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U.S. Citizenship and Immigration Services

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FILE: LIN 04 254 50373 Office: NEBRASKA SERVICE CENTER Date:

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:

[redacted]

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

The petitioner provides enterprise resource planning (ERP) for the business industry. The petitioner seeks to employ the beneficiary as an SAP programmer. 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).

On May 17, 2005, the director denied the petition. Counsel's submits a one-page brief and the petitioner's declaration on appeal.

The record includes: (1) the September 14, 2004 Form I-129 and supporting documents; (2) the director's January 28, 2005 request for further evidence (RFE); (3) the petitioner's March 21, 2005 response to the director's RFE; (4) the director's May 17, 2005 denial decision; and (5) the Form I-290B and counsel's brief and the petitioner's statement in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The issue in this matter is whether the petitioner's proffered position qualifies as a specialty occupation. To meets its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

In a September 10, 2004 letter submitted in support of the petition, the petitioner stated it had offered the beneficiary the position of SAP programmer and that the specific duties of the position include:

> Analyze, plan, develop and upgrade industry specific SAP business software modules using SAP R/3 Version 4.6C and SAP-BIW Version 3.1C; Append data source structures to include new fields; Write ABAP code in the user-exit to fill extraction structure; Design and develop interfaces between various file systems and SAP using IDOCS, EDI and ALE tools; Customize info cubes for MM module to suit clients' business needs; Develop user defined data sources using ABAP queries, views and transparent; Develop and enhance forms in SAP (SAPScript) and Layout Sets; Train clients and internal staff in the technical operation of SAP software modules; Develop transactions, interactive reports, classical reports and BDC programs using Menu Painter and Screen Painter; Build, test, install and validate new business software; Design and implement software applications using C, C++, Oracle, MS Access, Visual Basic and Windows NT; Evaluate user request for new or modified programs; Provide post production support for any ongoing production problems and maintain problem logs for future reference; Create thorough system documentation helpful to technical, functional and user staff; Conduct studies or surveys to obtain data and analyze data to advice [sic] on or recommend solutions including alternate methods or modifications of existing systems.

The Labor Condition Application (LCA) that the petitioner filed with the Department of Labor (DOL) listed the beneficiary's place of work as Chicago/Waukegan, Illinois as a programmer/developer.

On January 28, 2005, the director requested additional evidence from the petitioner. The director requested: an itinerary of definite employment, listing the location(s) and organization(s) where the beneficiary will be

providing services; contractual agreements (as well as any related work orders and appendices) between the petitioner and the particular client(s) for which the petitioning organization will be providing services; and if applicable specific evidence of contractually stipulated services to be performed by the alien at the petitioner's own facility on any internal project(s) that documents both the existence of the projects as well as the current commercial interest in their on-going development for particular clients.

In a March 21, 2005 response, the petitioner noted that it had created a software product idea and needed two sets of teams, one team with strong skills in business processes and their implementation in SAP and a second team with strong skills in programming applications. The petitioner noted further that the first team would map the business processes and design efficient solutions and the second team would interact with the first team to implement the solutions through their programming prowess. The petitioner indicated that the beneficiary's expertise would be used to develop components of the created software, implement the various SAP modules, and more specifically develop and implement the business software modules and applications using SAP-BIW Ver, C, C++, Oracle and Visual Basic. The petitioner stated that the beneficiary would remain its employee and if it became necessary for the beneficiary to visit a client site, he would not be dispatched for more than 30 days without filing a new LCA and amending the petition.

The petitioner also stated that it needed around 30 software professionals in order to develop and implement its new product while acknowledging that it also required employees as consultants to third parties. The petitioner provided copies of several contracts to perform consulting services. Some of the contracts included statements of work for particular individuals (the president of the petitioner and three other individuals) to perform the consulting work. The petitioner provided its business plan, its statement of incorporation, its 2003 Internal Revenue Service (IRS) Form 1120, U.S Corporation Income Tax Return, and its 2004 profit and loss statement. The record also contains a page from the petitioner's Form UCT-6, Florida Department of Revenue Employer's Quarterly Report, for the fourth quarter of 2004 listing one employee and a page from the petitioner's Form TXC-41, Texas Employer's Quarterly Report, which does not list the pertinent quarter but shows two employees.

In the May 17, 2005 decision, the director determined that the beneficiary would be working at the petitioner's facility as part of a product development team. The director noted that Citizenship and Immigration Services (CIS) had requested further evidence in this matter regarding the *bona fides* of the job offer, the actual operations of the business entity, and the alien's proposed project itinerary because the record indicated that the petitioner is a young firm with a small number of employees, an unknown organizational structure and hierarchy, and a strong dependence on client consulting engagements for continued business. The director determined that the petitioner had not provided sufficient evidence corroborating the existence of the petitioner's internal project(s) or commercial interest in the ongoing development of the internal project(s) to demonstrate that the proffered position constituted a specialty occupation. The director noted that the third party contracts did not demonstrate that sufficient H-1B level duties would immediately be available for the beneficiary in the location on the LCA. The director observed that the field of computer technology contains many job functions that cannot be classified as specialty occupations and concluded that in the absence of any active project contracts or purchase orders directly related to the beneficiary's proposed duties at the petitioner's Illinois facility or any client work address, the petitioner had failed to establish that it had a specialty occupation available for the beneficiary in the location on the LCA when the petition was filed.

On appeal counsel for the petitioner asserts that the director's denial, based on the petitioner's failure to establish that it will have a specialty occupation position available for the beneficiary, is in error. Counsel indicates that the petitioner's declaration submitted on appeal clearly shows that the beneficiary's services are specifically sought and required. Counsel references the petitioner's business plan as providing specific details of the petitioner's requirements to hire and retain a number of software professionals to provide technical services in the area of SAP ERP software implementation. Counsel also cites an unpublished decision in support of the contention that when there is no support for the exploration of the concept of "speculative employment," a request for contracts between the petitioner and the alien's work site does not fall within service guidelines.

The petitioner's vice-president's undated affidavit notes that the petitioner had only two employees when the petition was filed in September 2004 but currently has ten employees and is continuing its efforts to hire and retain qualified professionals. The vice-president states: that the petitioner's major emphasis is in the area of SAP; that the beneficiary will be performing technical duties including development of industry specific SAP business software and ERP systems; and that the vice-president will be "supervising the work of the beneficiary as a SAP programmer/analyst to ensure the performance according to the project specifications." The vice-president states further: "the petitioner has real business requirement to hire and retain qualified professionals not only for providing its consulting services but also to develop its innovative business process flow software." The vice-president acknowledges that the process flow software product is not yet marketable, but claims that the process will bring positive changes in ERP development and implementation and will enable the petitioner to not only market it as a viable new product but will enhance the petitioner's other ERP consulting services.

Preliminarily, the AAO observes that counsel has not furnished evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Further, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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.

Preliminarily, 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).

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, Citizenship and Immigration Services (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.

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 the instant matter, the petitioner has not provided a statement of work or other work order from any entity ultimately utilizing the beneficiary's services. Thus, the record does not provide sufficient evidence of the beneficiary's duties for entities other than the petitioner. The AAO observes that a portion of the petitioner's description of the beneficiary's duties refers to general duties of a network systems administrator, an occupation that does not necessarily require a four-year degree. The record suggests that if the individual in the proffered position would provide consulting services to third party companies, the services would include these general duties. Without an actual description of the beneficiary's duties from an entity utilizing the beneficiary's services and a general description of the responsibilities the individual might provide as a consultant to third parties, the AAO is precluded from determining whether this portion of the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty.[2]

Upon review of the record, however, including the vice-president's affidavit on appeal, the petitioner's business plan, tax returns, and the detailed illustration of the proffered position's duties on appeal, the AAO

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[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 *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; and that there is no universally accepted way to prepare for a job as a computer systems analyst, although most employers place a premium on some formal college education and many employer's seek applicants who have at least a bachelor's degree in computer science, information science or management information systems.

determines that the petitioner intends to employ the beneficiary in-house to work on an internal project. The description of the proposed project, and the duties accompanying the development and implementation of the project, is indicative of a position that would normally impose the minimum of a baccalaureate degree in a specific specialty. The AAO finds that the petitioner's attempt to develop the new software described requires the services of an individual with specialized knowledge of computer programming and software development that is usually associated with the attainment of a baccalaureate or higher degree. 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

Upon review of the totality of the record, the record reveals 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 demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

The record reflects that the beneficiary will be performing the duties of a specialty occupation and has completed coursework in general studies and an area of concentration in computer science and engineering at the University of Madras, in India. The beneficiary's foreign degree has been evaluated to be equivalent in level and purpose to a Bachelor of Science Degree in Computer Science. Thus, the beneficiary is qualified to perform the services of the specialty occupation.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The appeal is sustained. The petition is approved.