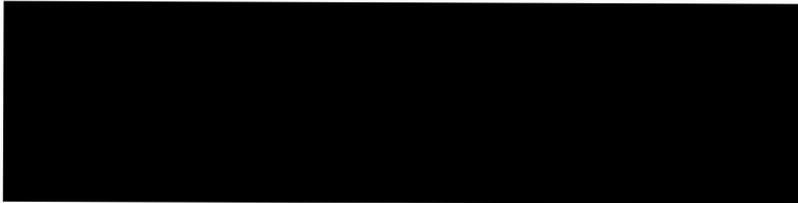


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U.S. Citizenship
and Immigration
Services

D2



FILE: WAC 04 800 58973 Office: CALIFORNIA SERVICE CENTER Date: MAY 10 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 materials 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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is an IT (information technology) consulting company. It seeks to employ the beneficiary as a programmer analyst and to classify him 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 ground that the record failed to establish that 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.

As provided in 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 notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In its initial submission, including Form I-129 and an accompanying letter, the petitioner described itself as a U.S. affiliate of an IT consulting and software services company – [REDACTED] – located in Bangalore, India. The petitioner indicated that it was incorporated in the State of California in 1999, began operations in 2000, has a gross annual income of \$283,000, and had one employee at the time of filing. The petitioner stated that it had offered the position of programmer analyst to the beneficiary for a three-year period running from October 1, 2004 to September 30, 2007, and described the proffered position as follows:

[The beneficiary] will be responsible for the development and implementation of business solutions using tools of [REDACTED]. He will be responsible for meeting with the TESCRA delivery teams during [the] pre-sales or systems analysis phase to identify integration requirements, define integration architectures, and deploy solutions.

He will have knowledge of the Tibco products including BusinessWorks, InConcert, Rendezvous, Adapter SDK, Integration Manager, Hawk, etc. Broadly, his responsibilities will include:

- providing subject matter expertise on Tibco technology and solution design/development using Tibco products; implementation of Tibco's active enterprise and active exchange suite of products;
- assisting TESCRA's customers in the development of technology expertise and the establishment of the correct EAI infrastructure;
- mentoring the customer teams in Tibco EAI products where required.

The petitioner estimated that the beneficiary would spend 60% of his time on development, 20% on design, 15% on implementation, and 5% on documentation. On Form I-129 and in the Labor Condition Application (LCA) certified by the Department of Labor (DOL), the petitioner stated that the beneficiary's work location would be in San Ramon, California.

According to the petitioner, the proffered position requires an individual with baccalaureate level education. The beneficiary is qualified for the position, the petitioner declares, by virtue of his bachelor of science degree in December 1998 and his master of computer applications in January 2000, both from Sri Venkateswara University in India.

In response to the RFE the petitioner submitted additional documentation including an internet profile of the Indian-based affiliate, [REDACTED] a photograph of the petitioner's business premises; federal and state tax filings by the petitioner in 2002 and 2003; the petitioner's organizational chart showing the proffered position as subordinate to the company's chairman, managing director, and director; the employment contract between [REDACTED] and the beneficiary, effective April 6, 2004, which states that the beneficiary's "normal place of work" would be Bangalore, India, but that he "may be assigned to different locations both in India and abroad and at the client's work place;" as well as the "contractor agreement" between DCSIL and [REDACTED] of Antioch, California, dated April 27, 2004, which provided the following description of the services to be provided the client:

General Description of Requirements: Contractor to provide integration services through its offshore development center in India. The specific details of this service shall be listed in a separate purchase order to be released after performing a detailed systems study and making a joint pre-sales presentation to Tescre's client(s).

The contractor shall also assist Tescre in business development and pre-sales activities in USA. [The contractor] will depute their business development team members, pre-sales/technical consultants in USA to assist the Tescre staff for pre-sales activities like system study, submitting business proposal etc. as and when required for a short duration.

An addendum to the contractor agreement, dated September 7, 2004, stated that the contractor was "to provide one developer with skills in Tibco Business Works, JMS, Adapter SDK, and Tibco Adapters for an assignment at a Tescre client site at Austin, Texas," identified the beneficiary as the assigned consultant, and indicated that his dates of assignment were August 23 to December 31, 2004. Another addendum to the contractor agreement, dated November 1, 2004, extended the beneficiary's dates of assignment for one year – from January 2 to December 31, 2005.

In his decision the director referred to information in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)* indicating that a variety of educational paths and work experience could lead to programmer analyst positions and that a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into the occupation. The record did not establish that businesses similar to the petitioner require programmer analysts to have baccalaureate degrees in a specific specialty, the director stated, or that the petitioner's business had unique and specific needs that require the services of a programmer analyst with a baccalaureate degree in a specific specialty. The director concluded that the proffered position does not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal counsel asserts that a computer programmer qualifies is a specialty occupation due to the complexity of the position and the changing nature of the computer field which has led to new skill requirements. Counsel refers to the petitioner's previously submitted internet job postings for programmer analysts as evidence that a bachelor's degree is required for such positions, as well as the petitioner's previously submitted names of prior **H-1B employees with baccalaureate degrees**. Counsel submits a letter from a vice president of Tescre, [REDACTED] who confirms that the beneficiary will be providing consulting services "to help TESCRA in architecting, developing and implementing integration solutions using TIBCO's integration suite including Business Works, BW: Workflow, InConcert and various adapters." The Tescre VP lists the duties of the programmer analyst position as follows

- Development and implementation of business solutions using tools of TIBCO Software, Inc.
- Meeting our delivery teams during pre-sales and systems analysis phases to identify integration requirements, define integration architectures and deploy the solutions.
- Providing subject matter expertise on TIBCO technology products including Business Works, InConcert, Hawk and various adapters.
- Assisting our customers in development of technology expertise, establishing integration infrastructure and deploying integration solutions.

According to Mr. [REDACTED] the position “requires an individual holding at least a bachelor’s degree along with relevant experience in developing and implementing integration solutions.” The beneficiary has provided consulting services to Teskra in the past, Mr. [REDACTED] stated, and is vitally needed for Teskra to fulfill its contract obligations to its client.

The AAO determines that the petitioner meets the definition of a United States agent, as described in the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F):

A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as it[s] agent. A petition filed by a United States agent is subject to the following conditions:

- (1) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.
- (2) A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; whether the industry’s professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ and recruit only degreed individuals.” See *Shanti, Inc. v. Reno*, 36 F.Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook*’s occupational descriptions as a reference, as well as the petitioner’s past hiring practices for the position. See *Shanti Inc. v. Reno, id.*, at 1165-66.

The AAO determines that the proffered position combines the duties of a programmer and a systems analyst, as described in the *Handbook*, 2006-07 edition:

Programmers write, test, and maintain the detailed instructions, called programs or software, that computers must follow to perform their functions. These specialized programs tell the computer what to do – for example, which information to identify and access, how to process it, and what equipment to use. Custom programmers write these commands by breaking down each step into logical series, converting specifications into a language that the computer understands Many programmers also customize a package to clients' specific needs or create better packages.

Professionals involved in analyzing and solving problems include *systems analysts*, who study business, scientific, or engineering data-processing problems and design new flows of information Systems analysts tie together hardware and software to give an organization the maximum benefit from its investment in machines, personnel, and business processes. To do this, these workers may design entirely new systems or add a single new software application to harness more of the computer's power. They use data modeling, structure analysis, information engineering, and other methods. Systems analysts prepare charts for programmers to follow for proper coding and also perform cost-benefit analyses to help management to evaluate the system. These analysts also ensure that the system performs to its specifications by testing it thoroughly.

Based on the comprehensive job descriptions and itineraries of employment submitted by the petitioner and its client company, Teskra, which explain the work the beneficiary will perform, the specialized and complex nature of the work, and the other documentation of record, the AAO determines that the proffered position requires baccalaureate or higher level knowledge in a computer-related specialty, and therefore qualifies as a specialty occupation under 8 C.F.R. § 214.2 (h)(4)(iii)(A)(4).

The petition cannot be approved, however, because the work location identified in the petition and in the LCA is not the same as that identified in the contractor agreement between DCSIL and Teskra. The petition and the certified LCA, submitted to the service center in electronic form on September 14, 2004 and approved for filing on October 1, 2004, identified San Ramon, California as the beneficiary's work location. The DCSIL/Teskra contractor agreement and its first addendum, dated September 7, 2004, identified Austin, Texas as the beneficiary's work location. The second addendum on November 1, 2004 confirmed the beneficiary's work location as Austin, Texas and extended the time period for a year. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92, (BIA 1988). The petitioner has not resolved the foregoing inconsistency in the record.

At the time the petition was filed, therefore, two different work locations for the beneficiary are specified in the documentation of record. Since the contractor agreement indicated that the beneficiary will work for a Teskra client in Austin, Texas, the petitioner was in not compliance with the work location condition of its LCA (San Ramon, California) at the time of filing. CIS regulations 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. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm.). Moreover, as stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), “[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition.” Since the

petitioner was not in compliance with the LCA at the time the instant petition was filed, the beneficiary is ineligible for H-1B classification under the instant petition.

The AAO notes that the petitioner, as an agent, has not complied with the requirement of 8 C.F.R. § 214.2 (h)(2)(i)(F)(2) to provide an itinerary of definite employment for the beneficiary for the entire three-year period of requested H-1B classification. The director advised the petitioner in the RFE to submit such an itinerary through October 1, 2007, but the contract documentation submitted in response to the RFE only showed that the beneficiary would be working for Tesera in Austin, Texas, until December 31, 2005. Thus, the record does not establish that the petitioner has employment to offer the beneficiary in a specialty occupation for the full three-year period of requested H-1B classification.

Beyond the decision of the director, the AAO also notes that the record fails to establish the beneficiary's qualifications to perform services in the specialty occupation. An alien must meet one of the following criteria set forth in 8 C.F.R. § 214.2 (h)(4)(iii)(C) to qualify to perform the services of a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The petitioner implies that the beneficiary meets the second criterion, at 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), based on his bachelor of science degree in December 1998 and his master of computer applications in January 2000, both from Sri Venkateswara University in India. There is no evidence in the record, however, such as an analysis of those degrees by a foreign educational credentials evaluation service, that the beneficiary's education in India is equivalent to a baccalaureate or higher degree in a specific specialty from an accredited U.S. college or university. Accordingly, record does not establish that the beneficiary is qualified under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), or any other regulatory criteria, to perform the services of the specialty occupation.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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