

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D2

FILE: LIN 04 250 52938 Office: NEBRASKA SERVICE CENTER Date: JAN 18 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:

SELF-REPRESENTED

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 acting director of the 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 software development and consulting firm, with five employees. It seeks to employ the beneficiary as a computer 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 based on his determination that the petitioner had failed to establish that it would employ the beneficiary in a specialty occupation or that the beneficiary was qualified to perform the duties of a specialty occupation.

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

The initial issue before the AAO is whether the record establishes that the proffered position is 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:

- (I) 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 computer programmer/analyst. At the time of filing, the petitioner indicated that the beneficiary would have responsibility for providing services to various clients in all areas of software development and support, and that the duties of the proffered position would require him to:

- Prepare and analyze software programs for clients;
- Design and implement different kinds of web based applications;
- Develop web sites for business applications using Oracle, VB, Java Script, RDBMS, SQL*PLUS, Developer and other applications;
- Perform analysis, prototype building, testing and quality assurance, production, coding, regression and functional testing, developing test scripts, analyzing results, programming, conferring with clients to resolve questions of data input and output, correct program errors and guide clients operating personnel;
- Solve production problems, making enhancements to existing functionality, fixing logical bugs existing in the application and carrying out research activities for the betterment of various activities; and
- Perform services for the petitioner in all other functional areas wherein the beneficiary has gained training and expertise.

The petitioner stated that performance of the proffered position's duties requires a bachelor's degree in computer science, engineering or other technical field, as well as two to five years experience.

At the time of filing, the petitioner stated that the above duties would be performed at one of its two offices, located in Santa Clara, California and Lakewood, Colorado. However, in its response to the director's request for evidence, the petitioner indicated that the beneficiary would be assigned to the work site of one of its clients in Sunnyvale, California and could, thereafter, be placed with another of its clients, although the beneficiary might also work within the petitioner's own software development center.

Based on this further explanation of the petitioner's plans for the beneficiary's employment, the AAO finds the record to establish the petitioner as an employment contractor, i.e., an entity that places individuals at multiple work locations to perform services established by contractual agreements for third-party companies. As a result, the petitioner may not establish the proffered position as a specialty occupation on the basis of the duties listed above.

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 its clients.

In response to the director's request for evidence, the petitioner submitted a copy of an open-ended October 15, 2004 consulting services agreement with Semilinks, Inc. in Sunnyvale, California and a work order of the same date, identified as Supplement A, indicating that the beneficiary would be employed under the contract on an as needed basis to provide applications development using Oracle, VB, C++ and Java. The agreement does not identify the location of the beneficiary's employment, although the petitioner indicates that it would be Sunnyvale, California.¹

In his denial, the acting director noted both that the signing of the consulting agreement between the petitioner and Semilinks occurred after the petitioner filed the Form I-129 and that the description of the beneficiary's employment provided insufficient detail to determine whether the duties he would perform are those of a specialty occupation. The AAO concurs with the acting director's findings.

¹ While the Sunnyvale location is not listed on the Labor Condition Application (LCA) that supports the Form I-129, it falls within the same metropolitan statistical area as Santa Clara, California, the location of the petitioner's offices. As a result, the prevailing wage rates for Sunnyvale and Santa Clara are the same and the beneficiary's employment in Sunnyvale would not violate the terms of the LCA.

The consulting services agreement and the work order submitted by the petitioner in response to the director's request for evidence are dated October 15, 2004, one month after the petitioner 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 demonstrate eligibility at the time of filing 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 eight-word description of the beneficiary's duties provided in Supplement A to the consulting services agreement is insufficient to establish the nature of the duties that the beneficiary would perform under contract. In that the record contains no client contract, statement of work or work order that would establish the beneficiary's duties as of the date of filing, the petitioner has not proved 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)(1).

On appeal, the petitioner asserts that its execution of a contract covering the beneficiary's services subsequent to the filing of the Form I-129 is a highly arbitrary ground for denial. It contends that it had contractual agreements, subsequently cancelled, that would have established the beneficiary's employment as of the date of filing and would have provided this documentation had the director asked for it. While the AAO notes the petitioner's statements regarding its previous contracts, it finds them to carry little evidentiary weight as the petitioner, on appeal, has failed to submit copies of any these prior consulting agreements identifying the beneficiary in support of its claims. Simply going on record without supporting documentation is not sufficient for the 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 that the record does not establish the proffered position as a specialty occupation, the AAO will not proceed with an analysis of the beneficiary's qualifications to perform the duties of a specialty occupation under the regulatory requirements at 8 C.F.R. § 214.2(h)(4)(iii)(C). Although the beneficiary's degree equivalency in mechanical engineering may qualify him to perform the duties of the proffered position, a beneficiary's credentials to perform a particular job are relevant only when that job is found to be a specialty occupation.

For reasons related in the preceding discussion, the record does not establish the proffered position as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the AAO shall not disturb the director's denial of the petition.

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 met that burden.

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