



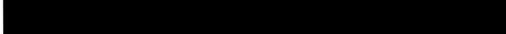
U.S. Citizenship  
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FILE: SRC 05 153 50327 Office: TEXAS SERVICE CENTER Date: **JAN 22 2007**

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 of the 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 consulting company that seeks to employ the beneficiary as a systems analyst. 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 her determination that the petitioner had failed to demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary at the time the petition was filed and also failed to establish that the petitioner would employ the beneficiary in a specialty occupation as of the filing date.

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, including the appellate brief. The AAO reviewed the record in its entirety before issuing its decision.

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 director found that because the petitioner and the beneficiary did not enter into a binding employment contract until after the filing date of the petition, that no employment relationship existed as of the date of filing. The AAO disagrees. The regulation at 8 C.F.R. § 214.2(h)(iv)(B) states that an employment contract or a summary of the terms of either the oral agreement may be submitted, if there is no written contract. The petition and supporting letter generally set forth the terms of proposed employment with the beneficiary, which are memorialized in the subsequent employment contract. Thus, the petitioner has established that as of the date of filing, it had an 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.<sup>1</sup> See 8 C.F.R. § 214.2(h)(4)(ii).

The evidence of record includes an employment agreement between the petitioner and the beneficiary, which indicates that the petitioner would act as the beneficiary’s employer. The petitioner’s July 25, 2005 response to the director’s request for additional evidence stated that the beneficiary would be hired as an employee, not an independent contractor; the petitioner emphasized that it would be the beneficiary’s actual employer. The record also contains copies of Forms W-2 for several of the petitioner’s employees, submitted as evidence that the petitioner pays its other employees and would therefore pay the beneficiary as well. In view of this evidence, the AAO finds that the petitioner will be the employer of the beneficiary and withdraws the director’s decision to the contrary.

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.

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<sup>1</sup> 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.<sup>2</sup>

On appeal, counsel submits a May 1, 2005 Master Services Agreement and corresponding work order between the petitioner and the North Texas Circuit Board (NTCB). The work order names the beneficiary, outlines the work that he will perform, states that he will work at [REDACTED] Road in Grand Prairie, Texas, and calls for his services to be provided from October 1, 2005 through September 30, 2008, which corresponds to the period of employment requested in the petition. The director, in her request for additional evidence, specifically requested a copy of the contract between the petitioner and the company requesting the services of the beneficiary, identifying the place of employment, supervision, conditions of employment, and all work to be performed. On appeal, counsel submitted the referenced May 1, 2005 agreement and work order with NTCB that pre-dates the petition’s filing. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director. As such, the AAO finds that the petitioner has not satisfied 8 C.F.R. § 214.2(h)(2)(i)(B) in that it has not timely submitted an itinerary of employment.

The director found that the contracts and other evidence submitted did not establish that the beneficiary would be employed in a specialty occupation as of the filing date of the petition. The AAO agrees. As mentioned *supra*, the contract and work order between the petitioner and NTCB was not submitted in response to the request for additional evidence despite the director’s specific request, and will not be considered. *Matter of Soriano*, 19 I&N Dec. at 764.

Even were the AAO to consider the contract, it would not establish the position as a specialty occupation. According to the May 1, 2005 work order, the beneficiary would provide consulting services to NTCB “in the area of systems analysis and software development using .net technology.”

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the proposed position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The duties of the proposed position fall within those noted for computer systems analysts, database administrators, and computer scientists, as the *Handbook* places the position of systems analyst within that occupational grouping.

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 proposed 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

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<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.”

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 proposed position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services.

The *Handbook* notes that there is no universally accepted way to prepare for a position in this occupational grouping, but that most employers place a premium on some formal college education. While a bachelor’s degree is a prerequisite for many positions, others may require only a two-year degree. For more technically complex positions, persons with graduate degrees are preferred. Many employers seek applicants who have a bachelor’s degree in computer science, information science or management information systems (MIS). MIS programs are usually part of a business school or college and differ considerably from computer science programs, emphasizing business and management-oriented course work and business computing courses. Employers are increasingly seeking individuals with a master’s degree in business administration with a concentration in information systems as more firms move their business to the Internet. The educational requirements for these positions vary greatly, depending on the needs of a particular position. A bachelor’s degree in a specific specialty, however, is not a minimum requirement for entry into the occupation. As the description of the job duties from the NTCB is insufficient to determine the level of knowledge required, the petitioner has not established eligibility under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. However, no such evidence has been presented.

Accordingly, the proposed position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The second prong of the second criterion will be discussed later in this decision.

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner’s ability to meet the third criterion, the AAO normally reviews the petitioner’s past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees’ diplomas. However, no such evidence has been presented. Thus, the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) has not been satisfied.

Finally, the duties to be performed by the beneficiary do not appear so specialized or complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Nor are the duties so complex or unique that they can only be performed by an individual with a degree in a specific specialty. As previously noted, not all systems analyst positions require a bachelor’s degree, as some require only a two-year degree. As evident in the earlier listing of the proposed duties listed by NTCB in the work order, the petitioner has limited its description of the proposed position and its duties to only a generalized description of functions generic to the occupation. Neither this description nor any other evidence of record develop the position or the nature of its duties in sufficient detail to establish either that the position is unique from or more complex than systems analysis positions not requiring at least a bachelor’s degree in a specific specialty, or that its

specific duties are more specialized and complex than systems analysis positions not requiring a degree in a specific specialty. Thus, the proposed position does not qualify as a specialty occupation under the second prong of the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), nor does it qualify under the fourth criterion of that regulation.

The proposed position does not qualify for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), or (4). As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial. Accordingly, the AAO will 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 sustained that burden.

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