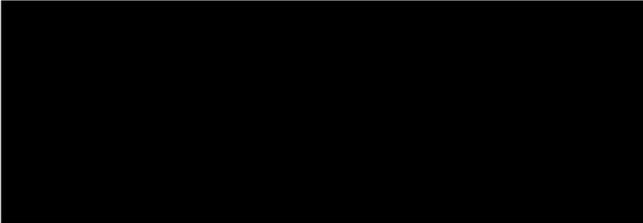


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Services**

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02

FILE: LIN 04 225 50446 Office: NEBRASKA SERVICE CENTER

Date:

DEC 05 2006

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 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 is an information technology and solutions company that seeks to employ the beneficiary as a computer engineer. 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 denied the petition finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation. Counsel submitted a timely appeal.

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)(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) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) Form I-290B and counsel's May 18, 2005 letter. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a computer engineer. 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 RFE. According to the petitioner, the beneficiary will be responsible for the research, design, development, and testing of computer systems and networks, and solving operating problems and supervising installation.

The director denied the petition, stating that the record contained no evidence which demonstrated that at the time of filing the petitioner had sufficient work at the H-1B level that was immediately available for the beneficiary at the Denver, Colorado, work location listed in the labor condition application (LCA). The director stated that the petitioner submitted no evidence of the beneficiary's employment itinerary and contractual agreements and work orders, as requested in his RFE. According to the director, the petitioner indicates that it is unable to provide an employment itinerary and contractual agreements and work orders as it "does not know who its clients will be as of yet, or which clients will need the beneficiary's services." The director noted that the employment agreement between the petitioner and the beneficiary does not identify the beneficiary's worksite. The director stated that *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) indicates that the ultimate employment of the beneficiary must be examined to determine whether the position constitutes a specialty occupation.

On appeal, counsel states that *Defensor* is distinguishable from the instant case. Counsel asserts that *Defensor* involves a nonspecialty occupation, a nurse; whereas the position here, a computer engineer, involves a specialty occupation. The petitioner here, counsel states, will be the beneficiary's employer as it will hire, fire, and control his work and the nature of his employment. Counsel states that the petitioner in *Defensor* is an employment agency. According to counsel, the petitioner, an information technology services company, provides human resources on a temporary or permanent basis. Counsel states that because the needs of the petitioner's clients are unpredictable it cannot provide an employment itinerary of the beneficiary's work. Counsel states that 29 C.F.R. § 730(c)(1)(v) allows for variations or changes in a petitioner's business status, such as amending an LCA to reflect changes in the initially intended employment location. Counsel asserts that CIS has previously found that the proposed position qualifies as a specialty occupation as it approved petitions filed on behalf of the beneficiary by other employers. Citing the Memorandum from William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3 (April 23, 2004), (the Yates memo) counsel states that the Yates memo conveys that a prior CIS determination should be given deference. According to counsel, the veracity of the beneficiary's position is attested to by the petitioner's income tax records and its desire to bring the beneficiary to the United States.

Based on the evidence in the record, the AAO concurs with the director's conclusion that the record fails to establish that the beneficiary would be employed in a specialty occupation.

The evidence of record, which includes the petitioner's company brochure and its response to the RFE, establish that the petitioner is an employment contractor in that it will place the beneficiary at multiple work locations to perform services established by contractual agreements for third-party companies. The petitioner, however, has provided no contracts, work orders, or statements of work describing the duties the beneficiary would perform for clients. Without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform for clients the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The director stated that he must examine the ultimate employment of the beneficiary to determine whether the position constitutes a specialty occupation, as stated by the *Defensor* court. It is noted that the petitioner in *Defensor*, Vintage Health Resources (Vintage), is a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." The court found that Vintage "is at best a token employer." In analyzing the regulation at 8 C.F.R. § 214.2(h)(4)(ii)(2), which provides the definition of an U.S. employer, the court stated that: "merely being able to "hire" or "pay" an employee, by itself, would be insufficient to grant employer status to an entity that does not also supervise or actually control the employee's work." The *Defensor* court did not determine whether Vintage qualifies as an employer under the regulations. It stated:

For even if Vintage is an employer, the hospital is also an employer of the nurses and a more relevant employer at that. The nurses provide services to the hospitals; they do not provide services to Vintage. Even if Vintage mails the nurses' paycheck, the nurses are paid, in the end, by the hospital and not Vintage. The hospitals are the true employers of the nurses, since at root level the hospitals "hire, pay, fire, supervise, or otherwise control the work" of the nurses, even if an employer-employee contract existed only between Vintage and the nurses. As such, the INS interpreted "employer" in § 214.2(h)(4)(iii)(A) to refer to the true employer-namely the hospitals-even though Vintage was the only "employer" petitioning for visas. Under this interpretation, the INS required Vintage to provide information regarding the hospitals' requirements for the nursing positions.

To interpret the regulations any other way would lead to an absurd result. If only Vintage's requirements could be considered, then any alien with a bachelor's degree could be brought into the United States to perform a non-specialty occupation, so long as that person's employment was arranged through an employment agency which required all clients to have bachelor's degrees. Thus, aliens could obtain six year visas for any occupation, no matter how unskilled, through the subterfuge of an employment agency. This result is completely

opposite the plain purpose of the statute and regulations, which is to limit H1-B visas to positions which require specialized experience and education to perform.

Based on the above passages, the court in *Defensor* 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 *Defensor* 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 AAO finds that the facts in the instant case are similar to those in *Defensor*. The beneficiary will not provide services to the petitioner; he will be placed at client sites to perform services established by a contractual agreement between the petitioner and the client. Like the hospital that the court considers the true employer of the nurses, the true employer of the beneficiary is the petitioner's clients. Thus, as *Defensor* indicates that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner, the petitioner here needed to submit evidence that the proposed position qualifies as a specialty occupation on the basis of the job requirements imposed by the clients for whom the beneficiary will provide consulting services, and the evidence needed to indicate the duration of the assignment and identify the beneficiary as assigned by the client to provide consulting services as a computer engineer. As the record does not contain any documentation of the specific duties the beneficiary would perform for the petitioner's clients, the AAO cannot analyze whether his duties 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)(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).

The director found that the petitioner had not established that it would employ the beneficiary in Denver, Colorado. 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 if the beneficiary's duties will be performed in more than one location.¹

In his RFE, the director asked for the beneficiary's employment itinerary and client contracts. 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

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).

discretion to request an employment itinerary and client contracts. As the petitioner submitted no evidence of an employment itinerary and client contracts, and counsel indicates in his response to the RFE that "the petitioner does not know who its clients will be as of yet, or which clients will need the beneficiary's services," the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), the petition must therefore be denied.

Further, as stated by the director, the record does not establish that the LCA is valid for the work location where the beneficiary will be employed. The AAO agrees. No evidence of record establishes that the beneficiary will be employed in Denver, Colorado, the location specified on the LCA. For this additional reason, the petition may not be approved.

Counsel asserts on appeal that CIS has previously found that the proposed position qualifies as a specialty occupation as it has approved petitions filed on behalf of the beneficiary by other employers. Citing the Yates memo counsel states that the prior CIS determination should be given deference. The AAO finds counsel's assertions unpersuasive. The Yates memo applies to cases in which CIS has previously approved an H-1B petition filed by the petitioner on behalf of the beneficiary and the petitioner seeks to extend the H-1B employment of the beneficiary under the same terms of employment. With the situation here, the record does not contain evidence that CIS previously approved an H-1B petition filed by the petitioner on behalf of the beneficiary. Thus, the Yates memo is not influential with the instant case.

Furthermore, this record of proceeding does not contain all of the supporting evidence submitted to the service centers in the prior cases. In the absence of all of the corroborating evidence contained in those records of proceeding, counsel's assertions are not sufficient to enable the AAO to determine whether the positions in the prior cases are similar to the position in the instant petition. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

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 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.