



U.S. Citizenship
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Services

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FILE: LIN 06 122 51312 Office: NEBRASKA SERVICE CENTER Date: **NOV 14 2007**

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 provides enterprise resource planning and business development services.¹ It seeks to employ the beneficiary as an SAP analyst. The petitioner, therefore, 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 record includes: (1) the Form I-129 and supporting documents; (2) the director's March 24, 2006 request for further evidence (RFE); (3) the petitioner's April 26, 2006 response to the director's RFE; (4) the director's May 22, 2006 denial decision; and (5) the Form I-290B, counsel's letter, and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

On May 22, 2006, the director denied the petition determining that the petitioner had not established that it qualified as the beneficiary's United States employer and that the petitioner had not provided sufficient evidence of the specific duties to be performed by the beneficiary while working for a third-party end-client. The director concluded that the petitioner had not established that it had a specialty occupation position available for the beneficiary in Glendale, California.

On appeal, counsel cites an unpublished AAO decision to state that the petitioner is the actual employer. Counsel asserts that the petitioner has complete authority to hire, fire, and control the beneficiary's services, and submits an employment agreement as supporting documentation. Counsel also asserts that the beneficiary will develop and maintain the petitioner's own software solutions, as well as provide technical services related to SAP ERP software applications for its client Allied Solutions Group, Inc. Counsel submits a variety of supporting documentation, including the following: a previously submitted copy of a service agreement between the petitioner and Allied Solutions Group, Inc.; a declaration, dated June 17, 2006, from the petitioner's president affirming, in part, that the beneficiary is working at Nestlé, Inc. in Glendale, California, the client site of Allied Solutions; and a revised purchase order naming the beneficiary to work at Nestlé, Inc., performing SAP SD Consultant duties, including mapping business processes and configuring SAP SD according to Nestlé's requirements.

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

¹ A search of the CyberDriveIllinois website at <http://www.ilsos.gov/corporatellc/CorporateLlcController> on October 11, 2007 finds the status of the petitioner's business as "not good standing." Thus the petitioner's status as a U.S. employer has not been established.

- (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)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

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.

In a March 14, 2006 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered SAP analyst position as follows:

- Gather and analyze business requirements;
- Develop and upgrade industry specific business modules using SAP technologies;
- Convert business requirements and provide SAP solutions;
- Customize various modules to suit clients' business needs;
- Train clients and internal staff in the technical operation of SAP modules;
- Evaluate user requests for new or modified programs;
- Create thorough system documentation helpful to technical, functional, and user staff; and
- Conduct studies or surveys to obtain data and analyze data to advise on or recommend solutions including alternate methods or modifications of existing systems.

The record also includes an LCA submitted at the time of filing listing the beneficiary's work locations in Chicago/Northbrook, Illinois and Glendale, California as an SAP analyst.

On March 24, 2006, the director requested additional evidence from the petitioner, including copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or an itinerary for the beneficiary.

In an April 26, 2006 response, the petitioner's vice president stated that, pursuant to a March 9, 2006 service agreement between the petitioner and Allied Solutions Group, Inc. located in Brecksville, Ohio, and corresponding purchase agreement, the beneficiary is currently working at a client location Nestlé, Inc., located at 800 N. Brand Blvd., Glendale, California. The petitioner's vice president submitted an agreement, dated March 9, 2006, between the petitioner and Allied Solutions Group, Inc. indicating that the petitioner would provide consulting services to Allied Solutions Group, Inc. on behalf of its client, according to the stipulations outlined in the addendum. The petitioner also submitted a purchase order for the beneficiary to perform as an "SAP SD Consultant" for Allied Solutions Group, Inc., beginning April 3, 2006 for 16 months (extendable).

As discussed above, the director denied the petition determining that the petitioner had not established that it qualified as the beneficiary's United States employer and that the petitioner had not provided sufficient evidence of the specific duties to be performed by the beneficiary while working for a third-party end-client.

The director concluded that the petitioner had not established that it had a specialty occupation position available for the beneficiary in Glendale, California.

Also discussed above, counsel cites an unpublished AAO decision on appeal to state that the petitioner is the actual employer. Counsel asserts that the petitioner has complete authority to hire, fire, and control the beneficiary's services, and submits an employment agreement as supporting documentation. Counsel also asserts that the beneficiary will develop and maintain the petitioner's own software solutions, specifically its flagship software product **ProcessFlow™**, as well as provide technical services related to SAP ERP software applications for its client Allied Solutions Group, Inc. Counsel submits a variety of supporting documentation, including the following: a previously submitted copy of a service agreement between the petitioner and Allied Solutions Group, Inc.; a declaration, dated June 17, 2006, from the petitioner's president affirming, in part, that the beneficiary is working at Nestlé, Inc., in Glendale, California, the client site of Allied Solutions; and a revised purchase order naming the beneficiary to work at Nestlé, Inc., performing SAP SD Consultant duties, including mapping business processes and configuring SAP SD according to Nestlé's requirements.

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.

As cited at footnote 1, the AAO finds that the petitioner has not established that it will act as the beneficiary's employer. Although the record establishes that the petitioner will have the authority to hire, pay, fire, supervise, or otherwise control the work of the beneficiary, as the petitioner is not currently in good standing with the State of Illinois, it has not been established that the petitioner will employ the beneficiary in the United States or that it is a United States employer within the meaning of the regulations.² See 8 C.F.R. § 214.2(h)(4)(ii). Moreover, 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, a 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.

² 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).

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 requirements imposed by the entities using the beneficiary's services.

Thus, when a petitioner is an employment contractor, the petitioner must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties from the entity ultimately employing the alien or using the alien's services. From this evidence, CIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

In this matter, the petitioner provided a general description of the proposed SAP analyst duties. The petitioner, however, must detail its expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. In circumstances where the beneficiary will provide services to a third party, the petitioner must also provide details of the third party's expectations of the position. Such descriptions must correspond to the needs of the petitioner and/or the third party and be substantiated by documentary evidence. To allow otherwise would require acceptance of any petitioner's generic description to establish that its proffered position is a specialty occupation. CIS must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business, what the third party contractor expects from the beneficiary in relation to its business and what the proffered position actually requires, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty.

The petitioner does not provide substantive evidence that the duties of the proffered position incorporate the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a bachelor's degree or higher degree in the specific specialty or its equivalent as a minimum for entry into the occupation in the United States. Only a detailed job description from the entity that requires the alien's services will suffice to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). While the petitioner submitted a revised purchase order naming the beneficiary to work at Nestlé, Inc., performing SAP SD Consultant duties, including mapping business processes and configuring SAP SD according to Nestlé's requirements, the record does not contain a letter from an authorized representative of Nestlé, Inc. describing the beneficiary's specific duties or a more specific description of the duties required by Nestlé. Moreover, the petitioner has not provided a detailed description of the beneficiary's duties pertaining to the petitioner's flagship software product **ProcessFlow**TM. Going on 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 Dec. 190 (Reg. Comm. 1972)). Thus, as the nature of the proposed duties are unclear, the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).

In that the record does not demonstrate that the beneficiary would perform the duties of an SAP analyst, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a job description entailing SAP analyst duties, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a descriptive listing of the SAP analyst duties the beneficiary would perform in relation to the petitioner's flagship software product **ProcessFlow™** and under contract with the third party, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

In view of the foregoing, the petitioner has not overcome the director's objections. For these reasons, the petition may not be approved. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.