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U.S. Citizenship
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Services

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FILE: LIN 04 203 53028 Office: NEBRASKA SERVICE CENTER Date: OCT 05 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:

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.

for *Michael T. Kelly*
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Nebraska 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 company providing information technology, advanced engineering technology, and management and consulting services to its clients, with two employees. It seeks to employ the beneficiary as a 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 acting director denied the petition because he determined that the record did not establish that, at the time of filing, the petitioner had a position in a specialty occupation available to the beneficiary.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief and previously submitted evidence. The AAO reviewed the record in its entirety before issuing its decision.

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

Section 214(i)(1) of 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, a petitioner must establish that its position meets one of four 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.

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 seeks the beneficiary’s services as a programmer/analyst. At the time of filing, the petitioner indicated that the beneficiary would be responsible for customs program design, development and implementation of business applications and systems; and the design, development, analysis, implementation and maintenance of software applications to meet clients’ needs and specifications. The petitioner indicates that the position requires a bachelor’s degree in computer science, mathematics or engineering and relevant experience.

The evidence of record establishes that the petitioner is an employment contractor and intends to place the beneficiary at more than one location to perform services established by contractual agreements for third-party companies. Accordingly, the petitioner may not establish the proffered position as a specialty occupation on the basis of the duties provided in its June 22, 2004 letter in support of the petition, as they do not establish the work that the beneficiary would actually perform for particular clients to which he would be assigned.

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. Therefore, the petitioner in the instant case must demonstrate the proffered position's degree requirement or equivalent based on the duties the beneficiary would perform for the organizations receiving his services.

In response to the director's request for contracts, statements of work or work orders covering the beneficiary's employment, the petitioner submitted copies of a contract with a St. Paul, Minnesota consulting firm and a work statement identifying the beneficiary, as well as a second contract with a technology firm based in Jamesburg, New York, under which the petitioner indicated the beneficiary would work should the contract with its St. Paul client fail to cover the entire three-year period requested on the Form I-129. The work order identifying the beneficiary indicates that the scope of his duties would include "Programmer/Analyst, Mercury Win Runner, Test Director, QA Analysis" for Travelers Express/MoneyGram in Minneapolis, Minnesota. None of the documentation submitted by the petitioner establishes that the work to be performed by the beneficiary for the petitioner's client(s) qualifies as a specialty occupation.

The petitioner's contract with its St. Paul client and the related work order are dated December 2, 2004, approximately four months after it filed the Form I-129. Therefore, they may not be used by the petitioner to establish the duties of the proffered position. A petitioner must establish eligibility at the time it files a nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Moreover, the work order indicates that the beneficiary's actual employment would take place at a third company, a client of the St. Paul firm with which the petitioner has contracted to provide the beneficiary's services. As a result, the work order signed by the petitioner and its St. Paul client does not establish the duties that the beneficiary would perform for the entity that would be using his services. While the petitioner's contract with its Jamesburg, New York client was in place at the time the petitioner filed the Form I-129, neither it nor the appendix listing the services to be provided under it identify the beneficiary. Accordingly, this contract also fails to establish the duties that the petitioner claims the beneficiary would perform on-site for this client.

As the petitioner has failed to submit any documentation that establishes the day-to-day duties the beneficiary would perform under its contracts with its clients, it has not established that the proposed position qualifies as a specialty occupation under any of the alternate 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).

Beyond the decision of the director, the AAO finds that the petitioner has also failed to comply with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B), which requires employers to submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.

The December 2, 2004 contract and work order submitted by the petitioner in response to the director's request postdates its filing of the Form I-129 and, as previously discussed, will not be considered. The petitioner's contract with its Jamesburg, New York client does not identify the beneficiary as one of the

programmer/analysts to be provided under the contract. As a result, the record provides no itinerary of the beneficiary's employment. Accordingly, the petitioner has failed to satisfy the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B). For this reason as well, the petition must be denied.

For reasons related in the preceding discussion, the record does not establish the duties of the proffered position as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the petitioner has complied with the filing requirements at 8 C.F.R. § 214.2(h)(2)(i)(B). Therefore, the AAO shall not disturb the director's denial of the petition.

The AAO notes that the basis for its decision differs from that relied upon by the director. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.