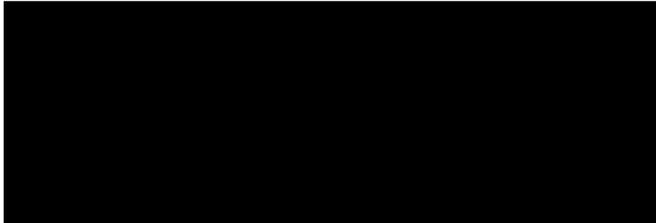


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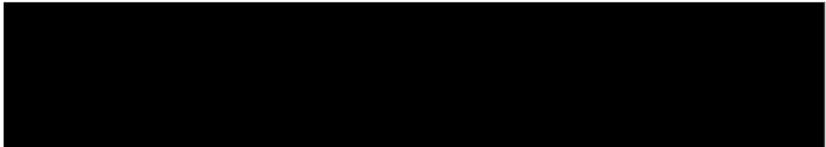
D2

FILE: LIN 04 227 50846 Office: NEBRASKA SERVICE CENTER Date: JAN 08 2007

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*  
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 a computer software development and consulting company that seeks to employ the beneficiary as a computer 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 did not demonstrate that it had H-1B caliber work available for the beneficiary during the three-year time period sought by the petitioner in the Form I-129 petition at the location noted on the Labor Condition Application (LCA), and the petition was not, therefore, approvable. The director also determined that the petitioner did not qualify as a United States employer in this instance. On appeal the petitioner submits a brief and additional information contending that the proffered position qualifies as a specialty occupation, and that the petitioner will be the employer of the beneficiary with H-1B caliber employment available for him in the United States.

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 petitioner provided copies of several contracts that it maintains with various companies under which the petitioner provides its employees for completion of various work projects on behalf of the contracting company's clients. Under the terms of these contracts, the petitioner acts as an independent contractor in providing services. The performance of the services to be provided are performed by employees of the petitioner. 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 is 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 is set forth in the Form I-129 petition and supporting attachment. According to evidence provided by the petitioner the beneficiary would:

- Plan, develop, test, and document computer programs and apply broad knowledge of programming techniques and computer systems to evaluate user requests for new or modified programs;
- Formulate plans outlining steps required to develop programs using structured analysis and design in addition to preparing flowcharts and diagrams to convert project specifications into detailed instructions and logical steps for coding into languages processed by computers;
- Write manuals and document operating procedures and assist users in solving problems;

- Replace, delete and modify codes to correct errors, analyze, review and alter programs to increase operating efficiency and adapt the system to new requirements; and
- Oversee the installation of software and provide technical assistance to clients.

The petitioner states that the beneficiary will be assigned to various client projects which will require him to maintain client networks and software builds. The petitioner requires a minimum of a bachelor's degree in information systems, engineering or a related field for entry into the proffered position.

In the director's decision, he noted that the petitioner had not identified the specific work location(s) where the beneficiary would be employed during the term of employment sought on the Form I-129 petition. Essentially, the director indicated that the petitioner had not provided a complete itinerary<sup>1</sup> for the beneficiary's work to be performed from August 6, 2004 through August 5, 2007. 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.

The petitioner provided sample copies of contracts between it and various clients for whom the beneficiary would perform services. The petitioner indicated that the beneficiary would perform some work at the petitioner's business location, but would primarily be available for work on various client projects at multiple, but unspecified, locations. In the Aytes memorandum cited at footnote 1, 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 his discretion in requiring contracts of work. The documentation contained in the record does not establish a complete itinerary for the beneficiary from August 6, 2004 through August 5, 2007. Accordingly, the petitioner has failed to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition must be denied.<sup>2</sup>

The beneficiary's position has been identified by the petitioner as a 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

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<sup>1</sup> See 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).

<sup>2</sup> As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."

justify the hiring of an individual with a baccalaureate level education, others require only an associate's degree or some other form of certification.

The petitioner, however, has provided no contracts, work orders or statements of work from any petitioner client for whom the beneficiary will actually perform services specifically describing the duties the beneficiary would perform and, therefore, has not established the proffered position as a specialty occupation. The petitioner states that initially the beneficiary will work on in-house projects at its work location in Lombard, IL. The petitioner did not, however, provide evidence of any such in-house project so it is impossible to determine the nature or complexity of the duties to be performed. Simply going on the 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 190 (Reg. Comm. 1972)).

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. As the record does not contain any documentation from the end users of the beneficiary's services (the petitioner's clients) that establish 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)(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). For this additional reason, the petition must be denied.

The director also found that the petitioner had not filed an LCA valid for the location of employment. The AAO agrees. The location of employment on the LCA is listed as Lombard, IL. The petitioner failed to submit an itinerary of employment for the beneficiary for the period of time requested. Thus, the record does not establish that the LCA is valid for the work location. For this additional reason, the petition may not 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 failed to sustain that burden.

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