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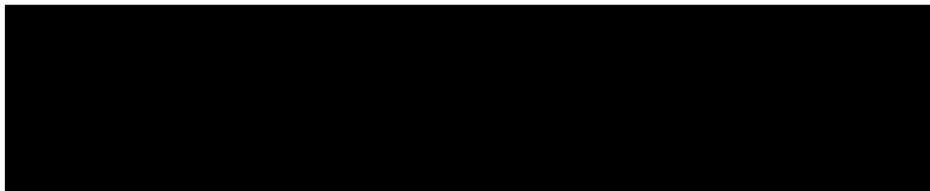
FILE: LIN 04 800 53875 Office: NEBRASKA SERVICE CENTER Date: FEB 20 2007

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, 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 provides software-consulting services and seeks to employ the beneficiary as a computer programmer.¹ 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 September 27, 2004 Form I-129 and supporting documents; (2) the director's February 10, 2005 request for further evidence (RFE); (3) the petitioner's March 14, 2005 response to the director's RFE; (4) the director's June 28, 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 June 28, 2005, the director denied the petition determining that the petitioner had not established that it had a specialty occupation position available for the beneficiary at the location identified on the Form ETA 9035, Labor Condition Application (LCA) when the petition was filed or currently. The director noted that the petitioner had not provided an educational evaluation of the beneficiary's foreign degree.

On appeal, counsel for the petitioner submits a brief and attachments.

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.

¹ The petitioner identifies the nontechnical job title as a computer programmer and indicates that the job title is engineer but that the specialty is not on the list. In the September 27, 2004 letter appended to the petition, the petitioner refers to the proffered position as a computer engineer – applications, and on the Labor Condition Application describes the job as a computer programmer analyst.

When filing the Form I-129 petition, the petitioner averred that it employed 2 persons, provided software-consulting services, and based on the client's requirements assisted in all aspects of project design, development and implementation from providing temporary staffing to creating totally integrated corporate wide turnkey systems. In a September 27, 2004 letter submitted in support of the petition, the petitioner stated that the beneficiary would join its information technology division as an applications engineer to assist and work as part of a technical team customizing and automating the needs of clients' business software packages. The petitioner indicated that the beneficiary:

As an Applications Engineer he will review our clients technical data to identify problems in software package, requiring need for revision of project scope and operational strategies. In this capacity, [the beneficiary] may review technical information and discuss with staff on implementation activities during the development stages to become familiar with product technology, Methods and determine operation procedures.

The petitioner also indicated that the beneficiary would work with others as a team and provided a general list of duties that the beneficiary might be assigned according to its clients' existing projects. The LCA that the petitioner filed with the Department of Labor (DOL) listed the beneficiary's place of work as Plainfield, Illinois as a computer programmer analyst.

On February 10, 2005, the director requested additional evidence from the petitioner, including in part, copies of past, current, or future work agreements or contracts with all clients/customers to establish that the petitioner had work for the beneficiary, as well as a copy of the petitioner's organizational chart.

In a March 14, 2005 response, the petitioner provided among other items, contracts with third parties and appended statements of work identifying different individuals as the resource or consultant for the third party. Each statement of work identified the particular consultants' tasks for the third party.

The director denied the petition on June 28, 2005. As noted above, the director determined that the petitioner had not established that it had a specialty occupation position available for the beneficiary at the location identified on the Form ETA 9035, Labor Condition Application (LCA) when the petition was filed or currently and noted additionally that the petitioner had not provided an educational evaluation of the beneficiary's foreign degree.

On appeal, counsel for the petitioner asserts that the beneficiary's resume and copies of his degrees show that the beneficiary has a bachelor's degree in mechanical engineering and that a credentials evaluation demonstrates that the beneficiary is eligible to perform the services in the occupation. Counsel contends that Citizenship and Immigration Services (CIS) must explain any inconsistency when reaching different conclusions for similarly situated petitions and notes that the petitioner has submitted similar documents on behalf of similarly qualified computer consultants in the past. Counsel does not directly address the director's determination that the petitioner had not established that it had a specialty occupation position available for the beneficiary when the petition was filed; rather counsel simply asserts that such a position was and is available. Counsel attaches a July 2005 affidavit signed by the petitioner's president, a September 13, 2004 offer of employment to the beneficiary, and re-submits contracts with third parties and statements of work

identifying different individuals as the resource or consultant for those third parties as well as a list of tasks the consultant will perform for the third party.

The petitioner's July 2005 affidavit indicates that the petitioner hires computer consultants to fill work orders from vendors and clients and that upon reviewing the needs and requirements of vendors/clients the petitioner matches beneficiaries' resumes with appropriate vendors/clients. The petitioner's president stated further that prospective beneficiaries are advised of the core functions of the job and that the nature of the employment will require assignments in different parts of the United States. The September 13, 2004 offer of employment to the beneficiary stated:

You will be employed by [the petitioner] on a full-time basis as a Computer Engineer-Applications. You will render all reasonable services expected of a Computer Engineer-Applications, including but not limited to computer programming, software development, systems analysis, professional engineering, consulting and technical writing. You will provide such services at locations designated by [the petitioner] and /or its customers.

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You understand that your employment requires you to perform services at customer sites, and you will promptly comply with [the petitioner's] instructions on relocating to or from a customer site.

Preliminarily, the AAO notes that a beneficiary's degree and/or experience do not make the proffered position a specialty occupation, rather the petitioner must establish that 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. Counsel's implicit assertion that the beneficiary's qualifications establish the position as a specialty occupation is erroneous. In addition, the AAO notes that it is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Moreover, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). The petitioner has not provided any evidence to suggest that other positions in other petitions were parallel to the proffered position. When making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The AAO further notes that the field of computer technology, a field that includes many job functions some of which are specialty occupations and some of which are not, requires in particular specific detail regarding a particular position.

Although neither counsel nor the petitioner address the director's determination that the petitioner did not have work available for the beneficiary at the location identified on the LCA, the AAO will briefly outline the requirements an employment contractor must satisfy. First, the petitioner must establish that it will be the beneficiary's actual employer. The regulation at 8 C.F.R. § 214.2(h)(4)(ii), indicates a *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 AAO 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.² See 8 C.F.R. § 214.2(h)(4)(ii). When the employer employing the beneficiary indicates that the beneficiary will work in multiple locations, the petitioner must establish an itinerary of definite employment, listing the location(s) and organization(s) where the beneficiary would be providing services. The Aytes memorandum cited at footnote 2, states that the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Although the director did not specifically request an employment itinerary, the director requested work contracts and statements of work to demonstrate that the beneficiary would actually be employed. The petitioner did not provide a statement of work from a specific entity detailing the beneficiary's actual duties.

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.

When a petitioner is an employment contractor, the entity ultimately employing the alien or 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.³

² 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).

³ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." See *id.* at 387.

The petitioner has provided a general description of the types of duties the beneficiary would perform upon his employment with the petitioner, but no evidence that establishes the specific duties he would be required to perform for an ultimate employer. A petitioner cannot establish employment as a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title, e.g., a programmer writes programs; a computer system analyst designs and updates software; a computer software engineer designs, constructs, tests, and maintains computer applications software. The petitioner's offer of employment indicated that the beneficiary's duties include computer programming, software development, systems analysis, professional engineering, consulting and technical writing, and in its letter appended to the petition lists general aspects of these fields when describing what might be expected of the beneficiary.

In addition, the petitioner does not provide a definitive title or statement of duties associated with an occupation, but rather indicates that the beneficiary will perform duties as a computer engineer in applications, as a computer programmer analyst, or as a computer programmer, occupations that require a variety of skills and knowledge. For example, the AAO observes that the Department of Labor's *Occupational Outlook Handbook (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. Thus, without a detailed job description from the entity that requires the alien'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. 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)).

It is not possible to determine from the general statement of responsibilities of the proffered position how these duties relate to the specific tasks of the petitioner, its particular business interests, or to the services to be performed by the beneficiary for the third party. Without a description of the beneficiary's actual duties from the entity utilizing the beneficiary's services, 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 offers no description of the duties the beneficiary would perform for the petitioner's client, the petitioner is also precluded from meeting the requirements of the three 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 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. The petitioner has not provided sufficient evidence regarding the actual proffered position to establish that it has H-1B level employment available for the beneficiary for the period of time requested.

Although the director did not make a specific determination regarding the eligibility of the beneficiary to perform H-1B level services, counsel asserts that the beneficiary's degree and experience demonstrate that the beneficiary is qualified to perform a specialty occupation. The record contains a June 27, 2005 academic and work experience evaluation from ITES, Inc. indicating that the beneficiary obtained a bachelor's of engineering degree in Industrial and Production Engineering in 2000 from the University of Gulbarga in India. The credentials evaluation service also noted that the beneficiary had completed a three-month course in computer networking at World of Software Sciences, in Hyderabad, India in 2001 and provided an analysis of the beneficiary's three and one-half years of work experience in information technology.

However, when attempting to establish that a beneficiary has the equivalent of a degree based on his or her combined education and employment experience under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), a petitioner may not rely on a credentials evaluation service to evaluate a beneficiary's work experience. A credentials evaluation service may evaluate only a beneficiary's educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). To establish an academic equivalency for a beneficiary's work experience, a petitioner must submit an evaluation of such experience from an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The AAO acknowledges that the evaluator claims he has authority to grant college-level credit but his claim is not supported by independent evidence. The AAO notes further that counsel has provided a statement from a network engineer who indicates that a review of the beneficiary's resume and credentials shows that the beneficiary is qualified in computer networking, especially computer certifications. However, the record does not contain sufficient evidence of either the ITES, Inc. evaluator or the network engineer's qualifications as "recognized authorities."⁴ The record does not contain sufficient evidence to establish that the beneficiary holds the equivalent of a baccalaureate degree in a field directly related to the proffered position.

The credentials evaluation from ITES, Inc. indicates that the beneficiary completed 12 years of high school education followed by a four-year degree in engineering from Gulbarga University. The AAO cannot accept this portion of the evaluation, as it is not substantiated by the evidence of record. The beneficiary's transcripts from Gulbarga University indicate that he received a bachelor of engineering following three years of university level

⁴ *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 opinion, 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)(i)(C)(ii).

study from 1999 to 2001. CIS does not consider a three year bachelor's of science degree from India as the equivalent of a United States baccalaureate degree when the degree does not require four years of study. *Matter of Shah* 17 I&N Dec. 244 (Comm. 1977). Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). For this additional reason, the petition will be denied.

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.