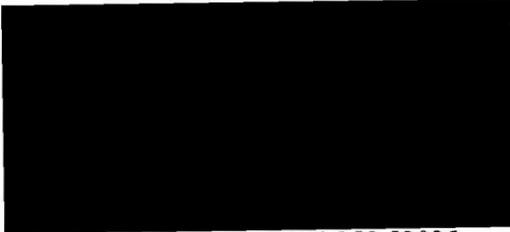




U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



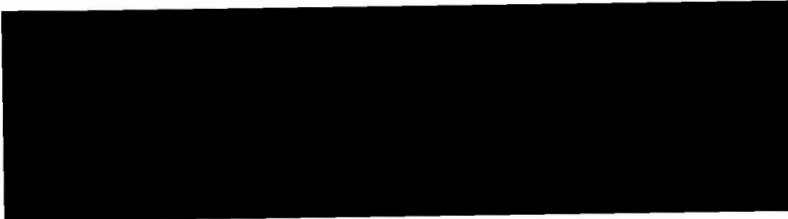
Pr

FILE: LIN 04 258 52035 Office: NEBRASKA SERVICE CENTER Date: JUN 02 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.

for Michael T. Kelly
for 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 sustained. The petition will be approved.

The petitioner is an information technology services company that seeks to employ the beneficiary as a software engineer and to classify her 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 on the basis that the petitioner failed to establish that it would act as the beneficiary's employer and that the proposed position was a specialty occupation. On appeal, counsel submits a brief and previously submitted evidence.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation and certified Labor Condition Application (LCA); (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B with accompanying letter. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner seeks the beneficiary's services as a software engineer. Evidence of the beneficiary's duties includes Form I-129 with attachments, the petitioner's response to the RFE, and the petitioner's appeal letter. According to this evidence, the beneficiary's duties would include: implementing complex web-based Business Performance Management solutions; researching, designing, developing, and testing complex software for web-based Business Performance Management; maintaining and customizing software; directing multiple and on-going software engineering application projects and assignments; providing engineering expertise to implement, develop, support, and maintain complex software applications; performing complex research and analysis on core server and device driver software; performing detailed software planning, evaluation, and recommendations; analyzing highly complex engineering problems and situations concerning software application by acquiring and analyzing diagnostic output documentation, identifying errors and incorrect procedures to aid in resolving system/application related errors and problems, and debugging in an embedded environment; providing information and technical expertise to resolve or clarify technical issues pertaining to software applications; developing detailed software and application project plans and coordinating project activities by directing and monitoring project tasks to ensure successful implementation; evaluating proposed and existing system applications by systematic analysis of their efficiency of design and resource utilization to assure performance within company service level agreements; and traveling to the petitioner's client sites located throughout the San Francisco area to oversee installation, maintenance, troubleshooting, and proper implementation of the petitioner's systems and solutions. The petitioner stated that the position required at least a bachelor's degree or foreign equivalent in computer science, computer engineering, information technology, software applications, or a related area.

The director believed the beneficiary would be performing services pursuant to a third-party contract and asked the petitioner to submit contracts with its clients that included addendums, work orders, dates of the project's or contract's duration, the location, and the name of the beneficiary. The director found that the petitioner's failure to submit the requested contracts showed that the petitioner did not, at the time of filing, have sufficient work at the H-1B level to employ the beneficiary at the location listed on the LCA. The director also found that the record did not contain sufficient evidence to establish that the proposed position was a specialty occupation.

In response to the RFE, the petitioner submitted a contract it has with the designer and manufacturer of the Business Performance Management software the beneficiary would implement for the petitioner's clients. On appeal, counsel asserts that the petitioner does not intend to act as the beneficiary's agent, and therefore, is not subject to the regulations for agents. Counsel asserts that just because the petitioner provides consulting services as one of its business activities does not make it an agent subject to the regulations on agents. Counsel asserts that the proposed position is a specialty occupation under three of the four specialty occupation criteria listed in the regulations.

If the petitioner intends to act as the beneficiary's agent, the petitioner may file the H-1B but must include an itinerary of definite employment and information on any other services planned for the period of time requested. 8 C.F.R. § 214.2(h)(2)(i)(F). As noted in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), CIS must examine the ultimate employment of the beneficiary to determine whether the position qualifies as a specialty occupation. When a petitioner will employ the beneficiary in multiple work locations, the regulations require that the petitioner submit an itinerary with the names and addresses of the locations where the beneficiary will work. 8 C.F.R. § 214.2(h)(2)(i)(B).

The petitioner provided documentation to establish that it will not act as the beneficiary's agent. As such, the petitioner is not subject to the requirements of 8 C.F.R. 214.2(h)(2)(i)(F). The petitioner provided sufficient detail regarding the beneficiary's specific duties under the requirements set forth in *Defensor*. Finally, the petitioner satisfied the requirement of 8 C.F.R. § 214.2(h)(2)(i)(B) by providing the following detailed explanation of how the beneficiary would perform her day-to-day duties:

The employees of [the petitioner], meet monthly at [the petitioner's] principal office, and the remaining work duties are performed from their home office or at client sites. [The petitioner] equips its employees with computers and equipment required for their work production off-site and communicates with them telephonically or via e-mail daily. The petitioner asserts that although the beneficiary would travel to clients' sites, she would be employed by the petitioner.

The petitioner stated the following regarding its employer/employee relationship with the beneficiary:

The beneficiary will be solely employed as a direct employee of [the petitioner] in the position of software engineer;

The beneficiary will be paid on our payroll submitted to the appropriate SESA on Quarterly Wage and Withholding Reports or other wage reporting documents required by state and/or federal law;

The beneficiary will be paid at least the full salary shown on the LCA for no less than 40 hours per week and the offered salary is the annual rate of pay; and

Any and all engineering duties performed, on or off-site, are performed on behalf of [the petitioner].

The petitioner also established, through documentation, that it resells the Business Performance Management software designed and manufactured by Hyperion Solutions Corporation and that the beneficiary would be customizing, designing, and implementing this software for the petitioner's clients. The petitioner provided the names of several of its clients, including Sempra Energy, Sony Computer Entertainment, and Yahoo.

The AAO finds that the petitioner satisfied the requirement at 8 C.F.R. § 214.2(h)(2)(i)(B). The petitioner established that it will not act as the beneficiary's agent and is not subject to the regulations regarding filing as an agent. The record offers a meaningful description of the proposed duties and establishes that position is that of a software engineer.

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.

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 bachelor's or higher degree, but one in a specific field of study that is directly related to the proposed position.

The petitioner need only satisfy one of the criterion at 8 C.F.R. 214.2(h)(4)(iii)(A) to establish that a position is a specialty occupation. Upon a thorough review of the record, the AAO concludes that the petitioner has established that its proposed position is a specialty occupation pursuant to 8 C.F.R.

§214.2(h)(4)(iii)(A)(I) - a bachelor's or higher degree or its equivalent is the normal minimum requirement for entry into the particular position.

An important factor CIS considers to determine whether or not this criterion has been met, is if the Department of Labor's *Occupational Outlook Handbook (Handbook)* reports that the industry requires at least a bachelor's degree in a specific field of study. *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 764 F. Supp. 1095, 1102 (S.D.N.Y. 1989)). The 2006-'07 *Handbook* states that for a software engineer position, a bachelor's degree in computer science or a related field is normally required. Thus, the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The burden of proving eligibility for the benefit sought rests entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. **The petitioner has sustained that burden.**

ORDER: The appeal is sustained. The petition is approved.