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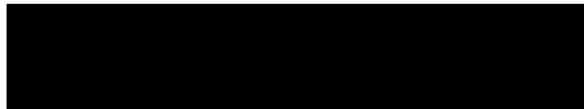


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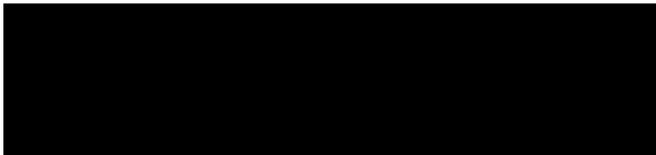
FILE: WAC 05 198 50328 Office: CALIFORNIA SERVICE CENTER Date:

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.

James Blunzinger, for

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 an information technology consulting and software development business that seeks to employ the beneficiary as a programmer analyst. It states that it employs eight personnel and had an estimated gross annual income of \$350,000 when the petition was filed. Accordingly, 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 record includes: (1) the Form I-129 and supporting documents; (2) the director's August 25, 2005 request for further evidence (RFE); (3) counsel's September 25, 2005 response to the director's RFE; (4) the director's October 6, 2005 denial decision; and (5) the Form I-290B, counsel's letter, and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

On October 6, 2005, the director denied the petition determining that the petitioner had not established that it qualified as the beneficiary's United States employer and that the petitioner had not provided sufficient evidence of the specific duties to be performed by the beneficiary while working for a third party end client. The director concluded that the petitioner had not established that at the time of filing the petition, or at the present time, it had a specialty occupation position available for the beneficiary in the location identified on the Form ETA 9035, Labor Condition Application (LCA).

On appeal, the petitioner's president asserts that the petitioner controls the beneficiary's duties and activities and has sole authority to pay, hire, and fire the beneficiary. He also states that although the beneficiary was originally slated to work on a project in California, the beneficiary would now work at the petitioner's headquarters on a software development project that will be marketed to potential clients upon completion.

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.

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.

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.

Pursuant to 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.

In a July 7, 2005 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered programmer analyst position at its client site Buena Vista Datacasting (Division of The Walt Disney Company) as follows:

- Developing and executing a system and component test plans and test cases for new Video-on-Demand service;

- Integration testing on Set-Top boxes, Conditional Access systems (NAGRA), content management systems and end-to-end system testing;
- Set-top box content (Video, Audio) delivery testing over air using Sky Stream Networks systems;
- Performing Functional, UI, white box, black box, stress and regression testing on Set-Top-box Software;
- Performing Software upgrade testing on Set-Top box over air;
- Using Test Director 8.0 for Testing Planning, Test Designing, Test Analysis, Test Execution, Defect Tracking and Test Evaluation; and
- Reporting defects to the team leader and helping the developer resolve the technical issues.

The record also includes an LCA submitted at the time of filing listing the beneficiary's work locations in Alameda, California and Farmington Hills, Michigan as a programmer analyst.

On August 25, 2005, the director requested additional evidence from the petitioner, including copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or an itinerary for the beneficiary.

In a September 25, 2005 response, counsel for the petitioner stated that the LCA for Alameda, California and Farmington Hills, Michigan had been erroneously submitted, and submitted a new LCA for Burbank, California. The petitioner's president stated that the beneficiary would be working on a project at Buena Vista Datacasting, Inc. (BVD) in Burbank, California, in conjunction with TechTalent Consulting and TeamBuilding, Inc. The petitioner submitted an agreement, dated June 24, 2005, between TechTalent Consulting and Teambuilding, Inc. and the petitioner indicating that the petitioner would provide digital video integration and engineering services to BVD and named the beneficiary to provide such services. The petitioner also submitted a supplemental terms rider for the beneficiary to perform onsite services at BVD as a "Business Intelligence Consultant," beginning October 1, 2005. The supplemental terms rider listed the beneficiary's duties at BVD as: "[A]nalyze, design, develop, implement, and maintain Decision Support and Analytical applications in support of agency reporting requirements for BVD programs." The supplemental terms rider also listed the "On Site Availability Constraints" as follows:

The Subcontractor shall be required to attend scheduled and impromptu meetings and conferences at the BVD facility on a regular basis. The Subcontractor shall also be required to perform tasks that require their physical presence within the BVD data center and satellite communications rooms on a scheduled and impromptu basis. . . It is estimated these types of activities for this task could potentially consume 75% - 100% of their normal workday tour of duty for a business day.

The director denied the petition on October 6, 2005 finding that the petitioner failed to provide valid client contracts establishing the availability of a programmer analyst position. The director also found that BVD is not a programming and analysis business that utilizes programmer analysts to complete its projects. The director concluded that the petitioner does not control the beneficiary's work, and thus had not established that it is qualified as a United States employer. The director also concluded that the petitioner had not established that it had a specialty occupation position available for the beneficiary in the location identified on the LCA.

On appeal, counsel for the petitioner asserts that the petitioner is the beneficiary's sole employer and that the beneficiary will be working for the petitioner in a specialty occupation. Counsel submits a letter from the petitioner's president who asserts that the petitioner controls the beneficiary's duties and activities and has sole authority to pay, hire, and fire the beneficiary. He also states that although the beneficiary was originally slated to work on a project in California, the beneficiary would now work at the petitioner's headquarters on a software development project entitled "Dimensional Data Warehouse" that will be marketed to potential clients upon completion.

On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). In this matter, the proffered position, as reflected on the petition and in the petitioner's July 7, 2005 letter, is that of a programmer analyst with the petitioner's client BVD.

The arguments raised by counsel and the petitioner on appeal relate to the new associated job responsibilities as a programmer analyst on the petitioner's in-house software development project entitled "Dimensional Data Warehouse." If the petitioner wishes to employ the beneficiary as a programmer analyst on its in-house software development project entitled "Dimensional Data Warehouse," it must file a new petition, with fee.

Pursuant to 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 AAO finds that the evidence of record is sufficient to establish 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.¹ See 8 C.F.R. § 214.2(h)(4)(ii). However, 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, a 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.

Thus, when a petitioner is an employment contractor, the entity ultimately employing the alien or using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, CIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

As discussed above, the agreement between the petitioner and TechTalent Consulting and TeamBuilding, Inc., and the corresponding supplemental terms rider do not indicate that the beneficiary would perform the duties of a programmer analyst. Rather, the beneficiary may spend 75% - 100% of his normal workday attending scheduled and impromptu meetings and conferences at the BVD facility. Thus, as the nature of the proposed duties are unclear, the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).²

In that the record does not demonstrate that the beneficiary would perform the duties of a programmer analyst, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a job description entailing programmer analyst duties, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by

¹ 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).

² The AAO observes that the Department of Labor's *Occupational Outlook Handbook* reports that there are many training paths available for programmers and that although bachelor's degrees are commonly required, certain jobs may require only a two-year degree or certificate; that most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of a variety of computer systems and technologies for positions of computer software engineer; and that there is no universally accepted way to prepare for a job as a systems analyst, although most employers place a premium on some formal college education.

alternate prongs of the second criterion. Absent a descriptive listing of the programmer analyst duties the beneficiary would perform under contract, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation. . . .

In his decision, the director also found that the petitioner had not established that a specialty occupation is available at the location specified on the labor condition application.

On appeal, the petitioner states, in part: "As noted on the LCA, the secondary work site is located in Farmington Hills, Michigan at our place of business."

Upon review of the record in its entirety, the AAO finds that the LCAs filed by the petitioner are not valid. The LCA submitted at the time of filing lists the work locations as Alameda, California and Farmington Hills, Michigan. The LCA submitted in response to the director's RFE lists the work location as Burbank, California. The letter of support filed with the petition indicates that the beneficiary will work off-site in Burbank, California. The letter of support filed with the appeal indicates that the beneficiary will work on-site at the petitioner's worksite in Farmington Hills, Michigan. As the beneficiary's actual duties and ultimate worksite are unclear, it has not been shown that the work would be covered by the locations on the LCAs. For this additional reason, the petition may not be approved.

In view of the foregoing, the petitioner has not overcome the director's objections. For these reasons, the petition may not be approved. Accordingly, the AAO shall not disturb the director's denial of the petition.

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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.