U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 04 198 52238 Office: NEBRASKA SERVICE CENTER Date: APR 25 2006

IN RE: Petitioner: [redacted]
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:

SELF-REPRESENTED

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, Director
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 provides information technology services. It seeks to employ the beneficiary as a programmer/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 because the proffered position is not a specialty occupation and because the labor condition application (LCA) is not valid for the place of employment. On appeal, counsel submits a brief and additional and previously submitted evidence.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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)(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 proffered position.

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. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a programmer/analyst. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail system analysis, system design and architecture, data modeling, meetings and discussions, coding, code walk through and unit testing, documentation, and web application integration and testing. The petitioner stated that the industry standard for the proposed position is a baccalaureate degree in computer science, electronics, information systems, or a related area.

In denying the petition, the director stated that the petitioner is an employment agency or consulting firm that provides contract employees to other businesses. The director stated that he must examine the ultimate employment of the beneficiary and determine whether it qualifies as a specialty occupation. The director found that the petitioner entered into a contract with a company that also provides contract workers to clients, and that the submitted contract did not have information about the business where the beneficiary will actually work. According to the director, in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now CIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the foreign nurses require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the nurses to the United States for employment with the agency's clients. Absent a contract with the actual employer stating the duties to be performed pursuant to the contract, the director stated that he cannot conclude that the proposed position qualifies as a specialty occupation. The director stated that there are five petitions which are unrelated to the petitioner, yet have the same cover letter and job description. According to the director, the petitioner conveyed that it paid someone to prepare the documents for the instant petition. The director thereby concluded that he could not find that the petitioner's statements in the cover letter are factual or relate to the proposed position or the petitioner's company. The director noted that the petitioner did not submit a certified labor condition application for Portland, Oregon, the client site where the beneficiary was to provide services. The director stated that the petitioner established none of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that it is submitting the following: the labor condition application for Portland, Oregon; the beneficiary's educational documents and educational evaluation; the revised supporting letter; and the third party agreement and work order.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(*1*) and (*2*): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree

requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the 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.

In the denial letter, the director correctly stated that the court in *Defensor* held that the petitioner needs to show that the entities ultimately employing the beneficiary must require a bachelor's degree for all employees in that position, and that the degree requirement should not originate with the employment agency that brings the alien worker to the United States for employment with its clients. The record here contains the contractual agreement between the petitioner and its client, EnSoftek, Inc., a provider of enterprise software services and consultancy services, and two purchase orders with EnSoftek, Inc. One purchase order lists the beneficiary's job responsibilities.[1] The other purchase order indicates that Oracle developer services are required. The record does not contain the contractual agreement between EnSoftek, Inc. and its client, which is the company that will ultimately use the beneficiary's services. In light of *Defensor*, the director properly determined that the petitioner needed to submit a contractual agreement describing the proposed duties from an authorized representative of EnSoftek, Inc.'s client. Without such a description, the petitioner has not demonstrated that the work that the beneficiary will perform for EnSoftek, Inc.'s client will qualify as a specialty occupation.

For the reasons discussed in this decision, the petitioner establishes none of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position; a specific degree requirement is common to the industry in parallel positions among similar organizations; the proffered position is so complex or unique that it can be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

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[1] The AAO notes that page 12 of the purchase order references the petitioner and [redacted] The AAO finds that the purchase order is unclear as to whether the petitioner or [redacted] providing a worker pursuant to the purchase order.

The director stated that there are five unrelated petitions which have identical cover letters. In response to the director's concern, on appeal the petitioner submits a revised cover letter. While the five identical petitions are not in the record and may not be considered, the AAO finds that the petitioner's response that it hired a consultant to prepare its petition inadequately addressed the director's concerns. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition on this ground.

The director also denied the petition because the LCA is not valid for the place of employment. 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.

On appeal, the petitioner submits an LCA for the place of intended employment, Portland, Oregon. The LCA was certified after the filing date of the petition. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) provides that the petitioner shall submit with the H-1B petition a certification from the Secretary of Labor that it has filed an LCA. Based on the regulations, it is incumbent upon the petitioner to file the proper documents in order to establish eligibility for a benefit. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at the future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The record reveals that the submitted LCA on appeal has October 29, 2004 as the certification date, and the H-1B petition has July 1, 2004 as the date of filing. Based on this evidence, the petitioner failed to establish eligibility at the time of filing the nonimmigrant petition as the LCA was filed subsequent to the filing of the H-1B petition. The petition will also be denied for this reason.

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.