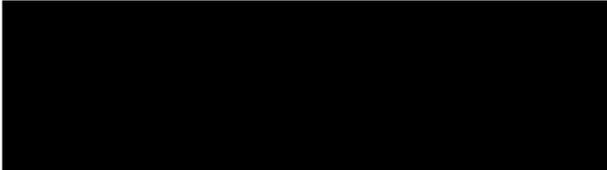


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S. Citizenship
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FEB 06 2007

FILE: LIN 05 236 51905 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is software consulting firm that seeks to employ the beneficiary as a software consultant. The petitioner, therefore, 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 on the basis of his determination that the petitioner had failed to demonstrate that the petitioner has a specialty occupation to be filled.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

In his denial, the petitioner stated that the petitioner is a consulting firm that provides contract employees to other places of business. The director then looked to the company with whom the petitioner has a contract for the beneficiary's services. The petitioner found that company to also be a consulting firm that provides contract employees to other places of business. The director found that since there is no contract between the petitioner's client and the company with whom it has a contract, he was unable to determine whether the proposed position qualifies as a specialty occupation.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n 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 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 proposed position.

The term “employer” is defined at 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 regulation at 8 C.F.R. § 214.2(h)(4)(iv)(B) provides that an employment contract between the petitioner and the beneficiary shall be provided, or a summary of the terms of oral agreement under which the beneficiary will be employed if there is no written contract. The record contains two letters from ██████████, Inc., the entity for whom the beneficiary would provide services pursuant to an agreement between ██████████ and the petitioner. These letters generally outline the services that the beneficiary will perform for ██████████. Thus, as of the filing date, the petitioner has established a proposed employment agreement with the beneficiary. 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 evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at work locations to perform services established by contractual agreements with third-party organizations. 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.

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).

While the Aytes memorandum cited at footnote 1 broadly interprets the term “itinerary,” it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. In his request for additional evidence, the director requested evidence from the end user of the beneficiary’s services establishing the duties to be performed and the address where they would be performed. Upon review, the director properly exercised his discretion to request contracts establishing an itinerary of employment. In response, the petitioner submitted a letter from ██████ dated September 29, 2005, which described the duties to be performed, stated that they would be performed in-house at ██████ office in Hopkins, Minnesota, and stated that her services would be required in mid-October 2005 and last an estimated period of 36 months. The AAO finds that this evidence constitutes an itinerary for the purpose of satisfying 8 C.F.R. § 214.2(h)(2)(i)(B).

While the director noted that ██████ provides contract employees to other businesses, the AAO finds that such is not the case here. The record indicates that the beneficiary would provide services to ██████ directly, so there is no need for the petitioner to submit a position description from any of ██████ clients.

Having concluded that a position exists to be filled, the AAO next turns to the issue of whether it qualifies for classification as a specialty occupation, analyzing the criteria, cited previously, at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO finds that duties of the proposed position, particularly those related to the writing of application programs, qualify for classification as a specialty occupation under the criteria set forth at the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), that the nature of the duties of the proposed position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree

According to an evaluation contained in the record, the beneficiary possesses the equivalent of a master’s degree in applied mathematics from a regionally accredited university in the United States. She is therefore qualified to perform the duties of this specialty occupation.

The petitioner has established both that the position qualifies for classification as a specialty occupation and that the beneficiary is qualified to perform the duties of that specialty occupation. Accordingly, the petition will 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 sustained that burden.

ORDER: The appeal is sustained. The petition is approved.