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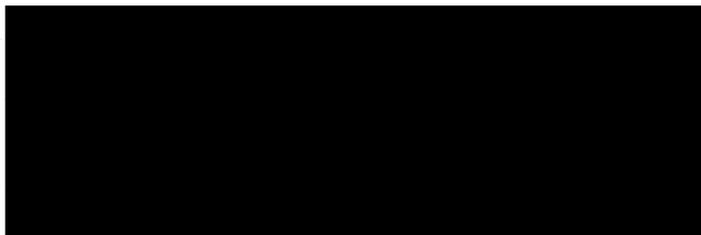


FILE: LIN 05 158 52435 Office: NEBRASKA SERVICE CENTER Date: NOV 22 2006

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 director of the 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 custom software and consulting firm 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 failed to establish that it would employ the beneficiary in a specialty occupation. Counsel submitted a timely appeal.

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 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 director denied the petition, stating that the petitioner had not submitted sufficient documentary evidence to demonstrate that it had, at the time of filing, sufficient work at the H-1B level that was immediately

available for the beneficiary at the work locations (Lombard, Illinois and Hoffman Estates, Illinois) described in the labor condition application (LCA). The director stated that the petitioner indicated that it had, at any given time, consultants working on in-house projects, and that the beneficiary would initially be placed at its company headquarters located in Lombard, Illinois. The director determined that the petitioner failed to provide supporting evidence establishing the existence of in-house projects or commercial interest in such projects. Furthermore, in the request for evidence, the director specifically requested a letter from the actual end-user, which identified the beneficiary and described the nature of his project, the dates and description of services, and the location where the services would be performed. The petitioner did not submit statements of work, exhibits, or related appendices of in-house projects and documentation of an identifiable end-user client at the LCA work location. The director stated that without such evidence the petitioner failed to establish that the beneficiary will perform specialty occupation duties at the LCA work location. The director stated that in determining whether a position qualifies as a specialty occupation the ultimate employment of the beneficiary must be considered; thus, the petitioner needed to provide a client letter and statements of work, exhibits, or appendices describing the nature of the project and the beneficiary's actual duties related to it. The director acknowledged that the petitioner asserts that its contracts reflect that it does not enter into agreements to furnish a specific employee for an assignment.

On appeal, counsel states that the petitioner is well-established, has four employees, and grossed more than \$200,000 in 2004. Counsel asserts that the petitioner:

[D]evelops in-house computer and information requirements, creating original and customized computer applications, training personnel on computer applications, implementing customized hardware systems . . . and updating and modifying existing programs and systems . . .

Counsel submits "a list of clients, and a sampling of client contracts" and a "comprehensive list of the types of in-house projects in which our IT professionals may be engaged." Counsel maintains that:

The [petitioner's] contracts are generally to develop and implement a system or subsystem or to perform turnkey projects. The contracts are not necessarily for the services of a particular individual consultant. As a result, there is generally no agreement to supply a particular individual for a particular job. Typically, the client does not know which professional will be assigned to a particular job site. The staffing of these projects is generally within the discretion of the company.

Counsel states that many "clients prefer that work be done on a consulting basis with the employees available on site to assist with a project." According to counsel, "the [b]eneficiary will not always be working at [the petitioner's] office." Counsel submits into the record the case, *Matter of Shanmukam*, LIN 99 243 50365; a December 29, 1995 memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications; and a master service agreement with Mihir Network Solutions, LLC, entitled "Exhibit 2," which he states indicates the name of the beneficiary, the type of agreement, the duration of the contract, the services to be performed, and the work location. Counsel states that the petitioner intends to place the

beneficiary initially at its headquarters and afterwards to the client site. According to counsel, the petitioner will file a new LCA and amended H-1B petition reflecting this. Counsel asserts that the petitioner has work immediately available for the beneficiary and will comply with the terms of the LCA. Counsel contends that under the regulations and case law CIS is barred from evaluating the petitioner's ability to pay its H-1B workers and from requesting a specific itinerary.

Based on the evidence in the record, the AAO concurs with the director's conclusion that the record fails to establish that the beneficiary would be employed in a specialty occupation.

The petitioner is seeking the beneficiary's services as a programmer analyst. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to the petitioner, the beneficiary will be responsible for the following:

As a programmer analyst, the beneficiary will plan, develop, test and document computer programs and apply broad knowledge of programming techniques and computer systems to evaluate user requests for new or modified programs. More specifically, the beneficiary will formulate plans outlining steps required to develop programs using structured analysis and design in addition to preparing flowcharts and diagrams to convert project specifications into detailed instructions and logical steps for coding into languages processed by computers. The beneficiary will also write manuals and document operating procedures and assist users to solve problems. The beneficiary will also replace, delete[,] and modify codes to correct errors, analyze, review[,] and alter programs to increase operating efficiency and adapt the system to new requirements; and, oversee the installation of software and provide technical assistance to clients. He will also analyze and evaluate development of local area networks and wide area networks to providing [sic] internet connectivity and support to the computer infrastructure. Furthermore, the beneficiary will be assigned to various projects, which will require him to maintain client networks and software builds. [sic] He will also coordinate with various locations during transitioning, oversee network administration[,] and create test scripts and applications to manage and test the various functionalities of builds [sic] and network administration.

The petitioner indicated that for the proposed position it requires a bachelor's degree or the equivalent in information systems, engineering, or related fields; and less than one year of experience in information technology.

The record contains independent contractor agreements, contractor agreements, consulting service agreements, work orders, statements of work, and a master services agreement. On appeal, the petitioner submitted a document entitled "Master Services Agreement Between [REDACTED] and [REDACTED]". The statement of work submitted with the master services agreement indicates that the beneficiary would perform consulting duties for one year, from October 5, 2005 to October 4, 2006, for [REDACTED] at its business location in Newark, Delaware. The statement of work does not

describe the duties the beneficiary will perform for [REDACTED] other than indicating that the work to be performed is for "software development."

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 clients. As such, the petitioner has not established the proffered position as a specialty occupation. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *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)).

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> 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 evidence in the record of the master services agreement and the statement of work with [REDACTED] is insufficient to support the petitioner's assertion that the beneficiary would perform consulting services for [REDACTED] requiring a four-year degree in a specialty. The record does not contain evidence from an authorized representative of [REDACTED] describing the specific duties that the beneficiary would perform for [REDACTED]. As *Defensor* indicates that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner, the petitioner needed to submit evidence that the proposed position qualifies as a specialty occupation on the basis of the job requirements imposed by [REDACTED] the entity for which the petitioner contends the beneficiary would provide programmer analyst consulting services.

The AAO notes that the petitioner submitted no evidence on appeal to support its assertion that the beneficiary would initially work on internal in-house projects for the petitioner, even though the denial letter indicated that the petitioner failed to provide evidence establishing the existence of in-house projects. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici* 22 I&N at 165. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

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)(I).

On appeal, counsel states that the petitioner is in compliance with the principles set forth in *Matter of Shanmukam*, LIN 99 243 50365. The AAO finds that the facts in *Matter of Shanmukam* differ from those in the instant case. The petitioner in *Matter of Shanmukam* submitted a letter from its client, Microsoft, which described the specific duties that the beneficiary would perform for Microsoft and the beneficiary's work location. Here, the petitioner did not submit a description of the beneficiary's duties from an authorized representative of [REDACTED].

In his August 23, 2005 letter counsel indicated that CIS has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service centers in the prior cases. In the absence of all of the corroborating evidence contained in those records of proceeding, the assertions made by counsel are not sufficient to enable the AAO to determine whether the position offered in the prior cases were similar to the position in the instant petition. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii).

The director found that the petitioner had not established that it would employ the beneficiary at its premises in Lombard, Illinois. Although counsel states that the petitioner is not required to furnish an itinerary, pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.<sup>1</sup>

In his request for evidence, the director asked for the beneficiary's employment itinerary and client contracts. In the Aytes memorandum cited at footnote 1, the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised his discretion to request an employment itinerary and client contracts. The submitted statement of work between the petitioner and [REDACTED] states that the beneficiary would perform consulting duties for 12 months, from October 5, 2005 to October 4, 2006. The beneficiary's period of employment, as indicated in the Form I-129 petition, is from October 1, 2005 to September 30, 2008. Thus, the statement of work does not cover the full duration of the beneficiary's period of employment, which is to September 30, 2008. As the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), the petition must be denied.

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<sup>1</sup> 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).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition on this ground.

The director also found that the record did not establish that the beneficiary would perform services at the locations listed on the LCA. The AAO agrees that the petitioner has not filed an LCA valid for the place of employment. The petitioner indicates in its statement of work with [REDACTED] at the beneficiary will work in Newark, Delaware. The LCA filed with the petition indicates that the beneficiary will work in Lombard, Illinois and Hoffman Estates, Illinois. The petitioner has failed to file an LCA for Newark, Delaware. 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 not sustained that burden.

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