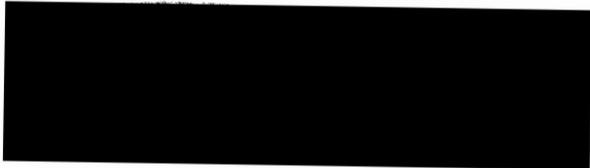
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FILE: LIN 04 800 51898 Office: NEBRASKA SERVICE CENTER Date: DEC 13 2006

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, 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 involved in the technology software consultancy and outsourcing solutions market and 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 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 determined that the petitioner had not established that it qualified as a United States employer and that the proffered position did not qualify as a specialty occupation. The director also found that the petitioner had not established that it had a Labor Condition Application (LCA) valid for the place of employment. The petition was accordingly denied. On appeal, the petitioner states that the director erred in denying the petition and indicates that the petitioner qualifies as an employer, that the position offered is a specialty occupation, and that the beneficiary will perform services in the locations specified on the LCA.

The first issue to be determined is whether the petitioner qualifies as a United States employer.

Pursuant to 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 record establishes that the petitioner will be the employer of the beneficiary, and the director's finding to the contrary shall be withdrawn. The petitioner submitted a vendor/independent contractor services agreement whereby the petitioner would provide consulting and programming services to SGS Software Associates, Inc. (SGS). Under the terms of that agreement, the petitioner will provide personnel to work on projects for SGS. The agreement specifically provides that the petitioner is being retained by SGS as an independent contractor and that the petitioner's personnel shall not be deemed employees of SGS. The petitioner will hire the beneficiary, will pay the beneficiary, has the right to fire the beneficiary and will otherwise have control over the beneficiary's work. The fact that the beneficiary may perform services at a client facility and be subject to that client's work rules and regulations does not change the employer/employee relationship existing between the petitioner and beneficiary. The petitioner will engage the beneficiary to work in the United States, has an employer-employee relationship with the beneficiary, and has an Internal Revenue Service Tax identification number. The petitioner qualifies as a United States employer in this instance, and the director's decision to the contrary is withdrawn.

The next issue to be determined is whether 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.

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, 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 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 of the beneficiary's duties includes the Form I-129 petition with attachment and the petitioner's response to the director's request for evidence. According to evidence provided by the petitioner the beneficiary would:

- Perform automated and manual testing of client-server and web applications;
- Perform mapping requirements/use cases to test cases and create test plans and test cases using Requirement Gathering Silk Test 5.5/6.0;
- Write manual and automated test scripts in Load Runner 6.5, Test Director 7.6, Winrunner – TSL, Astra Quick Test Pro 6.5, and Rational Studio;

- Handle defect-tracking tools for finding and reporting bugs to release software successfully;
- Test director 6.0 Regression testing for monthly builds;
- Perform project planning and quality assurance of client/Server and Web based application techniques and computer system using the aforementioned software tools and languages;
- Install and test programs and handle defect tracking tools at the user site; and
- Monitor performance of the program after implementation.

The petitioner requires a minimum of a bachelor's degree in computer science, engineering, information systems or a directly related field for entry into the proffered position.

As previously noted, the petitioner submitted an agreement between itself and SGS whereby the petitioner would provide personnel to perform work on projects for SGS. Pursuant to the terms of that agreement, the petitioner executed a work order on January 5, 2005 whereby the petitioner agreed to provide programmer/analyst services from January 5, 2005 through January 5, 2007.

The beneficiary's position has been identified by the petitioner as a computer programmer/analyst. The Department of Labor's *Occupational Outlook Handbook (Handbook)* notes that although there are many training paths available for programmers due to varied employer needs, the level of education and experience employers seek has been rising due to the growing number of qualified applicants and the specialization involved with most programming tasks. Bachelor's degrees are commonly required, although some programmers may qualify for certain jobs with 2-year degrees or certificates. The associate degree is a widely used entry-level credential for prospective computer programmers. In the absence of a degree, substantial specialized experience or expertise may be needed, and employers appear to place more emphasis on previous experience even when hiring programmers with a degree. Some computer programmers hold a college degree in computer science, mathematics, or information systems, while others have taken special courses in computer programming to supplement degrees in other fields. Thus, it is evident that while some programmer positions justify the hiring of an individual with a baccalaureate level education, others require only an associate's degree or some other form of certification.

The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at multiple work locations to perform services established by contractual agreements with third-party companies. 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. The petitioner, however, has provided no contracts, work orders or statements of work from the

party for whom the beneficiary will actually perform services (SGS) specifically describing the duties the beneficiary would perform and, therefore, has not established the proffered position as a specialty occupation. The "Scope of Work" detailed on the Work Statement to the parties contract gives a brief overview of the work to be performed but does not specifically detail the work to be performed by the beneficiary on a daily basis. The petitioner provides greater detail of the work to be performed in its response to the director's request for evidence. The work order indicates that the work to be performed will be done at the petitioner's work location. The petitioner states, however, in its response to the director's request for evidence, that the beneficiary will install and test programs, and handle defect tracking tools at the user (SGS) site. Thus, in order to determine whether the proffered position qualifies as a specialty occupation, it is necessary for SGS to provide a detailed description of the work to be performed at the SGS site. As the record contains insufficient evidence of the duties to be performed from the end user of the beneficiary's services (SGS), the AAO cannot analyze whether the 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). The petition must, therefore, be denied.

The director also found that the petitioner had not provided an LCA valid for all work locations. The record reflects that the beneficiary will perform services in Minneapolis, MN and will spend 20 per cent of her time at the user's site in East Windsor, NJ. The LCA is not valid for the New Jersey location. Thus, the petitioner has not filed an LCA valid for all the work locations. For this additional reason the petition may not be approved.

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 failed to sustain that burden.

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