

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

102

DEC 13 2006

FILE: LIN 04 251 54421 Office: NEBRASKA SERVICE CENTER Date:

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 software development and consulting company that seeks to employ the beneficiary as a computer 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 petitioner did not demonstrate that it had H-1B caliber work available for the beneficiary during the three-year time period sought by the petitioner in the Form I-129 petition, and the petition was not, therefore, approvable. The director also determined that the petitioner did not qualify as a United States employer in this instance. On appeal the petitioner submits a brief and additional information to establish that the proffered position qualifies as a specialty occupation, and that the petitioner will be the employer of the beneficiary with H-1B caliber employment available for him in the United States. The record contains a contract between the petitioner and Inforide Technologies, as well as a work order, whereby the beneficiary will provide computer consulting services for Inforide Technologies client, McGraw Hill in Dubuque, Iowa, for a period of three months (extendable).

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 a Professional Services Agreement Master Agreement which it entered into with Inforide Technologies. Under the terms of this agreement the petitioner acts as an independent contractor in providing services. The services to be provided to Inforide Technologies' clients will be performed by employees of the petitioner. 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 final 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 evidence provided by the petitioner the beneficiary would:

- Analyze software requirements/user problems to determine the feasibility of design within time and cost constraints.
- Formulate and define the scope and objectives through research and fact-finding to develop or modify complex software programming applications or information systems;

- Consult with hardware engineers and other engineering staff to evaluate interface between hardware and software, and operational and performance requirements of the overall system;
 - Formulate and design the software system, using scientific analysis and mathematical models to predict and measure the outcome and consequences of design;
 - Prepare functional specifications and design software programs;
 - Build detailed design specifications and programs for scientific, engineering, and business applications;
 - Design data conversion software programs;
 - Perform QA testing;
 - Develop and direct software systems testing procedures, programming and documentation including testing units and computer software systems;
- Coordinate the installation of software systems; and
- Consult with the client concerning maintenance of the software system.

The petitioner requires a minimum of a bachelor's degree in computer science or a related field for entry into the proffered position.

The director found that the petitioner did not establish that it would employ the beneficiary in a specialty occupation for the three-year period requested on the petition. The period of time requested on the Form I-129 petition is from October 1, 2004 through September 30, 2007. 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 three-year period.

Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary¹ 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. In response to the director's request for evidence, the petitioner provided a Professional Services Agreement Master Agreement entered into between

¹ 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).

it and Inforide Technologies with an accompanying work order. The documentation submitted by the petitioner does not establish a complete itinerary for the beneficiary from October 1, 2004 through September 30, 2007. Under the terms of the work order, the beneficiary would provide services for Inforide Technologies at its client's (McGraw Hill) facility in Dubuque, Iowa. The work order further provides that the beneficiary's services will be performed for a period of "3+ months (Extendable)." The petitioner states that the contract under which the beneficiary will work is for an initial period of 90 days, but extendable for the remainder of the beneficiary's term under the Form I-129 petition (until September 30, 2007). The petitioner's unsubstantiated statement that the contract will be extended after the initial 90 day term is not sufficient to establish a work itinerary for the beneficiary until September 30, 2007. The record contains no additional statement from Inforide Technologies indicating that the work order/contract will be extended. The work order simply indicates that the contract may be extended beyond 90 days. Simply going on the record without supporting documentary evidence is not sufficient for purposes 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 190 (Reg. Comm. 1972)). 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.²

The beneficiary's position has been identified by the petitioner as a programmer analyst, The Department of Labor's *Occupational Outlook Handbook (Handbook)* notes that although there are many training paths available for programmers due to varied employer needs, the level of education and experience employers seek has been rising due to the growing number of qualified applicants and the specialization involved with most programming tasks. Bachelor's degrees are commonly required, although some programmers may qualify for certain jobs with 2-year degrees or certificates. The associate degree is a widely used entry-level credential for prospective computer programmers. In the absence of a degree, substantial specialized experience or expertise may be needed, and employers appear to place more emphasis on previous experience even when hiring programmers with a degree. Some computer programmers hold a college degree in computer science, mathematics, or information systems, while others have taken special courses in computer programming to supplement degrees in other fields. Thus, it is evident that while some programmer positions justify the hiring of an individual with a baccalaureate level education, others require only an associate's degree or some other form of certification.

The petitioner, however, has provided no contracts, work orders or statements of work from the party for whom the beneficiary will actually perform services (McGraw Hill) specifically describing the duties the beneficiary would perform and, therefore, has not established the proffered position as a specialty occupation. 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

² 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."

requirements imposed by the entities using the beneficiary's services. As the record does not contain any documentation from the end user of the beneficiary's services that establishes the specific duties the beneficiary would perform under contract, the AAO cannot analyze whether these 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)(1). For this additional reason, the petition must be denied.

The petitioner also asserts that previous agency decisions have classified the offered position as a specialty occupation. This reference will not sustain the petitioner's burden of establishing H-1B qualification in the petition now before the AAO. This record of proceeding does not contain the entire record of proceedings in the petitions referred to by counsel. **Accordingly, no comparison of the positions can be made.** 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, the AAO is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). It warrants noting that Congress intended this visa classification for aliens that are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge. Congress specifically stated that such an occupation would require, as a *minimum* qualification, a baccalaureate or higher degree in the specialty. CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specialty occupation as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created that visa category. In the present matter, the petitioner has offered the beneficiary a position as a programmer analyst. For the reasons discussed above, the proffered position does not require attainment of a baccalaureate or higher degree in a specific specialty as a minimum for entry into the occupation, and approval of a petition for another beneficiary based on identical facts would constitute material error, gross error, and a violation of 8 C.F.R. § 214.2 paragraph (h).

Finally, counsel makes reference to a memorandum prepared by Terry E. Way, former director of the Nebraska Service Center, concerning programmer/analyst positions and whether or not such positions may qualify as a specialty occupation. That memorandum, which was issued as guidance for service center adjudicators, is not a national policy memorandum for CIS. Further, the referenced memorandum does not state that all such positions qualify as specialty occupations. A determination as to whether any particular position so qualifies must be made based upon the evidence of record and in accord with applicable regulations. As noted above, the record of proceeding in this instance does not establish that the proffered position is a specialty occupation.

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.