



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

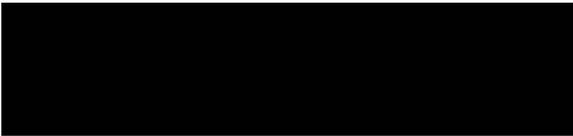
PUBLIC COPY



D2

FILE: LIN 04 186 52521 Office: NEBRASKA SERVICE CENTER Date: **JUL 14 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 an information technology services company 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 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 because the petitioner did not establish that the ultimate employer of the beneficiary would be employing the beneficiary in a specialty occupation. On appeal, the petitioner submits a brief.

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 June 11, 2004 letter in support of the petition; and the petitioner's response to the director's request for evidence. In its letter of support, the petitioner stated that the beneficiary would perform duties that entail: analyzing client information systems, client business and financial management procedures; identifying any hardware, software and organizational problems; designing, developing, testing, implementing and participating in the quality assurance process for business systems software applications using various hardware and software; designing, coding and implementing different applications using information security tools and routing technologies; and working on a team on in-house project to design, implement, document and perform the necessary upgrades. The petitioner submitted a labor condition application (LCA) stating that the beneficiary would be working in Mt. Prospect, IL. In response to the director's request for evidence, the petitioner stated that the beneficiary's duties would entail: studying and analyzing customer specifications; documenting discussions and software problems from customers; designing the solutions and code and implementing the different computer applications by using the latest computer skills and techniques; and handling all types of correspondence and communication with the client by meeting and visiting its customers and understanding the function of the products. The petitioner provided a purchase order from a client, indicating that the beneficiary would be working at the client site in Massachusetts, performing services for the client's client. The petitioner also provided a new LCA for the Massachusetts location. On appeal, the petitioner provides another agreement with a different client, which states that the beneficiary would be performing services at the petitioner's office for the client, with a different set of duties from those in the previous two descriptions. The petitioner stated in its letter of support that a qualified candidate would possess a bachelor's degree in computer science, engineering, math, physics, or business.

The director stated that CIS must examine the ultimate employment of the alien to determine whether the position qualifies as a specialty occupation. The director referred to the contract submitted in response to his request for evidence and stated that it provided no information regarding the business where the beneficiary would ultimately work. The director referred to the case of *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), which found that absent a contract with the actual employer stating the duties to be performed pursuant to the contract, CIS cannot determine that a position qualifies as a specialty occupation. The court found that a petitioner that is an employment contractor is merely a "token employer." The entity ultimately employing the alien or using the alien's services is the "more relevant employer." *Defensor v. Meissner, id.* In other words, the employment contractor's client is the "more relevant employment," whether the alien will be working within the employment contractor's operations on projects for the client or whether the alien will work at the client's place of business.

Thus, when a petitioner is an employment contractor, the petitioner must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties from the entity ultimately employing the alien or using the alien's services. From this evidence, CIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge,

and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.¹

On appeal, the petitioner states that it is the actual employer of the beneficiary, with responsibility for paying, hiring, firing and providing benefits for the beneficiary, and that it is not an agent. The petitioner also states that the duties to be performed by the beneficiary “clearly demonstrate the specialist nature of the position offered.”

As noted above, the petitioner provided LCA’s for two different work locations (with the original petition and in response to the director’s request for evidence) and contracts with two different companies (in response to the director’s request for evidence and on appeal), and three different descriptions of the position (with each of the petitioner’s submissions). The AAO cannot determine based on this record where the beneficiary would actually be performing services or what duties he would perform, and therefore, whether the position is a specialty occupation under any of the criteria specified in 8 C.F.R. § 214.2(h)(4)(iii)(A). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As the petitioner has not established that the beneficiary will be employed in a specialty occupation, 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 not sustained that burden.

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

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and “might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition.” *See id.* at 387.