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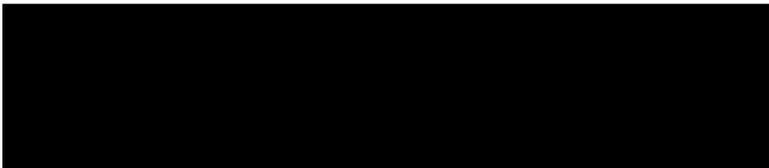
FILE: LIN 05 180 51041 Office: NEBRASKA SERVICE CENTER Date:

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 documents have been returned to
the office that originally decided your case. Any further inquiry must be made to that office.

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

DISCUSSION: The Director, Nebraska Service Center, denied the nonimmigrant visa petition. 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 an information technology company that offers software consulting services, application development, contract-to-hire placement, and software training services. It states that it employs 14 personnel and had net annual revenue of \$200,000 when the petition was filed. It seeks to employ the beneficiary as a software analyst. Accordingly, 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 record includes: (1) the May 25, 2005 Form I-129 and supporting documents; (2) the director's July 13, 2005 request for further evidence (RFE); (3) the petitioner's September 20, 2005 response to the director's RFE; (4) the director's November 2, 2005 denial decision; and (5) the Form I-290B, counsel's brief, and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

On November 2, 2005, the director denied the petition determining that the petitioner had not established that it qualified as the beneficiary's United States employer and that the petitioner had not provided sufficient evidence of the specific duties to be performed by the beneficiary while working for a third-party end client. The director concluded that the petitioner had not established that at the time of filing the petition, or at the present time, that it had a specialty occupation position available for the beneficiary in the location identified on the Form ETA 9035, Labor Condition Application (LCA).

On appeal, counsel for the petitioner asserts that the petitioner's employment agreement with the beneficiary, submitted in response to the director's RFE, makes clear that the petitioner has the right to hire, pay, fire, supervise, and control the work of the beneficiary and that the petitioner has a specialty occupation available for the beneficiary at the location(s) identified on the Form ETA 9035, LCA.

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)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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) consistently 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.

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.

In a May 13, 2005 letter submitted in support of the petition, the petitioner provided a synopsis of the proffered position of software analyst. The petitioner indicated that the duties of the position included:

- a. Design, development, testing, integration, and maintenance of client's software application programs for web applications, and e-data exchange for secure multi[-]user large-scale applications.
- b. Develop technical application architecture.
- c. Database and Systems design, development, administration and modeling.

- d. Design, develop, and implement Graphical User Interface using Object Oriented Technologies and client server architecture.
- e. Maintain software versions including customization, porting installation scripts and perform Quality Assurance Tests.
- f. Responsible for Custom Application analysis, design, development and implementation on Oracle based software projects involving accounting, sales and financial systems.
- g. Utilize expertise with Oracle, PL/SQL, Pro*C with dynamic SQL, JAVA, JDK, JSB, J2EE, Java, VB.NET, ASP.NET, and JAVA Script.

The petitioner also provided a breakdown of the anticipated time the position would require in certain endeavors including: 65 percent on software and database analysis, modification, design, development, and testing; 10 percent on maintaining program functionality and performance; 10 percent providing system management, backup and recovery; 10 percent studying the existing system; and 5 percent on meetings and discussions.

The record also includes an LCA listing the beneficiary's work locations in Chicago, Illinois and Mahwah, New Jersey as a software analyst.

On July 13, 2005, the director requested additional evidence from the petitioner, including a copy of the specific contract between the petitioner and its client for whom the beneficiary would be performing services, along with any work orders/purchase orders.

In a September 20, 2005 response, counsel for the petitioner indicated that the beneficiary would be providing her services pursuant to a partner agreement between the petitioner and NEO Consulting, Inc. (NEO). The February 17, 2005 agreement indicated that the petitioner would provide consulting services to NEO pursuant to work orders that would more fully describe the consulting services to be delivered. The record also includes a work order dated July 15, 2005 for the beneficiary to perform services in Mahwah, New Jersey as a software analyst, beginning November 18, 2005. The work order listed the beneficiary's duties in Mahwah, New Jersey as: "Analysis, design, development and Testing of client applications using Oracle, PL/SQL, JAVA, JDK, JAVA Script, and JSP." The record also includes an undated employment agreement between the petitioner and the beneficiary indicating that the beneficiary accepted employment as a *system analyst* on an at-will basis.

The director denied the petition on November 2, 2005 finding that the petitioner is providing contract-programming services to its client, NEO, and that NEO then brokers the beneficiary's services to an unrelated third party. The director found that this relationship suggested that the petitioner did not have an independent contract to provide any tangible product or service to any client directly. The director concluded that it is most likely that NEO's client – not the petitioner - would supervise and otherwise control the beneficiary's work, and, therefore, that the petitioner had not established that it qualified as a United States employer. The director also determined that the petitioner had failed to provide sufficient documentation of the specific duties to be performed by the beneficiary while working for the third-party end client.

On appeal, counsel for the petitioner asserts that the employment agreement between the petitioner and the beneficiary that had been previously submitted makes clear that the petitioner retains the right to hire, pay, fire, supervise, and control the work of the beneficiary. Counsel contends that the petitioner is not an agent or an employment agency and cites several unpublished decisions in order to substantiate his contention. Counsel indicates that upon arriving from overseas, the beneficiary will attend a four-week orientation at the petitioner's office in the Chicago, Illinois area before commencing her duties pursuant to the July 15, 2005 work order. Counsel repeats the initial synopsis of the job description pertaining to its employment of the beneficiary and asserts that these duties entail study and analysis of Java and Oracle software applications, other existing software and database systems and the related design, development, modification, testing and meetings and discussions with project team members and clients, and thus encompass the duties of a specialty occupation.

Preliminarily, the AAO notes that the consulting agreement between the petitioner and NEO calls for NEO to submit "work orders" for different projects as needed by NEO. Thus, the work order may be dated subsequent to the date of the consulting agreement, and such later dated statements of work do not necessarily require the conclusion that the petitioner did not have work available for the beneficiary when the petition was filed. The AAO further finds that the evidence of record is sufficient to establish 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 as set out in the undated employment agreement between the beneficiary and the petitioner.¹ See 8 C.F.R. § 214.2(h)(4)(ii).

The Aytes memorandum, cited at footnote 1, indicates that 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 her discretion to request additional information regarding the beneficiary's ultimate employment as the LCA submitted showed that the beneficiary would be working in two locations. Although the AAO declines to find that the petitioner is acting as the beneficiary's agent, the petitioner in this matter is employing the beneficiary to work for its clients or its clients' clients. Thus, the petitioner may be accurately described as an employment contractor. The beneficiary is attending a four-week orientation course at the petitioner's location and is not working at the petitioner's location. The beneficiary in this matter is providing services to other firms.

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, a 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.

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).

When a petitioner is acting as an employment contractor, the entity ultimately using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, CIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

In this matter the petitioner provided an overview of the types of duties the beneficiary might be required to provide as a software analyst in the May 13, 2005 letter attached to the petition. The petitioner's undated employment agreement with the beneficiary did not identify any job duties attached to the proffered position, but it referred to the beneficiary's position as a systems analyst – not software analyst as indicated on the Form I-129 and the Labor Condition Application related to this petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, the work order requesting the beneficiary's services provided only a general list of tasks. It is not possible to conclude from the brief description of the duties associated with the beneficiary's ultimate employment that the beneficiary's ultimate employment will include the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation.

Each petitioner must detail its expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. In circumstances where the beneficiary will provide services to a third party, the third party must also provide details of its expectations of the position. Such descriptions must correspond to the needs of the petitioner and/or the third party and be substantiated by documentary evidence. To allow otherwise would require acceptance of any petitioner's generic description to establish that its proffered position is a specialty occupation. CIS must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business and what the third party contractor expects from the beneficiary in relation to its business and what the proffered position actually requires, in order to analyze and determine whether the duties of the position require at least a baccalaureate degree in a specialty.²

The petitioner does not provide substantive evidence that the duties of the proffered position incorporate the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a bachelor's degree or higher degree in the specific specialty or its equivalent as a minimum for entry into the occupation in the United States. Only a detailed job description from the entity that requires the alien's

² The AAO observes that the *Handbook* reports that there are many training paths available for programmers and that although bachelor's degrees are commonly required, certain jobs may require only a two-year degree or certificate; that most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of a variety of computer systems and technologies for positions of computer software engineer; and that there is no universally accepted way to prepare for a job as a systems analyst, although most employers place a premium on some formal college education.

services will suffice to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Going on record without supporting documentary evidence is not sufficient for purposes 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)).

In this matter, without a comprehensive description of the beneficiary's actual duties from the entity utilizing the beneficiary's services, the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(1).

In that the record does not offer a comprehensive description of the duties the beneficiary would perform for the petitioner's client, the petitioner is also precluded from meeting the requirements of the remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a detailed listing of the duties the beneficiary would perform under contract, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

Beyond the decision of the director, the AAO finds that the record does not contain an evaluation of the beneficiary's foreign education or other evidence demonstrating the beneficiary's qualifications as required by 8 C.F.R. § 214.2(h)(4)(iii)(C). For this additional reason, the petition will not be approved.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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