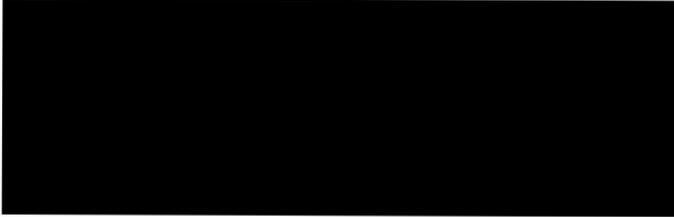




U.S. Citizenship
and Immigration
Services

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FILE: LIN 05 015 50907 Office: NEBRASKA SERVICE CENTER Date: **JUL 12 2006**

IN RE: Petitioner:
Beneficiary:



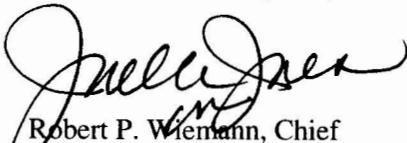
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials 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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a computer consulting company. It seeks to employ the beneficiary as a Java programmer analyst and to continue his classification 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 on the ground that the record failed to establish that the petitioner meets the requirements of a "United States employer" vis-a-vis the beneficiary.

As defined in the regulation 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.

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.

As provided in 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 evidence (RFE); (3) the petitioner’s response to the RFE; (4) the director’s decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In Form I-129 the petitioner stated that it is a computer consulting company, established in 2001, with 48 employees and gross annual income of \$577,999. The petitioner indicated that it wished to employ the beneficiary for three years, at an annual salary of \$60,000, as a Java programmer analyst. Copies of the beneficiary’s educational degrees were submitted, showing that he graduated from Nagarjuna University in India with a bachelor of technology (computer science engineering) on December 24, 1998, and from Bradley University in Peoria, Illinois, with a master of science on May 18, 2002. Documentation submitted with the petition also showed that the beneficiary was granted H-1B classification pursuant to a petition filed by another U.S. company prior to the filing of the instant petition.

In the RFE the director noted that the petitioner is located in Nashua, New Hampshire, while the beneficiary’s work location is identified as Hoffman Estates, Illinois. The director requested the petitioner to provide the name and work address of the business for which the beneficiary would be working, as well as a copy of the contract between the petitioner and the business located in Hoffman Estates, Illinois. “The contract should be specific as to the dates of employment [and] duties of the position,” the director advised, “as well as address the supervision, control and pay of the beneficiary.”

In response to the RFE the petitioner provided a copy of a contract between the petitioner and [REDACTED] of St. Louis, Missouri, dated October 11, 2004, which states that the petitioner will provide the services of the beneficiary for a one-year period through October 11, 2005, with possible extensions, to perform services such as computer programming, analysis, design, coding, testing, documentation, and software and hardware consulting for a client of [REDACTED]. The contract states that the beneficiary “shall work under the direction of the management of the client” and indicates that the petitioner is responsible for paying the beneficiary. The petitioner also submitted a letter from [REDACTED] dated December 3, 2004, stating that it was subcontracting the beneficiary’s services to one of its clients in Hoffman Estates, Illinois. The letter declared that the beneficiary “is currently on assignment as a Lead Java Programmer/Developer” from October 11, 2004 to October 11, 2005, with a possible extension of six to twelve months. The client company to whom the beneficiary is assigned was identified in the record as SBC. Copies were submitted of the beneficiary’s identification card and a company printout, both of which identify the beneficiary as a contractor of SBC.

In his decision the director found that the evidence of record did not establish that the petitioner will supervise and control the beneficiary's work. The director determined that petitioner failed to show that it meets the requirements of an employer-employee relationship as defined in 8 C.F.R. § 214.2(h)(4)(ii).

On appeal counsel acknowledges that the beneficiary's daily tasks at the work site will be controlled and supervised by the client company's project manager, but contends that the petitioner retains all other indicia of an employer because it pays the beneficiary; has the authority to fire him, transfer him to a different project or client site, or to an in-house project; and has the authority to terminate the contract with NextGen on 15 days notice. Counsel asserts that the documentation of record establishes an employer-employee relationship between the petitioner and the employer, and that the petition should therefore be approved.

The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at one or more work locations to perform services established by contractual agreements for one or more third-party companies. The petitioner has provided no contracts, work orders, or statements of work, however, that describe the duties the beneficiary would perform for its client(s). Without such evidence it cannot be determined that the proffered position is a specialty occupation.

In *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000), a federal appeals court 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 court recognized that evidence of the client companies' job requirements is critical when the work is to be performed for entities other than the petitioner, and held that the legacy Immigration and Naturalization Service reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the alien workers in a particular position require a bachelor's degree for all employees in that position.

As previously noted, the director advised the petitioner in the RFE to submit a copy of its contract with the business located in Hoffman Estates, Illinois, where the beneficiary would work, and that the contract "should be specific as to . . . [the] duties of the position." The petitioner responded with a copy of its contract with ██████ of St. Louis, Missouri, which is not the beneficiary's work location and not the company for which he would render services. The ██████ contract states generally that the beneficiary would provide computer programming, analysis, design, coding, testing, documentation, and software and hardware consulting services, but does not identify the ultimate client (CSB) or work location (Hoffman Estates, Illinois), and provides no details about the services to be provided that are specific to the client. Though the letter from ██████ dated December 3, 2004, indicates that the beneficiary's services had been subcontracted to a client company in Hoffman Estates, Illinois, it does not identify the client and provides no details about the duties of the position except to say that the beneficiary was serving "as a Lead Java Programmer/Developer." Most importantly, there is no description of the beneficiary's job duties from the client company to whom the beneficiary is subcontracted, as required to show that the beneficiary is performing services that require a baccalaureate or higher degree in a specific specialty.

As the record does not contain any documentation that establishes the specific duties the beneficiary performs under contract for the client company, CSB, in Hoffman Estates, Illinois, the AAO cannot analyze whether these duties require at least a baccalaureate degree or the equivalent in a specific specialty, as required for the proffered position to be classified as a specialty occupation. Accordingly,

the petitioner has not established that the proffered position qualifies as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A), or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(1)(ii)(B)(I).

The record indicates that the beneficiary has previously been employed in H-1B status by another U.S. employer. Notwithstanding the approval of a prior H-1B petition, the current petition cannot be approved unless the record establishes current eligibility. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). The AAO is not required to approve applications or petitions in which eligibility has not been demonstrated merely because of a prior approval that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). For the reasons previously discussed, the record in the instant proceeding does not show that the proffered position qualifies as a specialty occupation.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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