

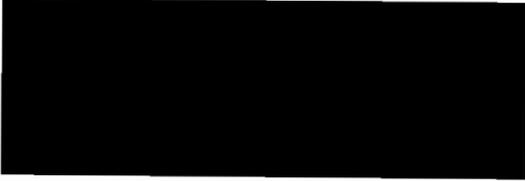
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FILE: WAC 06 236 52447 Office: CALIFORNIA SERVICE CENTER Date: JUN 18 2008

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 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 a computer consulting company that seeks to employ the beneficiary as a senior programmer 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 determined that the proffered position did not qualify as a specialty occupation. Specifically, the director noted that the petitioner failed to provide copies of contracts with the end user of the beneficiary's services detailing the duties the beneficiary would perform, and, as such, it could not be determined that the proffered position qualified as a specialty occupation. The director also determined that the petitioner did not qualify as a United States employer, and that the record established that the beneficiary would be eligible to recapture only 53 days for absences from the country as opposed to the 180 days sought by the petitioner. On appeal the petitioner submits a brief and additional information stating that the proffered position qualifies as a specialty occupation, that the petitioner is a United States employer, and that the beneficiary is entitled to recapture 180 days of H-1B eligibility for absences from the United States. The petitioner submitted, on appeal, a Master Work Agreement entered into with Puerto Rico Telephone Company, Inc. (Puerto Rico Telephone) on September 1, 2006, and a Statement of Work for the eCOMM Data Mart Project with Puerto Rico Telephone detailing the services that the petitioner would provide between August 1, 2006 and December 31, 2006.

The first issue to be determined is whether the petitioner qualifies as a United States employer.

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 record establishes that the petitioner will be the employer of the beneficiary, and the director's finding to the contrary shall be withdrawn. The petitioner submitted, on appeal, a Master Work Agreement entered into with Puerto Rico Telephone. Under the terms of this agreement the petitioner acts as an independent contractor in providing services. The services to be provided to Puerto Rico Telephone will be performed by the petitioner's employees, who shall work as independent contractors on Puerto Rico Telephone projects. The petitioner will hire the beneficiary, will pay the beneficiary, has the right to fire the beneficiary and will otherwise have control over the beneficiary's work. The fact that the beneficiary may perform services at a third party client's facility and is subject to that client's work rules and regulations does not change the employer/employee relationship existing between the petitioner and beneficiary. The petitioner will engage the beneficiary to work in the United States, has an employer-employee relationship with the beneficiary, and has an Internal Revenue Service Tax identification number. The petitioner qualifies as a United States employer in this instance, and the director's finding to the contrary is withdrawn.

The next issue to be determined 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 petitioner seeks the beneficiary’s services as a programmer analyst. Evidence of the beneficiary’s duties includes the Form I-129 petition with attachment and the petitioner’s response to the director’s request for evidence. According to this evidence the beneficiary would:

- Provide staff and users with assistance solving computer related problems, such as malfunctions and program problems;

Test, maintain, and monitor computer programs and systems, including coordinating the installation of computer programs and systems;

Use object-oriented programming languages, as well as client/server applications development processes and multimedia and Internet technology;

Confer with clients regarding the nature of the information processing or computation needs a computer program is to address;

- Coordinate and link the computer systems within an organization to increase compatibility and share information;

Consult with management to ensure agreement on system principles;

- Expand or modify systems to serve new purposes or improve work flow;
- Interview or survey workers, observe job performance and/or perform the job in order to determine what information is processed and how it is processed;
- Determine computer software or hardware needed to set up or alter systems; and
- Train staff and users to work with computer systems and programs.

The beneficiary will be assigned to<sup>1</sup> work on the eComm Data Mart Project with Puerto Rico Telephone. According to the Statement of Work provided for that project, the beneficiary would:

Identify available sources;

- Construct business intelligence stations;
- Create reports for decision making;
- Develop Destiny in Oracle with data of the following applications: OSP 4149, OSP;
- Provide services in Construction, Clear Quest, Capex, TTP, Incident, Report, USF, Star/OSADIA Flowtrhu Metrics, Standardization Reports, Cognos Tools, and Reports Interface;

Provide reports Interface;

- Create reports viewer through the Web;

Create function to export data from flat files; and

Validate functions for graphical reports.

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<sup>1</sup> The AAO notes that the Statement of Work referencing the master agreement pre-dates the master agreement.

The duties detailed in the Statement of Work are generally consistent with those detailed by the petitioner in its response to the director's request for evidence.

Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary<sup>2</sup> with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.

In his request for evidence, the director asked for copies of contracts between the petitioner and its clients for whom the beneficiary would perform services and an itinerary for the beneficiary's employment. In the Aytes memorandum cited at footnote 1, the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised his discretion to request the contracts described above. As the employer may place the beneficiary in multiple work locations, the record should establish the existence of specialty occupation work available to the beneficiary throughout the one-year period. As previously set forth, the petitioner provided, on appeal, a copy of a Master Work Agreement with an accompanying Statement of Work entered into with Puerto Rico Telephone under which the beneficiary would provide services from August 1, 2006 until December 31, 2006. The petitioner states on the Form I-129 that the beneficiary's intended dates of employment are from September 15, 2006 through September 15, 2007. The documentation submitted by the petitioner does not establish a complete itinerary for the beneficiary from September 15, 2006 through September 15, 2007. Accordingly, the petitioner has failed to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition must be denied.<sup>3</sup>

The AAO routinely consults the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. The duties of the proffered position include duties normally performed by computer systems analysts. The education and training requirements for computer systems analysts are set forth in the *Handbook*, 2008 – 09 edition, as follows:

Training requirements for computer systems analysts vary depending on the job, but many employers prefer applicants who have a bachelor's degree. Relevant work experience also is very important. Advancement opportunities are good for those with the necessary skills and experience.

***Education and training.*** When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred.

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<sup>2</sup> See 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).

<sup>3</sup> 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."

The level and type of education that employers require reflects changes in technology. Employers often scramble to find workers capable of implementing the newest technologies. Workers with formal education or experience in information security, for example, are currently in demand because of the growing use of computer networks, which must be protected from threats.

For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.

Despite the preference for technical degrees, however, people who have degrees in other majors may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation.

. . . .

The petitioner has not established that the nature of the proffered position's specific duties, in the petitioner's client's business environment, and as described by the petitioner and detailed in supporting contractual documentation, are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate degree or higher in a specific educational discipline. The duties described in the petition and Statement of Work are administrative and post analytical in nature. The beneficiary will rely on commercially available or pre-existing management tools in performing the duties of the position. The duties of the position, as detailed by the end-user of the beneficiary's services (Puerto Rico Telephone), are set forth in general terms and do not provide sufficient detail concerning the day-to-day activities of the beneficiary in Puerto Rico Telephone's business environment, to determine that the performance of those duties requires a baccalaureate level education. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000) 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 has not, therefore, established that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the offered position. The position does not, therefore, qualify as a specialty occupation. 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The next issue to be considered is whether the petitioner would be entitled to recapture time the beneficiary spent out of the country in order to extend the beneficiary's period of H-1B eligibility beyond December 13, 2006. The beneficiary has been in H-1B status since December 13, 2000. In general, section 214(g)(4) of the

Act, 8 U.S.C. § 1184(g)(4), provides that “[t]he period of authorized admission [of an H-1B nonimmigrant] may not exceed 6 years.” The record does not establish any exception to this rule. As such, the beneficiary would exhaust the maximum period of stay in H-1B status on December 12, 2006. The petitioner seeks to recapture 180 days that it claims the beneficiary was outside of the United States during his period of H-1B eligibility.

In general, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that “[t]he period of authorized admission [of an H-1B nonimmigrant] may not exceed 6 years.” [Emphasis added.] The regulation at 8 C.F.R. § 214.2 (h)(13)(iii)(A) states, in pertinent part, that:

An H-1B alien in a specialty occupation . . . who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status or be readmitted to the United States under section 101(a)(15)(H) or (L) of the Act unless . . . . [emphasis added].

Pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(A):

An H-1B alien in a specialty occupation . . . who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status or be readmitted to the United States under section 101(a)(15)(H) or (L) of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

The regulation states, “[a]n H-1B alien. . . who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension.” 8 C.F.R. § 214.2(h)(13)(iii). Section 214(g)(4) of the Act states, “[i]n the case of a nonimmigrant described in section 101(a)(15)(H)(i)(b), the period of authorized admission as such a nonimmigrant may not exceed 6 years.” Section 101(a)(13)(A) of the Act states that “[t]he terms ‘admission’ and ‘admitted’ mean, with respect to an alien, the lawful entry of the alien in the United States after inspection and authorization by an immigration officer.” The plain language of the statute and the regulations indicate that the six-year period accrues only during periods when the alien is lawfully admitted and physically present in the United States. This conclusion is supported and explained by the court in *Nair v. Coultime*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001). It is further supported by a policy memorandum issued by the United States Citizenship and Immigration Services (USCIS) that adopts *Matter of I*, USCIS Adopted Decision 06-0001 (AAO, October 18, 2005), available at: <http://uscis.gov/graphics/lawregs/decisions.htm>, as formal policy. See Memorandum from Michael Aytes, Acting Associate Director for Domestic Operations, Citizenship and Immigration Services, Department of Homeland Security, *Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants*. AFM Update AD 05-21 (October 21, 2005).

In support of the petitioner’s claim that the beneficiary is entitled to recapture time spent out of the country during his period of H-1B eligibility, the petitioner submitted a chart listing arrival and departure dates for the beneficiary to the United States from foreign countries. This chart was supported by copies of pages from the beneficiary’s passport bearing arrival and departure stamps. Not all dates listed by the beneficiary could be verified by the passport stamps because they were illegible. The evidence does establish, however, that the

beneficiary would be entitled to recapture 179 days for documented absences from the country were the petition approvable. As noted above, however, the petition may not be approved.

Beyond the decision of the director, the record does not establish that the beneficiary is qualified to perform the duties of the proffered position. The petitioner submitted an evaluation of the beneficiary's foreign education and work experience by an educational consultant (a credentials evaluation service), Eddie Aguilu Semidey. Credentials evaluations services may evaluate foreign education only for equivalency purposes, not work experience. 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Work experience may only be evaluated, for the purpose of determining degree equivalence, by an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The record does not establish that the beneficiary's work experience was evaluated by someone with that authority. 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.