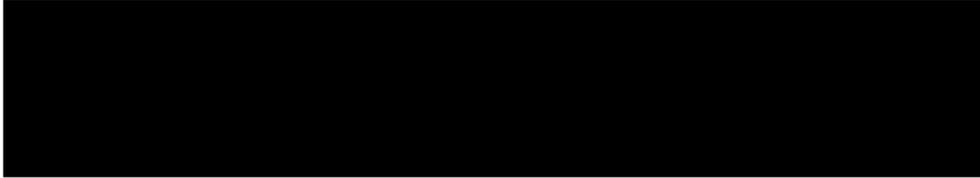




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FILE: WAC 04 240 53538 Office: CALIFORNIA SERVICE CENTER Date: **JAN 18 2007**

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:

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 service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The petition will be denied. The appeal will be dismissed.

The petitioner is a California company that seeks to employ the beneficiary as a Senior Developer. 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 denied the petition because: (1) the petitioner failed to establish that its company met the definition of an agent or U.S. employer, as set forth in 8 C.F.R. §§ 214.2(h)(2)(i)(F) and 214.2(h)(4)(ii); (2) the petitioner failed to submit an itinerary of employment, as set forth in 8 C.F.R. § 214.2(h)(2)(i)(B); and (3) the record contained insufficient evidence to establish that the proffered position qualified as a specialty occupation as set forth in section 101(a)(15)(H)(i)(b) of the Act.

On appeal the petitioner submits a statement, a letter verifying the petitioner's offer of employment, client contracts, and wage and tax information. The petitioner asserts that it has sole authority to hire, pay, fire, supervise, or otherwise control the work of the beneficiary, and that the petitioner is therefore the beneficiary's employer for immigration purposes. The petitioner asserts further that the beneficiary will be engaged in in-house product development for the petitioner, in addition to being sent to client sites to provide services at the clients' request. The petitioner contends that it is not necessary to submit client service itineraries or contracts of employment, and the petitioner asserts that the evidence contained in the record establishes that the proffered position meets the definition of a specialty occupation.

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

The petitioner states that it is seeking the beneficiary's services as a senior developer. Evidence of the proffered position duties is contained in: the Form I-129 and letter of support from the petitioner; the petitioner's response to the director's RFE; the petitioner's letter verifying its offer of employment to the beneficiary; and the Form I-290B and supporting documentation.

The above information reflects that the petitioner is a consulting and systems integration firm involved in the formulation and delivery of relevant software related services to users and providers of technology. The petitioner states that it is a "technology services firm, specializing in solutions design and delivery," and that its:

[E]xpertise is focused on turning raw data into actionable knowledge through [the petitioner's] Business Intelligence practice, developing/managing complex Engineering and IT applications through [the petitioner's] Product Services practice, extending [the petitioner's] client's reach to their customers and partners through [the petitioner's] CRM

practice and protecting [the clients'] information systems through [the petitioner's] Security Services practice.

The petitioner indicates that its software engineers typically, "[s]pend approximately two thirds of their time at client sites. The remainder of the time is spent at Saama, developing our 'tool sets' which are smaller versions of products used by our employees." The petitioner states that the beneficiary, "works both at client sites and at [REDACTED] and that, "he spends approximately 70% of his time working on client projects and 30% of his time developing [REDACTED]'s "toolsets'." Specifically, the petitioner states that the beneficiary would be responsible for:

Systems study;
Design and development of BI (Business Intelligence) and software application architecture for web-based applications for intranet, internet, and for manufacturing, sales, customer support, and marketing operations of large corporations;
Providing consulting in the areas of Cold-Fusion, BI tools and web technology;
Write custom modules and analyze software requirements to determine feasibility of design.

The petitioner states further that "[i]nitial contracts are for a specified number of unnamed engineers," and that, "engineers are assigned to a contract when the start date is imminent."

A letter verifying that the petitioner has offered the beneficiary employment as a Senior Developer reflects the above duties and clarifies that the letter is not a contract between the petitioner and beneficiary.

The regulations at 8 C.F.R. § 214.2(h)(4)(ii), provide that the term "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 [IRS] Tax identification number.

Upon review of the evidence contained in the record, the AAO finds that the petitioner in this matter is the beneficiary's direct employer for 8 C.F.R. § 214.2(h)(4)(ii) purposes, as the evidence of record establishes that the petitioner would engage the beneficiary to work within the United States, that the petitioner has an IRS Tax identification number, and that the petitioner has the authority to hire, pay, supervise or otherwise control the work of the beneficiary.

The petitioner asserts that the beneficiary will spend approximately 70% of his time working on client projects and 30% of his time developing [REDACTED]'s business intelligence related products. The record contains no itinerary or contract evidence to establish which clients the beneficiary would work for, or to establish the duties that the beneficiary would perform for clients. Instead, the petitioner asserts that it is not required to provide an itinerary of the beneficiary's services or engagements because the petitioner is the beneficiary's actual employer.

The record contains general internet website information reflecting that the petitioner has developed products related to client business intelligence implementation. However, the record contains no evidence to establish that the petitioner is presently developing an in-house product on-site, or to establish or demonstrate how the beneficiary would be involved in the development of an in-house product.

In the present matter, the record fails to establish where the beneficiary will work throughout the three-year period requested in the petitioner's Form I-129, or what the petitioner will be doing.

The record reflects that the beneficiary would spend 70% of his time working at an off-site work location and performing services established by contractual agreements for third-party companies. The record contains copies of several past contractual agreements with clients in which the petitioner provides information systems service employees and consultants to the client companies. None of the agreements, however, discuss or mention the beneficiary or his proffered position duties. Furthermore, the petitioner submitted no independent evidence to corroborate the assertion that the beneficiary will spend 30% of his time working on in-house production of business intelligence related products for the petitioner, or to establish that the petitioner is presently involved in the development, or production of an in-house product. The record thus does not establish that the beneficiary will work on an in-house project at [REDACTED]. The record also does not establish what an in-house project would entail, whether the performance of duties on any such in-house project would require a four-year degree in a specialty, or the length of time that the beneficiary would spend on such a project. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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)).

The director also found that the petitioner did not comply with the terms stipulated on the labor condition application (LCA) because the evidence established that the beneficiary would be employed at a location other than the petitioner's place of business. The director found that without employment contracts U.S. Citizenship and Immigration Services (CIS) was unable to determine whether the petitioner complied with the terms of the LCA or whether the LCA was proper in relationship to the area of employment or the wage offered the beneficiary.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), a petitioner must submit a statement that it will comply with the terms of the LCA for the duration of the alien's period of authorized stay. In the present matter it is unclear where the beneficiary will work throughout the three-year period requested in the petitioner's Form I-129. The record thus does not establish whether the LCAs that were certified prior to filing the I-129 petition are valid or whether the petitioner has complied with the terms of the LCA.

A director maintains the discretion to request any evidence that he or she independently requires in order to adjudicate an H-1B petition, which may include contracts between a petitioner and the beneficiary or its client(s). See 8 C.F.R. § 214.2(h)(9)(i). In the present matter the director requested, amongst other things, that the petitioner submit copies of employment contracts between the petitioner, its clients, and the beneficiary. The AAO notes that a review of an employment contract between a petitioner and a beneficiary is important because it reflects the terms of the beneficiary's employment. Moreover, the submission of a contract between the petitioner and the alien is provided for at 8 C.F.R. § 214.2(h)(4)(iv)(B), which states that an H-1B petition involving a specialty occupation shall be accompanied by "copies of any written contracts

between the petitioner and beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract.”

Moreover, 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, when requested at the discretion of the director. The AAO finds that the director properly exercised his discretion to request an itinerary of employment in the present matter. *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).

The evidence establishes that the beneficiary will work in off-site locations, but does not establish what the beneficiary will be doing. The record does not contain a complete itinerary of employment with the dates and locations of the beneficiary’s work in multiple locations. The petitioner has thus not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B),

The petitioner has also failed to establish that the proffered position is 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.

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.

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 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. *See 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.

To determine whether the position duties described above are those of a specialty occupation, the AAO first considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining these criteria include: whether the Department of Labor’s *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports that the industry requires a degree; whether the industry’s professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ and recruit only degreed individuals.” *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The petitioner has characterized its position as that of a senior developer. The 2006-2007, *Handbook* does not contain a definition for the occupation of a senior developer. The *Handbook* does, however, discuss several computer related professions ranging from computer programmers, database administrators and software engineers, to computer support specialists, systems administrators and systems analysts - all with varying educational requirements.

The 2006-2007, *Handbook* reflects on page 111, that computer systems software engineers coordinate:

[T]he construction and maintenance of a company’s computer systems and plan their future growth. Working with the company, they coordinate each department’s computer needs . . . [t]hey also might set up the company’s intranets. . . . Systems software engineers work for companies that configure, implement, and install complete computer systems. These workers may be members of the marketing or sales staff, serving as the

primary technical resource for sales workers, and customers. They also may be involved in product sales and in providing their customers with continuing technical support. Since the selling of complex computer systems often requires substantial customization for the purchaser's organization, software engineers help to explain the requirements necessary for installing and operating the new system in the purchaser's computing environment.

The *Handbook* discusses educational requirements for the computer systems software engineer position on page 112, stating that, "[m]ost employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual degree concentration for . . . systems software engineers . . . is computer science or computer information systems."

The *Handbook* also discusses related computer systems positions. For example, the *Handbook* describes a *computer systems administrator* position on page 114, by stating that:

Systems administrators are the information technology employees responsible for the efficient use of networks by organizations. They ensure that the design of an organization's computer site allows all of the components, including computers, the network, and software, to fit together and work properly. Furthermore, they monitor and adjust the performance of existing networks and continually survey the current computer site to determine future network needs.

The *Handbook* states further on page 114, that:

[A] bachelor's degree in computer science or information systems is a prerequisite for some jobs; however, other jobs may require only a computer-related associate's degree. For systems administrators, many employers seek applicants with bachelor's degrees, although not necessarily in a computer-related field. . . . A number of companies are becoming more flexible about requiring a college degree for support positions. However, certification and practical experience demonstrating these skills will be essential for applicants without a degree.

The *Handbook* describes a *computer systems analyst* occupation on page 116, and states that:

Computer systems analysts solve computer problems and apply computer technology to meet the individual needs of an organization. They help an organization to realize the maximum benefit from its investment in equipment, personnel, and business processes. Systems analysts may plan and develop new computer systems or devise ways to apply existing systems' resources to both hardware and software, or add a new software application to harness more of the computer's power. Most systems analysts work with specific types of systems . . . that vary with the kind of organization.

The *Handbook* discusses a computer systems analyst position's educational requirements on pages 116 and 117, and states that:

[W]hile there is no universally accepted way to prepare for a job as a systems analyst, most employers place a premium on some formal college education. . . . Many employers seek applicants who have at least a bachelor's degree in computer science, information science, or management information systems (MIS). . . . Despite employers' preference for those with

technical degrees, persons with degrees in a variety of majors find employment as system analysts. The level of education and type of training that employers require depend on their needs. . . . Employers usually look for people who have broad knowledge and experience related to computer systems and technologies, strong problem-solving and analytical skills, and good interpersonal skills.

The AAO finds that the duties of the proffered position as initially listed by the petitioner, are generic and provide no meaningful description of the specific tasks that the beneficiary would perform for the petitioner or its clients on a daily basis. The same lack of specificity is found in the petitioner's response to the director's request for evidence, and in the information submitted on appeal.

The AAO notes that, while a computer systems software engineer position may require a baccalaureate degree in a specialty, the information contained in the *Handbook* clearly reflects that a computer systems administrator or analyst may enter into the occupation with less than a baccalaureate degree, and that for those positions that require degrees, the degree may be in a broad range of backgrounds. In order to make a determination regarding the nature of the position and its degree requirements, if any, the AAO requires information about the specific duties of the proffered position. In the present matter, the record fails to offer a detailed, meaningful description of the proffered position, when the beneficiary is located on-site. The AAO is thus unable to determine whether the beneficiary would be employed in a specialty occupation for the petitioner, as required by 8 C.F.R. § 214.2(h)(1)(B)(1).

The AAO is also unable to determine whether the beneficiary would be employed in a specialty occupation as a contracted employee for the petitioner's clients. 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 (now CIS) had reasonably interpreted the statute and regulations as requiring a 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 that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients, 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)(1).

The AAO finds that the petitioner has also failed to establish that the proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which states that a, "[d]egree 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." The record contains no parallel position or industry evidence for like positions. The record also contains no information from a professional association in the petitioner's industry, and the record contains no letters or affidavits from firms or individuals in the industry attesting to the educational

requirements of the proffered position. Moreover, as noted above, the petitioner has failed to provide evidence containing a detailed description of the job duties for the proffered position. The AAO is thus unable to assess the uniqueness or complexity of the proffered position. Accordingly, the petitioner has failed to establish that the proffered position is a specialty occupation under the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has additionally failed to establish that the proffered position qualifies as a specialty occupation under the third prong of 8 C.F.R. § 214.2(h)(4)(iii)(A), which states that, “the employer normally requires a degree or its equivalent for the position.” The record contains no evidence relating to the petitioner’s past hiring practices for the proffered position. The petitioner therefore failed to establish that the position is a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). The AAO notes further that the record also fails to establish that the job itself involves the theoretical and practical application of a body of highly specialized knowledge.

The record also fails to establish that the proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which states that, “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.” As previously discussed, the description of the proffered position duties at the petitioner’s offices is too generic to determine the specific tasks that the beneficiary would perform on a daily basis, and the petitioner failed to provide a description of job duties from the entities for which the beneficiary would perform services off-site. The description of record makes it impossible to assess whether the proffered position’s duties meet the specialized and complex threshold of the fourth criterion contained in 8 C.F.R. § 214.2(h)(4)(iii)(A).

Accordingly, the AAO finds that the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation as set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has additionally failed to submit an itinerary of employment as required at 8 C.F.R. § 214.2(h)(2)(i)(B). The petitioner has also failed to establish that it filed an LCA valid for the work location. 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 sustained its burden in the present matter. The appeal will therefore be dismissed.

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