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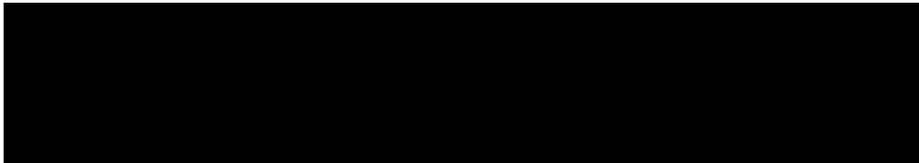
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FILE: WAC 04 168 53658 Office: CALIFORNIA SERVICE CENTER Date: JUN 23 2006

IN RE:



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 of the California Service Center 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 consulting firm, was established in 1997, has annual gross income of \$1.2 million, and 5 employees. It provides software development and consulting. It seeks to employ the beneficiary as a full-time programmer analyst 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 based on his determination that the petitioner had not established that it would employ the beneficiary in a specialty occupation. The director found that the petitioner had not established that it would be the beneficiary's employer. The director found that the petitioner had not employed the beneficiaries for whom previous petitions were approved and concluded that the petitioner would not employ the beneficiary in a specialty occupation.

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 director's RFE, dated October 13, 2004; (3) the director's denial letter; and (4) Form I-290B, with the petitioner's appeal statement, and new and previously submitted evidence.

The first issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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.

In order to determine whether a position is a specialty occupation, CIS must examine the ultimate employment of the alien. To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner states that it is seeking the beneficiary’s services as a Programmer Analyst. Evidence of the beneficiary’s duties includes: the Form I-129, and the petitioner’s support letter. The petitioner indicated the duties of the proposed position as follows:

- Plan, develop tests and document computer programs applying knowledge of programming techniques and computer systems;
- Evaluate user requests for new or modified programs;
- Consult with users to identify current procedures and clarify program objectives; and
- Formulate plan outlining steps required to develop program using structured analysis and design.

To determine whether the duties described are those of a specialty occupation, the AAO first considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)& (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining these criteria include: whether the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports that the industry requires a degree; whether the industry’s professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ and recruit only degreed individuals.” *See Shanti, Inc. v.*

Reno, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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 for third-party companies. The petitioner, however, has provided no contracts, work orders or statements of work describing the duties the beneficiary would perform for its clients and, therefore, has not established the proffered position as a specialty occupation.

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)(1).

The AAO turns to a consideration of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The AAO finds that the duties of the position, though generally described, are comparable to those of a computer programmer. The 2006-2007 Internet version of the *Handbook’s* description of computer programmer, at <http://www.bls.gov/oco/oc0s110.htm>, states:

Computer programmers write, test, and maintain the detailed instructions, called programs, that computers must follow to perform their functions. Programmers also conceive, design, and test logical structures for solving problems by computer. Many technical innovations in programming—advanced computing technologies and sophisticated new languages and programming tools—have redefined the role of a programmer and elevated much of the programming work done today. Job titles and descriptions may vary, depending on the organization. In this occupational statement, *computer programmers* are individuals whose main job function is programming; this group has a wide range of responsibilities and educational backgrounds.

Computer programs tell the computer what to do—which information to identify and access, how to process it, and what equipment to use. Programs vary widely depending on the type of information to be accessed or generated. For example, the instructions involved in updating financial records are very different from those required to duplicate conditions on an aircraft for pilots training in a flight simulator. Although simple programs can be written in a few hours, programs that use complex mathematical formulas whose solutions can only be approximated or that draw data from many existing systems may require more than a year of work. In most cases, several programmers work together as a team under a senior programmer's supervision.

...

Many programmers update, repair, modify, and expand existing programs. When making changes to a section of code, called a routine, programmers need to make other users aware of the task that the routine is to perform. ...

Programmers test a program by running it to ensure that the instructions are correct and that the program produces the desired outcome. If errors do occur, the programmer must make the appropriate change and recheck the program until it produces the correct results. This process is called testing and debugging. ...

Computer programmers often are grouped into two broad types—applications programmers and systems programmers. *Applications programmers* write programs to handle a specific job, such as a program to track inventory within an organization. They also may revise existing packaged software or customize generic applications which are frequently purchased from vendors. *Systems programmers*, in contrast, write programs to maintain and control computer systems software, such as operating systems, networked systems, and database systems. These workers make changes in the instructions that determine how the network, workstations, and central processing unit of the system handle the various jobs they have been given and how they communicate with peripheral equipment such as terminals, printers, and disk drives. Because of their knowledge of the entire computer system, systems programmers often help applications programmers determine the source of problems that may occur with their programs.

Regarding training of computer programmers, the *Handbook* states:

Although there are many training paths available for programmers, mainly because employers' needs are so varied, 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. Most community colleges and many independent technical institutes and proprietary schools offer an associate degree in computer science or a related information technology field.

Employers primarily are interested in programming knowledge, and computer programmers can become certified in a programming language such as C++ or Java. College graduates who are interested in changing careers or developing an area of expertise also may return to a 2-year community college or technical school for additional training. In the absence of a degree, substantial specialized experience or expertise may be needed. Even when hiring programmers with a degree, employers appear to place more emphasis on previous experience.

The *Handbook* indicates that a baccalaureate degree in a specialty is not normally required to enter the occupation. The *Handbook* indicates that some programmers may qualify for certain jobs with 2-year degrees or certificates. The 2-year degree is a widely used entry-level credential for prospective computer programmers. The *Handbook* is clear that a degree or its equivalent is not the normal minimum requirement for entry into the occupation. Because the petitioner has failed to submit a job description from the ultimate work location, the AAO is unable to analyze whether a two- or a four-year degree might be required. Accordingly, the AAO finds that the petitioner has failed to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

The AAO now turns to a consideration of whether the proffered position may qualify as a specialty occupation under either of the prongs of the second criterion at 8 C.F.R. § 214.2(h)(4)(ii)(A)(2) – establish that a degree requirement is common to the industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that it can be performed only by an individual with a degree.

Regarding parallel positions in the petitioner's industry, the petitioner submitted 5 Internet job postings for programmer/analyst positions. 4 of the advertisements requiring degrees are from employers in fields unrelated to the petitioner's. One is a medical-surgical products and services company; one is a developer of building products; one is a music distributor with 2,000 employees; and one is a mall-based specialty retailer with over 450 locations. The other advertisement seeks a candidate with website development experience to work on its website. The petitioner is an employment contractor and seeks to place the beneficiary with a third party to perform unspecified job duties.

Further, the duties of the advertised positions are not specific enough to compare with the job duties of the proffered position. Thus, the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations. No other evidence of record establishes the first prong of the second criterion. Therefore, the petitioner has failed to establish that a degree requirement is common to the industry in parallel positions among similar organizations.

As noted above, the petitioner has described duties normally performed by computer programmers. However, the duties of the proffered position, as listed, are so generic that they provide no meaningful description of the tasks that the beneficiary would perform for the petitioner or its clients on a daily basis. The petitioner provided no documentation to establish the complexity of the position. In the response to the RFE, counsel simply referenced the *Handbook* to indicate that a degree is required by most employers for programmer analyst positions. The AAO finds the petitioner to have provided no evidence that would support a finding that the proffered position is so complex or unique that it can be performed only by an individual with a degree. Therefore, the record also fails to establish that the position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – the position is so complex or unique that it can be performed only by an individual with a degree. Accordingly, the petitioner has not established its position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. To determine the petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant case, the petitioner did not provide any such information. Accordingly, the petitioner failed to establish its normal hiring practices with regard to the proffered position and has not established it as a specialty occupation on this basis.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires that a petitioner establish that the nature of the specific duties of the position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. As previously noted, the AAO requires information regarding the specific duties of a proffered position to make its determination regarding the position's degree requirements, if any. In the instant case, the record offers a general description of the type of work to be performed, rather than a description of the proffered position's duties as they relate to the petitioner's client's business. As the petitioner has provided no description of the specific tasks to be performed by the beneficiary, the record contains no evidence to establish the specialized and complex nature of those tasks. The record does not establish the complexity of the project work which the beneficiary will perform. Therefore, the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The director found that the proffered position could not be considered a specialty occupation because the petitioner failed to establish that it has available employment, and therefore was not the 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 evidence of record, including the employment agreement, 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.¹ See 8 C.F.R. § 214.2(h)(4)(ii). As the beneficiary will be placed at multiple work locations, including third-party company locations, the petitioner is also an agent, as described at 8 C.F.R. § 214.2(h)(2)(i)(F):

A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent

The regulation governing agents at 8 C.F.R. § 214.2(h)(2)(i)(F)(1) requires the submission of an itinerary of definite employment to cover the entire period of time requested in the petition. Employers, pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), must also 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 the beneficiary's employment itinerary for contracts of work to be performed. In response to the RFE the petitioner provided an employment "itinerary" indicating that the beneficiary will be employed at the petitioner's office in Sacramento, CA. However, this statement conflicts with the employment contract between the petitioner and the beneficiary indicating that the beneficiary will be working off site for the petitioner's clients. The record contains no documentation regarding the dates and locations of the beneficiary's employment or contracts of work to be performed. Accordingly, the petitioner

¹ 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).

has failed to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and 8 C.F.R. § 214.2(h)(2)(i)(F)(I) and the petition must be denied.²

The director also questioned the petitioner's documentation and specifically noted that although the petitioner has filed at least 46 H-1B petitions, the majority of which have been granted, on the I-129 it claimed 5 employees. The AAO notes that in its appeal statement the petitioner states that it has 13 employees and 8 independent contractors. The AAO also notes that the payroll record the petitioner submitted is for only one payroll period from December 01, 2004 to December 22, 2004, and indicates 5 employees. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.

² As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."