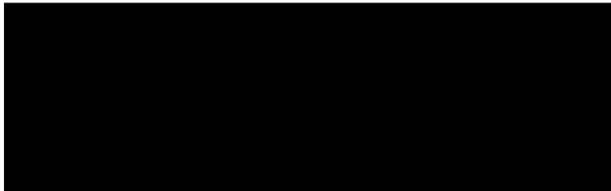


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U.S. Citizenship
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FILE: WAC 04 249 51703 Office: CALIFORNIA SERVICE CENTER Date: JUN 26 2006

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 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 an information technology and consultancy company. It seeks to employ the beneficiary as a programmer analyst and to extend 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 grounds that the record failed to establish that the proffered position qualifies as a specialty occupation or that the petitioner was in compliance with the terms of the Labor Condition Application (LCA) certified by the Department of Labor.

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 notice of decision;

and (5) Form I-290B and an appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

In its initial submission, including Form I-129 and an accompanying letter, the petitioner described itself as a business information technology company that provides enterprise resource planning (“ERP”), e-commerce, and information technology (“IT”) services to clients in the United States and around the world. The petitioner stated that it was established in 1968, had 18 offices and 1,700 employees at the time of filing, and earned gross annual income of \$250 million. The petitioner indicated that it wished to employ the beneficiary as a programmer analyst, and described the duties of the position as follows:

Our Programmer Analysts are responsible for analyzing a client’s business technology needs and proposing a plan that best meets those needs. Thereafter, the Programmer Analyst will design and develop a computer application or system that meets the client’s needs in the most efficient and cost effective manner. Undertaking implementation, installation and customization of the business solution based on the specific needs and goals of the client is also necessary. Finally, the Programmer Analyst is responsible for testing the solution to determine whether the client’s objectives have been achieved.

The beneficiary is qualified for the position, the petitioner declared, by virtue of his bachelor’s degree in engineering (electronics and communication) in 1988 from Delhi University in India, together with his experience in the computer field.

In his RFE the director advised the petitioner to submit copies of contractual agreements it had with client companies for which the beneficiary would be providing consulting services, including statements of work, work orders, or other appendices to the contracts specifying the duties the beneficiary would perform, his dates of service, as well as his work and pay schedules. In reply to the RFE the petitioner indicated that the beneficiary was assigned to a client, Conexant Systems, Inc. (Conexant), located in Newport Beach, California, and submitted a copy of Conexant’s purchase order for 350 hours (approximately two months) of consulting services from the petitioner at \$113/hour. The petitioner asserted that Conexant had committed to an additional 350 hours of consulting services, and was in the process of finalizing the agreement. Once the Conexant project is complete, the petitioner stated, the beneficiary would be placed in a new project.

In his decision the director indicated that, although the record contained a summary of the terms of employment indicating that the petitioner had hired the beneficiary and would pay his salary, the beneficiary’s services would be provided to the client company, Conexant. The purchase order did not identify the specific project where the beneficiary would work, however, and there was no comprehensive description of the beneficiary’s job duties from an authorized representative of Conexant. Without such information, the director concluded, the petitioner had not demonstrated that the proffered position meets the statutory definition of a specialty occupation. The director also ruled that the purchase order from Conexant was insufficient evidence to determine that the petitioner was in compliance with the wage and work location conditions for the three-year period certified in the LCA.

On appeal the petitioner reiterates that the beneficiary will be working at the client’s offices in Newport Beach, California, but asserts that the petitioner has an employer-employee relationship with the beneficiary and meets the definition of a U.S. employer at 8 C.F.R. § 214.2(h)(4)(ii). The petitioner

declares that the proffered position qualifies as a specialty occupation because it requires at least a bachelor's degree in a field such as engineering, computer science, statistics, mathematics, physical and life sciences, economics and commerce, or business. The duties of the programmer analyst position are listed by the petitioner as follows:

- Analyze a client's data processing requirements to determine the computer software that best meets those needs.
- Design and develop computer applications and systems using software that will process data in the most reliable, efficient, and cost effective manner.
- Plan, develop, test, and document computer programs, applying knowledge of programming techniques and computer systems.
- Analyze and develop specifications for a project to determine project feasibility, cost and time requirements, compatibility with the current system, and present computer capabilities.

The petitioner describes the client company, Conexant, as a developer, integrator, and manufacturer of personal communications electronics, including semiconductor device sets for the broadband industry, and a provider of programming services for internal information technology systems. The petitioner states that it has a consulting agreement with the client to provide programming services to facilitate a change to the client's business model for its plant in Japan which involves mapping the required process in SAP and configuring the new process in the SAP sales and distribution (SD) model; upgrading its internal system from SAP version 4.6B to version 4.7; changing the programs for acknowledgement, delivery, and invoicing of orders; validating SD integration with materials management (MM) and FI; and reversing system changes for the existing business process. The petitioner asserts that it has complied with the terms of the LCA because, although it listed Irvine, California as the beneficiary's work location, rather than Newport Beach, both towns are in Orange County and are recognized by the Department of Labor as part of the same area.

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 has provided no contracts, work orders, or statements of work, however, that describe the duties the beneficiary would perform for its clients. 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 noted by the director, the only evidence regarding the beneficiary's employment is a purchase order from Conexant to the petitioner for 350 hours of "SAP consulting services per the Statement of Work dated 9/13/04." The purchase order does not address the respective parties' relationship to the beneficiary, however, and while it references both a statement of work and a consulting agreement,

neither document has been submitted in this proceeding. The purchase order does not identify the beneficiary as the individual who would perform the services covered by the purchase order. Nor does it specify what those services would be. Thus, the record does not contain any document from Conexant identifying the beneficiary or describing the duties he would perform under the purchase order. Simply going on record without supporting documentation does not satisfy the petitioner's burden of proof. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, 350 hours of consulting services amount to only about two months of work. No evidence has been submitted to show what duties the beneficiary would perform, and for what client(s), during the rest of the three-year period of requested H-1B classification.

As the record does not establish the specific duties the beneficiary would perform under contract for the petitioner's client(s), 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 proffered position qualifies as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The director also found that the petitioner failed to show that it was in compliance with the terms of the LCA. On appeal the petitioner has still not submitted an itinerary of services or engagements demonstrating that the beneficiary would be employed in Orange County for the three-year period of requested H-1B classification. Accordingly, the record does not establish that the petitioner will be in compliance with the provisions of the LCA certified by DOL for the proffered position.

For the reasons discussed above, the petitioner has not overcome the bases for denial discussed in the director's decision.

Beyond the decision of the director, the petitioner has failed to submit the itinerary requested by the director in the RFE. 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.¹ *See* 8 C.F.R. § 214.2(h)(4)(ii). As the beneficiary will be placed at multiple work locations established by contractual agreements between the petitioner and third-party companies, 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 at 8 C.F.R. § 214.2(h)(2)(i)(F)(1) requires agents to submit an itinerary of definite employment to cover the entire period of time requested in the petition. Under the regulation at 8 C.F.R.

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).

§ 214.2(h)(2)(i)(B), employers 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.

As previously discussed, the director's RFE included a request for copies of the petitioner's contractual agreements with client companies for which the beneficiary would be providing consulting services, including statements of work, work orders, or other appendices to the contracts specifying the duties the beneficiary would perform, his dates of service, as well as his work and pay schedules. The only document furnished by the petitioner in response to the foregoing request – *i.e.*, the purchase order from Conexant – does not identify the beneficiary or specify the duties he will perform, and does not cover the entire period of the beneficiary's proposed employment with the petitioner. As the petitioner has not complied with the requirements of 8 C.F.R. § 214.2(h)(2)(i)(F)(1), the petition must be denied on this ground as well.

Furthermore, the present record does not establish that the beneficiary is qualified to perform services in a specialty occupation. An alien must meet one of the following criteria set forth in 8 C.F.R. § 214.2(h)(4)(iii)(C) to qualify to perform the services of a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Though the record shows that the beneficiary earned a bachelor of engineering (electronics and communication) degree in 1988 from Delhi University in India, there is no evidence in the record that the degree is equivalent to a baccalaureate degree in the field from a U.S. college or university, as required for the beneficiary to meet the qualifying criterion of 8 C.F.R. § 214.2(h)(4)(iii)(C)(2). For this additional reason the petition may not be approved.

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.