



U.S. Citizenship
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FILE: LIN 04 266 53422 Office: NEBRASKA SERVICE CENTER Date: AUG 29 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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, Chief
Administrative Appeals Office

DISCUSSION: The acting director of the Nebraska 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 a company providing information technology services to its clients, with 25 employees. It seeks to employ the beneficiary as a programmer/analyst 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 acting director denied the petition because he determined that the record did not establish the proffered position as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with additional evidence. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the duties of the proffered position establish it as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job offered 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 one 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, a petitioner must establish that its position meets one of four 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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply 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 petitioner states that it seeks the beneficiary’s services as a programmer/analyst. At the time of filing, the petitioner indicated that the beneficiary would design, code and implement different applications using information security tools and routing technologies, and would work in a team on an in-house project to design, implement, document and perform necessary upgrades. It provided the following breakdown of the beneficiary’s time as follows:

- Systems analysis – 15 percent;
- Systems design and architecture – 15 percent;
- Data modeling – 5 percent;
- Meetings and discussions – 10 percent;
- Actual coding – 25 percent;
- Code walk through and unit testing – 10 percent;
- Documentation – 10 percent; and
- Web application integration and testing – 10 percent.

The petitioner states that performance of the proffered position’s duties requires the minimum of a bachelor’s degree in computer science or a related field, as well as six months software development experience.

The evidence of record establishes that the petitioner is an employment contractor and intends to place the beneficiary at multiple work locations to perform services established by contractual agreements for third-party companies. Accordingly, the petitioner may not establish the proffered position as a specialty occupation on the basis of the duties listed above.

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, 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. Therefore, the petitioner in the instant case must demonstrate the proffered position’s degree requirement or equivalent based on the duties the beneficiary would perform for its clients.

In response to the director’s request for evidence of the contracts or work orders covering the beneficiary’s employment, the petitioner submitted a master vendor agreement with a Toronto-based company to provide computer software and systems services, a work order under that agreement for the beneficiary, and a new Labor Certification Application (LCA) to cover the change in employment locations. The work order indicates that the beneficiary would be employed at a Jersey City, New Jersey company for ten months and would be responsible for Siebel 7 configuration, integration, EAI, Workflow, Service request and the preparation of reports using Actuate.

In his denial, the director concluded that the contractual information submitted by the petitioner did not provide sufficient information to determine what duties would be performed by the beneficiary for its Jersey City client. He, therefore, found the record insufficient to establish the proffered position as a specialty occupation.

While the AAO agrees that the 14-word job description in the work order submitted by the petitioner is insufficient to establish the proffered position as a specialty occupation, it notes that both the master vendor agreement and the work order are dated December 7, 2004, one month after the petitioner filed the Form I-129. Therefore, they may not be used by the petitioner to establish the duties of the proffered position. A petitioner must establish eligibility at the time of filing a nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Moreover, the LCA submitted to cover the beneficiary’s employment with the Jersey City client does not comply with H-1B filing requirements as it was certified after the petitioner filed the Form I-129. *See* 8 C.F.R. § 214.2(h)(1)(B)(1). In that the record contains no client contract, statement of work or work order that would establish the beneficiary’s duties as of the date of filing, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the alternate 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)(1).

On appeal, the petitioner submits a new work order for the beneficiary under a contract between the petitioner and a second client in Princeton, New Jersey, and another LCA covering the Princeton work location. The AAO will not, however, consider this evidence. Pursuant to the regulation at 8 C.F.R. § 214.2(h)(2)(i)(E), a petitioner must file an amended or new H-1B petition, with fee and new LCA, with the service center where the original petition was filed to reflect any material changes in the terms and conditions of employment. 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 its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

Beyond the decision of the director, the AAO finds that the petitioner has also failed to comply with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B), which requires employers to submit an itinerary 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 the contracts or work orders under which the beneficiary would be employed. The work order submitted by the petitioner in response to the director's request postdates its filing of the Form I-129 and, as previously discussed, will not be considered. As a result, the record contains no itinerary of the beneficiary's employment. Accordingly, the petitioner has failed to satisfy the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B). For this reason as well, the petition must be denied.

For reasons related in the preceding discussion, the record does not establish the duties of the proffered position as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the petitioner has complied with the filing requirements at 8 C.F.R. § 214.2(h)(2)(i)(B). Therefore, the AAO shall not disturb the director's denial of the petition.

The AAO notes that the basis for its decision differs from that relied upon by the director. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.