

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

02

NOV 29 2006

NOV 29 2006

FILE: WAC 05 112 51541 Office: CALIFORNIA SERVICE CENTER

Date:

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.

for *Michael T. Kelly*
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 software consulting company. It seeks to employ the beneficiary as a senior 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 fails to establish that the proffered position qualifies as a specialty occupation.

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, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In its initial submission, including the Form I-129 and an accompanying letter, the petitioner stated that its business was established in 2002, has five employees and a gross annual income of \$500,000, and seeks to hire the beneficiary for three years, at an annual salary of \$70,000, as a senior programmer analyst. The proffered position was described as follows in the petitioner's initial letter:

[The] beneficiary will design, write, develop and utilize custom-made software applications as per requirements. He will study work systems and engage in systems analysis, as well as design applications to cater to the needs of the situation. This will also involve programming in an individual capacity. He will be involved in systems integration, trouble shooting, network installation and design and development of software applications. The beneficiary will maintain thorough and accurate documentation on all application systems and adhere to established programming and documentation standards.

The beneficiary will . . . design, enhance and create new software products . . . and provide training and support in the installation, implementation and customization of the application software. [He] will offer solutions for various software problems and analyze compatibility of various systems.

The beneficiary will research and evaluate user requests for new modified programs in areas such as finance and human resources. He will be responsible for satisfying the client/user in terms of the specific deliverables in the project. He will create detailed design documents, including program specifications and test plans from higher level design and functional documents. He will also deliver tested, bug-free and documented programs.

The beneficiary will participate in the testing process and ensure the successful implementation and use of the system. He will take on any additional responsibilities as decided by the Team/Project Leader. He will hold consultations with the objective of clarifying program objectives and determining feasibility, cost effectiveness and capabilities . . . make recommendations for modifications as required, and carry out such modifications.

The beneficiary will keep himself updated with the latest developments in the field by studying technical manuals, periodicals, and reports He will formulate plans outlining steps required to develop programs, using structured analysis and design and submit plans to management for approval and implementation.

The beneficiary will prepare flow charts and diagrams to illustrate the sequence of steps that programs follow and describe logical operations involved He will prepare write-ups to describe installation and operating procedures and also test software programs.

According to the petitioner, the proffered position requires at least a baccalaureate degree in engineering, computer science or mathematics, or the equivalent, and relevant work experience. The beneficiary is qualified for the job, the petitioner declares, by virtue of his bachelor of science degree in 1990 from the University of Calcutta in India, an advanced diploma in systems management in 1994 from the NIIT (National Institute of Information Technology) in India, and more than five years of experience in the computer industry.

In the RFE the director requested a more detailed job description of the programmer analyst position and indicated that the record was unclear whether the petitioner is the beneficiary's employer or acting as his agent to secure employment for him with other entities. The petitioner was requested to clarify its employment relationship with the beneficiary by submitting such evidence as letters from client companies about their work relationships with the beneficiary; contractual agreements and associated documentation from client companies that describe the beneficiary's duties; an itinerary of employment specifying the companies, work locations, and dates of engagement where the beneficiary will provide services during the period of requested H-1B classification; copies of the petitioner's vacancy announcements and advertisements for the proffered position; various business-related materials and documentation pertaining to prior H-1B employees; as well as copies of any contracts between the petitioner and the beneficiary.

In response to the RFE, filed on June 29, 2005, the petitioner submitted a copy of its offer of employment letter to the beneficiary, dated March 2, 2005, which states that he would begin work in the company's Phoenix office on or before March 7, 2005 and that his initial duties would include:

- Providing analysis and support of multiple applications within the Oracle Applications Suite.
- Working with Applications DBAs to apply patches.
- Regression test to verify patches fix issues without impacting other portions of the application.
- Control the patch migration process, coordinating with the business, DBA, and infrastructure teams.

The letter also advised that the beneficiary's initial assignment would be at a client location in the greater Phoenix area, that the petitioner would pay his annual salary of \$70,000, plus benefits, and that the beneficiary's employment relationship with the petitioner would be "at will."

The petitioner advised in its response to the RFE that the beneficiary had already gone to work for a client company in Phoenix, [REDACTED] in an assignment that would last until December 2006, though the project was expected to last three years with support and maintenance. A copy was submitted of the "Contractor Request" from On Semiconductor, dated February 20, 2005, describing its need for "Oracle Applications Support," in particular an analyst/programmer who would be "responsible for providing analysis and support of multiple applications within the Oracle Applications Suite." The contractor request includes a detailed summary of the duties to be performed by the analyst/programmer, and states that the mandatory qualifications for the job are a four-year degree, without any specific major field, and four years of relevant experience. The petitioner stated that the beneficiary would also work on a Novartis Pharmaceutical project, which is executed at the petitioner's home office in Phoenix but may require the beneficiary to travel for a "short duration" to the client location in New Jersey (where a subcontracting partner, Radiant Systems, Inc. is located as well). The project was expected to last five years, the petitioner indicated, and the beneficiary might be assigned to it as early as January 1, 2006. No contract documentation was submitted with respect to this project.

In his decision the director found that the evidence of record did not include any comprehensive description of the beneficiary's proposed duties from an authorized representative of any of the client companies, On [REDACTED]. Without such evidence, the director declared, the petitioner had not demonstrated that a specialty occupation exists for the beneficiary or that the proffered position meets the statutory definition of a specialty occupation.

On appeal the petitioner describes itself as a web service company providing networked solutions to customers, with ongoing contracts for software development, consulting, and software maintenance which are executed to some extent in the petitioner's home office and to some extent at customer work sites. Its core business, the petitioner explains, is providing Oracle application services and DBA outsourcing services work. The petitioner reiterates that the beneficiary has been hired as a programmer analyst and was assigned to its client company, On Semiconductor. A letter is submitted from an official of On Semiconductor, dated August 29, 2005, confirming that the petitioner is assisting "with the Database Maintenance and development support of Oracle Apps databases," which involves the utilization of the petitioner's employees at the client's work location in Phoenix, Arizona. The duties performed by the petitioner's employees are listed in the letter as follows:

- Round-the-clock database maintenance and development support of Oracle Apps databases, as well as on primary/secondary automated pager system for support of production applications. Oracle applications database upgrades.
- Cloning of Oracle application instance from production to other environments. Production support of Orion instances, 11i10 upgrade on UAT/Patch/QA instances.
- Oracle application tuning for critical performance issues primarily directed towards optimizer behavior, managing concurrent manager, CM processes, CM logs/out, system administration responsibility. Registering new DB custom users, function, reports and concurrent request.
- Managing database backups, monitoring database storage, monitoring and reacting to database and application performance tuning issues, working closely with functional and development team to troubleshoot daily operation issues, working with Oracle using i TAR and Oracle Metalink support.

According to the letter, On Semiconductor anticipated needing the services of the beneficiary "for an initial commitment of a one-year period that will be further extended on a yearly basis." The letter also confirmed that the beneficiary began working for the client company on March 15, 2005, but that the beneficiary remained an employee of the petitioner, which is responsible for paying his salary, benefits and expenses. The petitioner submits several other documents relating to the beneficiary's work with On Semiconductor, as well as the petitioner's payroll records for the beneficiary and other employees.

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). The record indicates 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. While the petitioner claims that some of the beneficiary's work would be performed at its home office, it is clear that much of the work would be performed at client company worksites. 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

¹ See also Memorandum of 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).

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 discussed, the director requested in the RFE an itinerary of definite employment for the beneficiary covering the requested period of H-1B classification, substantiated by contract documentation detailing the duties the beneficiary would perform, for whom, and at what locations. The only client company documentation submitted by the petitioner, in response to the RFE and in support of the instant appeal, relates to the project with On Semiconductor. These materials confirm that the beneficiary began working for the client in March 2005 at the client's worksite, that the client was committed to utilize the beneficiary's services for one year, and that it might extend the beneficiary's services thereafter. There is no evidence in the record that the client has continued to utilize the beneficiary's services since March 2006, or that it has committed to do so for the duration of the three-year period of requested H-1B classification – *i.e.*, until March 17, 2008. Nor has the petitioner submitted any documentation concerning the other client contract – with Novartis Pharmaceutical and the subcontractor Radiant Systems, Inc. in New Jersey – on which it claims the beneficiary would work, perhaps as early as January 1, 2006, at the petitioner's home office and to some extent in New Jersey.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides that if the beneficiary's duties will be performed in more than one location, the employer must submit an itinerary with the dates and locations of employment. The director's RFE included a request for an itinerary of definite employment covering the requested period of H-1B classification along with contract documentation detailing the duties the beneficiary would perform. Under the Aytes Memorandum, cited at footnote 1, the director has the discretion to request an employer who will employ a beneficiary in multiple locations to submit an itinerary. The director properly exercised his discretion to request an itinerary and substantiating contract documentation from the petitioner. The documentation submitted by the petitioner, however, does not provide an itinerary of definite employment for the entire three-year time period of requested H-1B classification for the beneficiary. Since the petitioner has failed to comply with the requirements of 8 C.F.R. § 214.2(h)(2)(i)(B), the petition must be denied.²

In accord with the director's decision, the AAO determines that the petitioner's failure to submit an itinerary of definite employment for the last two years of the requested period of H-1B classification means that the petitioner has not established that it would employ the beneficiary in a specialty occupation for the entire period of requested H-1B classification. Furthermore, the AAO notes that the "Contractor Request" from On Semiconductor, dated February 20, 2005, describing its need for an analyst/programmer to furnish "Oracle Applications Support," states that the job requires a four-year degree, without any specific major field, and four years of relevant experience. Since the client company does not require a degree in any particular specialty, it does not appear that even the one-year position working on Oracle applications support qualifies as a specialty occupation as defined in Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1).

As the evidence of record does not establish the specific duties the beneficiary would perform for client companies during the entire three-year period of requested H-1B classification, the AAO cannot analyze

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

whether the beneficiary's 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)(1). The instant petition must therefore be denied.

Beyond the decision of the director, the record does not establish that the beneficiary is qualified to perform services in a specialty occupation. Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), provides that an alien must have the following credentials to be qualified to perform the services of a specialty occupation:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

As further explained in 8 C.F.R. § 214.2(h)(4)(iii)(C), an alien must meet one of the following criteria 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.

For the purpose of deciding whether the beneficiary is qualified under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), 8 C.F.R. § 214.2(h)(4)(iii)(D) provides that the determination shall be based on one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service [CIS] that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as: (i) Recognition of expertise in the specialty occupation by at least two recognized authorities³ in the same specialty occupation; (ii) Membership in a recognized foreign or United States association or society in the specialty occupation; (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers; (iv) Licensure or registration to practice the specialty occupation in a foreign country; or (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The beneficiary does not qualify to perform the services of the specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(1) because he does not have a U.S. baccalaureate or higher degree, or under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2) because he does not hold a foreign degree determined to be equivalent to a U.S.

³ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used.

8 C.F.R. § 214.2(h)(4)(ii).

baccalaureate or higher degree, or under 8 C.F.R. § 214.2(h)(4)(iii)(C)(3) because he does not have an unrestricted state license to practice the specialty occupation.

In order for the beneficiary to qualify under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) to perform services in a specialty occupation, the record must establish that she has a combination of education, specialized training and progressively responsible work experience equivalent to a U.S. baccalaureate or higher degree in the specialty occupation, as evidenced by one or more of the documentary forms set forth in 8 C.F.R. § 214.2(h)(4)(iii)(D). The evaluation of the beneficiary's education and work experience from Multinational Education & Information Services, Inc. (MEIS) is not authored by an official with authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university with a program for granting such credit. Accordingly, the evaluation cannot be considered as evidence of the beneficiary's U.S. degree equivalency under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Furthermore, the evaluation from MEIS is not an evaluation of the beneficiary's foreign education alone, as required to be considered as evidence of the beneficiary's U.S. degree equivalency under 8 C.F.R. § 214.2(h)(4)(iii)(D)(3), and it specifically states that the beneficiary's bachelor of science degree from the University of Calcutta is equivalent to two years of academic studies in science at an accredited U.S. college or university – *i.e.*, not equivalent to a baccalaureate degree in science from a U.S. college or university.

Nor does the record establish that the beneficiary has the equivalent of a U.S. degree in science, and recognition of expertise therein, as required to meet the alternative qualifying criteria at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). As previously discussed, the beneficiary's bachelor of science degree has been evaluated to be the equivalent of two years of academic study in science at a U.S. college or university, and the academic transcript in the record specifically identifies the degree as a "two-year B.Sc." To account for two more years of credit in a specialty related to the proffered position, therefore, the beneficiary must demonstrate six years of specialized training and/or experience in the specialty. According to the evaluation from MEIS, the beneficiary's advanced diploma in systems management from NIIT was the culmination of a two-year training program and the beneficiary also has five years of work experience in high-level hardware and software engineering, systems analysis, and computer program design and development. There is no evidence in the record, however, that any of the beneficiary's specialized training and work experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation, or that the beneficiary has documented recognition of expertise in the specialty, as required under the regulation. Accordingly, the beneficiary's work experience cannot be counted for the purpose of determining degree equivalency under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). The AAO concludes, therefore, that the beneficiary's education, training, and work experience combined are not equivalent to a U.S. degree in a specific specialty.

For the reasons discussed above, the record does not establish that the beneficiary is qualified to perform services in a specialty occupation. For this reason as well, the petition must be denied.

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.