

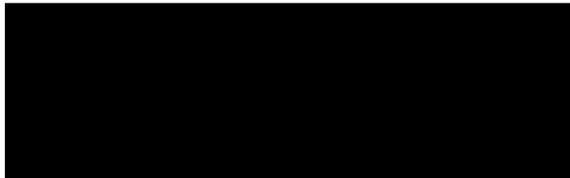


U.S. Citizenship
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FILE: LIN 04 021 52694 Office: NEBRASKA SERVICE CENTER Date: MAR 14 2007

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 Nebraska Service Center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The petitioner has now filed a motion to reconsider the AAO's decision. The motion to reconsider will be granted and the previous decisions of the director and the AAO will be affirmed.

The petitioner is an information technology and consulting firm that engages in system design and development and field services for numerous clients in the United States. It desires to extend its authorization to employ the beneficiary temporarily in the United States as a computer software engineer, at a salary of \$13.20 per hour, for three years. The director determined that the petitioner did not establish that the proffered position qualifies as a specialty occupation. The director also determined that current facilities do not exist to employ the beneficiary in-house and denied the petition.

On appeal, the AAO affirmed the director's decision. The AAO determined that the petitioner had not established that the beneficiary was coming to perform services in a specialty occupation, as described in the initial petition and its accompanying documents. The AAO also determined that the petitioner had failed to file a labor condition application (LCA) valid for the worksite specified on the petition, and that a new LCA with the appropriate work location was filed after the filing date of the petition.

On motion, counsel states that the AAO's conclusions and statements are unfounded and merit reconsideration. Counsel states that the beneficiary will work as a software engineer and that a software engineer is a specialty occupation. Counsel indicates that it would be impractical for the business entities where the beneficiary will be placed to list the job duties. Counsel states that the new LCA was filed because the job location changed and that it is in compliance with the regulations. The petitioner's motion to reconsider will be granted. However, the petition may not be approved.

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), defines an H-1(b) temporary worker as:

an alien . . . who is coming temporarily to the United States to perform services in a specialty occupation described in section 214(i)(1) . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1). . . .

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.

Similarly, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) provides that:

Specialty occupation means 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.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A) establishes four standards, one of which an occupation must meet to qualify as a specialty occupation:

- (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 proffered position.

The record of proceeding before the AAO contains: (1) Form I-290B motion and supporting brief; (2) the AAO's decision; (3) Form I-290B appeal and supporting documentation; (4) the director's denial letter; (5) the director's request for additional evidence; (6) the petitioner's response to the director's request; and (7) Form I-129 and supporting documentation.

The petitioner is seeking the beneficiary's services as a computer software engineer. In the initial petition, the petitioner stated that the duties of the proffered position entail analyzing users' needs, designing, creating and modifying general computer applications software or systems. In an accompanying letter to the petition dated October 15, 2003, the petitioner lists identical duties.

The director issued a request for evidence (RFE) asking that the petitioner provide a detailed description of the specific projects that would require the beneficiary's services.

In response, the petitioner provided a listing of companies and the companies' computer systems descriptions, which it called external and internal projects. The petitioner did not submit contracts or work orders for any of the projects nor did the petitioner list any actual projects requiring the beneficiary's services. The petitioner states that it is common practice among system developers to accept projects without the need of a written contract.

Upon review, the evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at multiple work locations to perform services established by contractual agreements for third-party companies. Counsel states in his motion to reconsider that because the petitioner is legally bound to provide properly accredited, licensed and degreed professionals, it is not necessary to itemize a laundry list of responsibilities. Counsel also states that excessive detail could foment litigation whenever a dispute arises. The regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A) states that an H-1B petition involving a specialty occupation shall be accompanied by evidence sufficient to establish that the services the beneficiary is to perform are in a specialty occupation. Absent a detailed description of the beneficiary's duties, CIS cannot determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act.

The court in *Defensor v. Meissner*, 201 F. 3d 384, 388 (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. Consequently, a description of the beneficiary's duties to be performed with the petitioner's client is required.

The record of proceeding contains the petitioner's two contracts with QualxServ for installation services on certain computer equipment for QualxServ customers. The contracts do not describe, in detail, the specific duties the beneficiary would be performing for QualxServ customers. As the AAO noted in its initial decision, the QualxServ contracts request installation services, which are not generally the duties of a computer software engineer as described on the petition. The contract signed April 29, 2002 refers to any purchase order for a more complete description of the petitioner's obligations under the contract, but no purchase order is attached. The contract dated January 5, 2004 refers to Exhibit A, which describes duties such as PC/laptop repair, which are not similar to the duties described on the petition. The record is not clear whether the beneficiary will work on the QualxServ contract or on some other project. The petitioner has not provided a job description or copies of work orders other than the QualxServ PC/laptop repair order, that the beneficiary will be working on. As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's client, QualxServ, or under any other project, the AAO cannot analyze whether these duties 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)(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)(ii)(B)(I).

On motion, counsel contends that the petitioner complied with CIS regulations at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) by submitting a new LCA of the changed employment location. Counsel asserts that the above cited regulation merely obliges the petitioner to certify to the Secretary of Labor that it has filed a LCA and that nothing more is required.

Upon review, the regulation at 8 C.F.R. § 214.2(h)(4)(i) states in pertinent part:

(B) *General requirements for petitions involving a specialty occupation.* (1) Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor (DOL) that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

The Petition for a Nonimmigrant Worker (Form I-129) was filed on October 30, 2003. The new LCA that accompanied the petitioner's appeal was certified on November 20, 2003 for the beneficiary to work at Oakland, California, with a validity period of December 1, 2003 through December 1, 2006. Although the new LCA was approved on November 20, 2003, its approval is subsequent to the filing of the H-1B petition on October 30, 2003. The petitioner states that it only had to file an LCA, and that it is in compliance with the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). The petitioner fails to consider 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), which requires that the petitioner state upon filing that it will comply with the terms and conditions of the LCA for the duration of the authorized period of stay. The location of the employment is critical, as it determines the prevailing wage for the occupation in the area of employment. *See* 20 C.F.R. § 655.730(c)(4) and (d)(1). The prevailing wage for Springfield, Mo for the occupation is \$13.20 per hour; the prevailing wage for Oakland, Ca is \$26.61. The petition indicates that it will pay the beneficiary \$13.20 per hour, not \$26.61 per hour. As the petitioner did not file the LCA valid for the work location until after the filing date of the petition, the petition may not be approved. The petitioner must establish eligibility at the time of filing the 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).

Counsel states that the new LCA was essentially an amendment and failure to file a new LCA would have violated CIS regulation at 8 C.F.R. § 214.2(h)(2)(i)(E). However, since the petitioner obtained a new LCA, it needed to file an amended or new petition, with fee, pursuant to 8 C.F.R. § 214.2(h)(2)(i)(E), with the Service Center where the original petition was filed to reflect the change in the beneficiary's employment. The petitioner has not presented evidence of its filing a new or amended petition in accordance to the above-cited regulation. The subsequent submission of a new LCA cannot in itself amend the initial petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden. Accordingly, the previous decisions of the director and the AAO will be affirmed.

ORDER: The order of November 2, 2005 dismissing the appeal is affirmed. The petition is denied.