

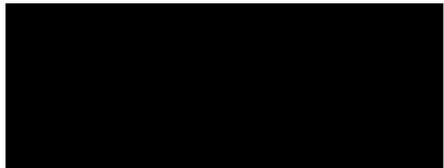
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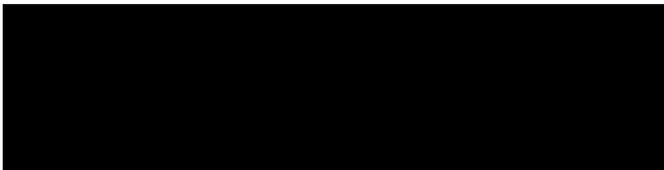
FILE: LIN 06 022 50825 Office: NEBRASKA SERVICE CENTER Date: NOV 30 2007

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 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 an IT consulting firm, and seeks to employ the beneficiary as an autoCAD developer/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 denied the petition because the proffered position does not qualify as a specialty occupation. On appeal, counsel submits a brief and additional information stating that the offered position qualifies as a specialty occupation.

The issue to be considered 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 director denied the petition stating that the proffered position does not qualify as a specialty occupation. Specifically, the director referenced *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). In that case, the court 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. The petitioner, however, has provided no contracts, work orders or statements of work from the party 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. As the record does not contain any documentation from the end user of the beneficiary's services that establishes 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)(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)(1). The petition must, therefore, be denied.

It is noted that the petitioner submitted an opinion letter from [REDACTED] Professor of Mechanical Engineering at Texas A & M University. [REDACTED] opined that, based on the petitioner's description of the duties to be performed by the beneficiary, the proffered position required bachelor's level educational training in Mechanical Engineering, Engineering Technology, Computer-Aided Design, or a related engineering or technology discipline, and the application of specialized knowledge in these fields. As noted above, however, the duties to be performed by the beneficiary must be supplied by the end-user of the beneficiary's services when determining whether the position ultimately qualifies as a specialty occupation. Thus, [REDACTED] evaluation of the position based on a description of the position's duties supplied by the petitioner, and not the end-user of the beneficiary's services ((P3 Information Technologies, Inc.), is of little evidentiary value and will be afforded little weight. CIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept, or may give less weight, to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Beyond the decision of the director, the LCA for Norristown, PA was not timely submitted. The petitioner filed the Form I-129 petition with a Labor Condition Application (LCA) indicating the beneficiary would be employed in Sunset Hills, MO. In its response to the director's request for evidence, the petitioner submits a new LCA for a work location in Norristown, PA, stating that the beneficiary was being assigned to a job at that location based on a work order executed on January 17, 2006. The LCA for that work location was certified on February 1, 2006, subsequent to the date of the filing of the Form I-129 petition on October 28, 2005. The job to

which the beneficiary is being assigned is a different position than that initially petitioned for in a different locality not covered by the initial LCA. Title 8, Code of Federal Regulations, part 214.2(h)(4)(iii)(B)(1) provides that the petitioner shall submit with an H-1B petition "a certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." The regulations further provide:

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

8 C.F.R. § 214.2(h)(4)(i)(B)(1). Thus, the submitted LCA was not timely obtained.

Further, the petitioner must file a new or amended Form I-129 petition as the beneficiary has not yet begun working for the new employer in H-1B status. Advisory letter, Thomas W. Simmons, Branch Chief, Benefits and Trades Section, Immigration and Nationalization Service (INS), to Shirley Tang, Friedman & Siegelbaum, LLP (November 12, 1982). 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.