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FILE: LIN 04 184 50428 Office: NEBRASKA SERVICE CENTER Date: NOV 30 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 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 involved in the technology software consultancy and outsourcing solutions market and 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 determined that the petitioner had not established that it qualified as a United States employer and that the proffered position did not qualify as a specialty occupation. The director also found that the petitioner had not established that it had a Labor Condition Application (LCA) valid for the place of employment. The petition was accordingly denied. On appeal, the petitioner states that the director erred in denying the petition and indicates that the petitioner qualifies as an employer, that the position offered is a specialty occupation, and that the beneficiary will perform services in the location specified on the LCA.

The first issue to be determined is whether the petitioner qualifies as a United States 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 record establishes that the petitioner will be the employer of the beneficiary, and the director's decision to the contrary shall be withdrawn. The petitioner submitted a vendor/independent contractor services agreement whereby the petitioner would provide consulting and programming services to Hexaware Technologies, Inc. (Hexaware). Under the terms of that agreement, the petitioner will provide personnel to work on projects for Hexaware and/or its customers. The agreement specifically provides that all personnel provided by the petitioner shall be employees or agents of the petitioner and that nothing in the agreement shall be construed to create any partnership, association, joint venture or employment between any party to the agreement. The agreement further states that the petitioner shall have exclusive control over its employees or agents who perform services for Hexaware and over labor and employee relations policies including those related to wages, hours, working conditions, benefits and other conditions of its employees and agents. The petitioner will hire the beneficiary, will pay the beneficiary, has the right to fire the beneficiary and will otherwise have control over the beneficiary's work. The fact that the beneficiary may perform services at a client facility and be subject to that client's work rules and regulations does not change the employer/employee relationship existing between the petitioner and beneficiary. The petitioner will engage the beneficiary to work in the United States, has an employer-employee relationship with the beneficiary, and has an Internal Revenue Service Tax identification number. The petitioner qualifies as a United States employer in this instance, and the director's decision to the contrary is withdrawn.

The next issue to be determined is whether 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.

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.

The petitioner seeks the beneficiary's services as a programmer/analyst. Evidence of the beneficiary's duties includes the Form I-129 petition with attachment and the petitioner's response to the director's request for evidence. According to evidence provided by the petitioner the beneficiary would:

- Be responsible for custom program design, development and implementation of business applications and systems; and

- Be responsible for design, development, analysis, implementation and maintenance of software applications to meet clients' needs and specifications, using the following tools: Java, Oracle and .Net.

The petitioner requires a minimum of a bachelor's degree in computer science, mathematics or engineering for entry into the proffered position.

As previously noted, the petitioner submitted a vendor/independent contractor services agreement between itself and Hexaware whereby the petitioner would provide personnel to perform work on projects for Hexaware and/or its clients. Pursuant to the terms of that agreement, the petitioner executed a work order on October 31, 2003 whereby it agreed to provide Java Oracle.Net Programmers to work for a minimum period of 16 months providing consulting services to Amexco (American Express). It subsequently submitted a revised work order dated March 15, 2005 under which the petitioner would provide consulting and programming services for Hexaware at Amexco.

The beneficiary's position has been identified by the petitioner as a computer programmer/analyst. The Department of Labor's *Occupational Outlook Handbook (Handbook)* notes that although there are many training paths available for programmers due to varied employer needs, 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. In the absence of a degree, substantial specialized experience or expertise may be needed, and employers appear to place more emphasis on previous experience even when hiring programmers with a degree. Some computer programmers hold a college degree in computer science, mathematics, or information systems, while others have taken special courses in computer programming to supplement degrees in other fields. Thus, it is evident that while some programmer positions justify the hiring of an individual with a baccalaureate level education, others require only an associates degree or some other form of certification.

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 with third-party companies. 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 petitioner, however, has provided no contracts, work orders or statements of work from the party for whom the beneficiary will actually perform services (Amexco) specifically describing the duties the beneficiary would perform and, therefore, has not established the proffered position as a specialty occupation. As the record does not contain any documentation from the end user of the beneficiary's services (Amexco) that establishes the specific duties the beneficiary would perform under contract, 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)(iii)(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). The petition must, therefore, be denied.

The final issue to be decided is whether the petitioner established that it has a certified LCA valid for the place of employment. The director noted that the LCA submitted with the Form I-129 petition provided that the persons working under that LCA permitted work to be performed in Hennepin County, Minnesota and Orange County, California. While the petitioner stated that the beneficiary would work at Hexaware Technologies located in Minneapolis, Minnesota, the work order stated that the beneficiary would work for Amexco. The work order did not name the beneficiary as the employee to provide the contracted services, nor did it give the address where the work would be performed. On appeal, the petitioner issued a revised work order which clarified the employment to be performed under the work order. The revised work order states that the beneficiary will provide consulting and programming services for Hexaware pursuant to the terms of the aforementioned vendor/independent contractor services agreement with the work to be performed at Amexco in Minneapolis, MN. The period of employment on the revised work order would run from March 13, 2005 until December 31, 2007. As the revised work order designates Minneapolis as one of the locations of employment, the LCA is valid for the place of employment. The petition may not be approved, however, as the petitioner has not established that the proffered position is a specialty occupation.

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 failed to sustain that burden.

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