

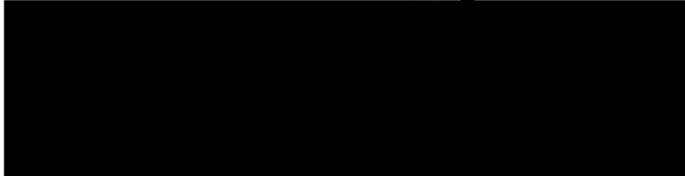


U.S. Citizenship
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Services

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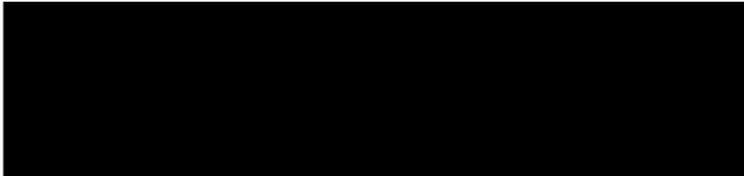


FILE: LIN 05 236 52017 NEBRASKA SERVICE CENTER Date: **DEC 19 2006**

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:



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.

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Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center acting director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed. The petition will be denied.

The petitioner is a corporation engaged in software development and consulting. In order to employ the beneficiary in a position that it has designated system analyst, the petitioner endeavors to classify the beneficiary as a temporary 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 on two independent grounds: (1) failure to establish that the proffered position qualifies as a specialty occupation according to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A); and (2) failure to submit a Labor Condition Application (LCA) for the location where the proposed work would be performed.

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v).

The only comment entered on the Form I-290B is:

Please see attached LCA for work location in Minneapolis, MN. Please approved [sic] this petition.

Counsel's letter on appeal is limited to these statements:

Please note that the petitioner wishes to file an Appeal Notice on the case.

Please find the requested LCA for work location in Minneapolis, MN. beneficiary. [Sic]

We respectfully request you to overturn this denial and issue an approval as soon as possible.

As noted below, the appeal does not specify any legal or factual error with regard to either of the two grounds of the director's decision.

The AAO will first address the director's finding that the petitioner failed to establish that the proffered position is a specialty occupation.

The record reflects that the beneficiary would be assigned to work at clients' business locations. As indicated in the director's citation to *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), where a beneficiary would perform his or her work at a petitioner's clients' businesses, it is incumbent on the petitioner to provide sufficient evidence of that work to establish the level of theoretical and practical knowledge in the relevant specialty that job performance would require. To determine whether a particular job qualifies as a specialty occupation, Citizenship and Immigration Services (CIS) does not simply rely on a position's title. Nor does CIS rely on generalized descriptions of duties that do not relate actual performance that is indicative of the

theoretical and practical application of at least bachelor's degree level of knowledge in a particular specialty. CIS must focus on the actual employment of the alien. *Cf. Defensor v. Meissner*. The critical element is not the title of the position, an employer's standards that are not dictated by actual performance requirements of the position, or the extent to which the record's duty descriptions mirror those that the *Handbook* uses for an occupational category. Rather, the decisive issue is whether the evidence of record establishes that, as required by the Act, the particular position that is the subject of the petition actually requires the theoretical and practical application of a body of highly specialized knowledge in a specific specialty, and the attainment of a baccalaureate or higher degree in that specialty.

The acting director based his denial on the specialty occupation issue on his finding that the evidence of record, including the contract submitted in reply to the RFE, did not provide sufficient information about the work that the beneficiary would perform. The appeal does not address this basis of the denial decision.

The petitioner concedes that the director's finding on the LCA issues was correct: with regard to the director's finding that the petition had not provided an LCA for the location where the beneficiary would work, the response on appeal is the submission of a new LCA.

Obtaining certification of an LCA after a petition has been filed will not overcome the denial of a petition for filing a deficient LCA.¹ To be recognized in support of a petition, the related LCA must have been certified by the Department of Labor prior to the filing of the petition. The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) states:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that with the petition an H-1B petitioner shall submit "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). 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).

Counsel fails to specify how the director made any erroneous conclusion of law or statement of fact in denying the petition. As neither the petitioner nor counsel presents additional evidence on appeal to overcome the decision of the director, the appeal will be summarily dismissed in accordance with 8 C.F.R. § 103.3(a)(1)(v).

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.

¹ The LCA submitted on appeal was certified on September 7, 2005, a date later than the August 9, 2005 filing of the petition.

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ORDER: The appeal is dismissed. The petition is denied.