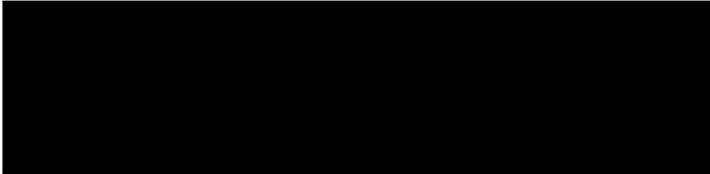


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D-2

FILE: WAC 07 004 51649 Office: CALIFORNIA SERVICE CENTER Date: **FEB 21 2008**

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, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner provides software-consulting services. It was incorporated in January of 2006. The petitioner states that it employs 1 person and had \$0 in gross annual revenue when the petition was filed. It seeks to employ the beneficiary as a programmer analyst. 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 filed September 29, 2006 and supporting documents; (2) the director's December 19, 2006 request for further evidence (RFE); (3) counsel's March 8, 2007 response to the director's RFE; (4) the director's April 17, 2007 denial decision; and (5) the Form I-290B and counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On April 17, 2007, the director denied the petition. The director determined that the petitioner did not qualify as either an employer or an agent, thus was not eligible to file an H-1B petition. The director also determined that multiple employment locations would be expected as the petitioner's business involved placing aliens with different firms and the petitioner had not submitted a Labor Condition Application (LCA) for all work locations. The director further determined, based on the documentation in the record, that the petitioner had not established the proffered position met the regulatory requirements of a specialty occupation.

On appeal, counsel for the petitioner asserts that the petitioner qualifies as an employer and that the beneficiary performs his work from the corporate headquarters of the petitioner in Hoffman Estates, Illinois. The petitioner states that it has a contract with Symphony Corporation for software development and that Symphony Corporation has subcontracted the work of its client to the petitioner and the services to be performed are data conversion using Informatica and other database related functions.

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 September 22, 2006 letter appended to the petition, the petitioner indicated the major duties of the position included the following responsibilities:

Plans, develops, tests, and documents computer programs, applying knowledge of programming techniques and computer systems. Evaluates user request for new or modified program, such as for financial or human resource management system, clinical research trial results, statistical study of traffic patterns, or analyzing and developing specifications for bridge design, to determine feasibility, cost and time required, compatibility with current system, and computer capabilities. Consults with user to identify current operating

procedures and clarify program objectives. Enters commands into computer to run and test program. Reads computer printouts or observes display screen to detect syntax or logic errors during program test, or uses diagnostic software to detect errors. Replaces, deletes, or modifies codes to correct errors. Analyzes, reviews, and alters program to increase operating efficiency or adapt new requirements.

The record also includes an LCA listing the beneficiary's work location as Streamwood, Illinois.

On December 19, 2006, the director requested, among other items, evidence establishing the validity of the petitioner; evidence establishing whether the petitioner would be an employer or an agent; and an itinerary of definite employment including copies of contracts between the employers.

In a March 8, 2007 response, counsel for the petitioner provided a statement that the petitioner would be the beneficiary's actual employer and that the roles and responsibilities vary from client to client. The record includes a single-page description of duties with a percentage of time assigned to each duty; however the title of the position is not identified nor is the employer or client requiring the exercise of the responsibilities identified. The petitioner also indicated that it had increased its number of clients from eight to twelve and with the increase in clients the demand for Data Warehouse and Enterprise Resource Planning was also increasing. The petitioner provided several contracts with different companies specifying generic duties for different services as well as purchase and work orders identifying different consultants. The petitioner provided a copy of a work order dated December 1, 2006 for the beneficiary to start work for a company located in Madison, Wisconsin for a six-month term.

On appeal, counsel for the petitioner asserts that the beneficiary performs his work from the petitioner's corporate headquarters in Hoffman Estates, Illinois and travels to the client's headquarters, a two-hour drive away, when necessary and returns the same day. As noted above, the petitioner indicates in a June 6, 2007 letter appended to the appeal, that the services to be performed by the beneficiary for the client company are: "Data conversion using Informatica and other database related functions."

To determine whether a particular job qualifies as a specialty occupation, CIS does not 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. *Cf. 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.

The AAO finds that the record presents confusing information regarding the beneficiary's work location. Although the petitioner indicates that the beneficiary would work "in-house" the work orders and contracts submitted suggest that the beneficiary will work in multiple locations. In addition, the petitioner is a newly established company and the record does not demonstrate that the petitioner will have specific employment for the beneficiary for the duration of the requested H-1B classification. The AAO concludes that, although

the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor and that the petitioner will place the beneficiary at different work locations to perform services according to various agreements with third-party companies.¹ 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 in such situations. 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. As the evidence contained in the record at the time the petition was filed did not establish that the petitioner had three years of work for the beneficiary to perform, the director properly exercised her discretion to require an itinerary of employment.² As the petitioner has not submitted an itinerary, the petition may not be approved.

The petitioner also has failed to establish that the Labor Condition Application (LCA) is valid for all work locations. As the record does not contain an itinerary of employment, it cannot be determined that the LCA is valid for all the locations of employment. For this additional reason, the petition may not be approved.

Further, although the petitioner is an employment contractor and will be the beneficiary's actual employer, the petitioner indicates that the beneficiary's roles and responsibilities will range from client to client. 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. In this matter, as the beneficiary's roles and responsibilities will differ for each client, CIS is unable to determine whether the proffered position incorporates 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.

The petitioner has provided an overview of an occupation and has indicated that one of the beneficiary's roles will require "Data conversion using Informatica and other database related functions." This information is insufficient to establish that the proffered position is a specialty occupation. The Department of Labor's *Occupational Outlook Handbook (Handbook)* indicates there are a number of computer-related positions, some of which require a four-year course of college-level education, some of which require a two-year associate's degree, and some of which only require experience. Moreover, although the beneficiary's role for

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 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."

a six-month period (the term of the work order) will require "Data conversion using Informatica and other database related functions," the record contains no other information regarding the beneficiary's tasks for the duration of the H-1B classification. As the record does not contain documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients for the duration of the H-1B classification, the AAO is also unable to analyze whether the duties of the proposed position 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)(B)(I).

Each petitioner must detail its expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. In circumstances where the beneficiary will provide services to a third party, the third party must also provide details of its expectations of the position. Such descriptions must correspond to the needs of the petitioner and/or the third party and be substantiated by documentary evidence. To allow otherwise would require acceptance of any petitioner's generic description to establish that its proffered position is a specialty occupation. CIS must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business and what the third party contractor expects from the beneficiary in relation to its business and what the proffered position actually requires, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty.

In that the record does not offer a comprehensive description of the duties the beneficiary would perform for the petitioner or the petitioner's client, 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 meaningful job description, the petitioner has not established the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguished the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a detailed listing of the duties the beneficiary would perform under contract, the petitioner has not established that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither has the petitioner satisfied 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. For this additional reason, the petition may not be approved.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. As always, in visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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