

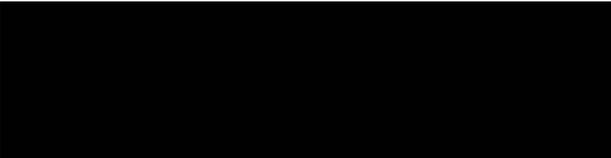
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FILE: WAC 07 125 50623 Office: CALIFORNIA SERVICE CENTER Date: **SEP 30 20**

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, California Service Center, denied the nonimmigrant visa petition. 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 software consulting services. It claims to employ 4 personnel and to have had approximately \$450,000 in gross annual income when the petition was filed. It seeks to employ the beneficiary as a programmer analyst indicating the dates of intended employment as March 28, 2007 to March 28, 2010. Accordingly, 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).

On September 24, 2007, the director denied the petition. The director determined that the petitioner had not established that it was an employer and that the petitioner had not established that the proffered position is a specialty occupation. On appeal, counsel for the petitioner submits a brief and documentation in support of the appeal.

The record includes: (1) the Form I-129 filed March 26, 2007 and supporting documents; (2) the director's June 12, 2007 request for evidence (RFE); (3) counsel for the petitioner's response to the RFE; (4) the director's September 24, 2007 denial decision; and (5) the Form I-290B, counsel's brief, and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

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
- (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 13, 2007 letter appended to the petition, the petitioner indicated it needed to employ a programmer analyst to assist with the design and development of applications in SAP. The petitioner described the specifics of the job as:

Gather and document business requirements for software applications to be developed at client sites. **Analyze requirements to perform function and data-flow modeling.** Create functional specifications documents. Develop entity-relationship models for database design. Design and implement integrated application software solutions using SAP R/3 technology. Develop Unix shell scripts, C programs and SQL* Loader scripts for data conversion. Perform routine database administration tasks for applications under development and testing. Participate in the implementation of SAP R/3 applications (Financials and Manufacturing applications) at client sites.

The petitioner further indicated that the position required the individual in the position to have a degree in computer science, information technology, or the equivalent with related experience in programming.

The record also includes an ETA Form 9035E, Labor Condition Application (LCA), listing the beneficiary's work location as Irving, Texas and St. Paul, Minneapolis in the position of a programmer analyst. The record further includes evidence that the beneficiary had been approved for H-1B classification from October 1, 2000 to October 1, 2008.¹

On June 12, 2007, the director requested, among other items: clarification of the petitioner's employer-employee relationship with the beneficiary; a description of conditions of employment, such as contracts or letters from authorized officials of the ultimate client companies; an itinerary of services or engagements that specifies the date of each service or engagement and the names and addresses of each of the employers; and contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and authorized officials of the ultimate client companies where the work will actually be performed, that provide a comprehensive description of the beneficiary's proposed duties.

In response, counsel for the petitioner submitted, among other items, a March 9, 2007 contract between Technical Information & Professional Solutions, Inc (TIPS Consulting) and the petitioner and a contractor agreement addendum also dated March 9, 2007. The contractor agreement addendum identified the client as Boston Scientific/Guidant Corporation, the beneficiary as the contractor, and the effective date as March 28, 2007 to March 31, 2008. The contractor agreement addendum did not include a description of the beneficiary's proposed duties.

On September 24, 2007, the director denied the petition. As noted above, the director determined that the petitioner had not established that it would be the beneficiary's employer and had not provided a description of the duties that the beneficiary would perform for the actual user of the beneficiary's services from an authorized official of the ultimate client company.

On appeal, counsel for the petitioner asserts that the petitioner clearly qualifies as the beneficiary's employer. Counsel noted that the beneficiary would work on an "IT project in ETL processes" for the end user of the beneficiary's services, Boston Scientific and that the documents submitted included the specific job duties of the beneficiary. Counsel contends that the petitioner's managers provide technical support to the beneficiary and are in position to know the job duties of the beneficiary and of providing CIS a detailed description of the beneficiary's job duties. Counsel also submits a copy of an agreement between TIPS Consulting and Cardiac Pacemakers, Inc. doing business as "Guidant" and an October 11, 2007 letter signed by the president of TIPS Consulting confirming that the beneficiary is working for its client Boston Scientific/Guidant. The letter also indicates that the beneficiary is providing technical services for an IT project called Latitude Customer Satisfaction Trending and the project involves the design of ETL processes using ETL tool Informatica and PL/SQL and requires that the beneficiary develop Informatica mappings and sessions to load data from different source systems. Counsel also includes an October 16, 2007 letter signed by the manager of Boston Scientific Information Systems indicating that the beneficiary "is responsible for the design & development of ETL processes using Informatica and PL/SQL procedures" and that "[h]is job involves the extensive usage of

¹ The last approval notice issued to the beneficiary is for the time period from October 6, 2008 to October 1, 2008 for a different employer.

the following technologies: Informatica PowerCenter 8.1.1, Oracle, SQL Developer, Oracle Discoverer & UNIX."

The AAO disagrees with the director's finding that the petitioner would not act as the beneficiary's employer. The evidence of record establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.² See 8 C.F.R. § 214.2(h)(4)(ii). In view of this evidence, the AAO finds that the petitioner will be the employer of the beneficiary and withdraws the director's decision to the contrary.

The petition may not be approved, however, as it does not establish that the beneficiary will be employed in a specialty occupation. To determine whether a particular job qualifies as a specialty occupation, CIS does not rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In this matter, although the petitioner is an employment contractor and will be the beneficiary's employer, the record does not contain a detailed description of the beneficiary's actual daily duties. The petitioner initially provided a broad statement of the beneficiary's potential duties and on appeal a similarly general statement regarding the beneficiary's usage of different technologies submitted by the end user of the beneficiary's services. 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. 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. In this matter, the ultimate end user of the beneficiary's services although indicating generally that the beneficiary would be responsible for the design and development of ETL processes using certain technologies does not elaborate on the specific tasks associated with the end user's particular project; thus the AAO is precluded from determining whether the proffered position incorporates 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.

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 AAO observes that the Department of Labor's *Occupational Outlook Handbook (Handbook)*, reports that there are a number of computer-related positions, some of which require a four-year course of college-level education, some of which require a two-year associate's degree, and some of which only require experience. As the record does not contain documentation that establishes the specific duties the beneficiary would perform on the project under contract with the petitioner's client's client for the duration of the H-1B classification, the AAO is unable to analyze whether the duties of the proposed position would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation or whether the position could be performed by individuals proficient in computer languages learned through certification courses and at the associate degree level. 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)(iii)(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)(I).

Each petitioner 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 third party must also provide details of its 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 and 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. Neither the petitioner nor the third-party contractor describes the project(s) the beneficiary will work on in detail.

In that the record does not offer a comprehensive description of the duties the beneficiary would perform for the petitioner or the petitioner's client, or the petitioner's client's client, 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 meaningful job description, the petitioner has not established the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguished the position as more complex or unique than similar, but non-degreed, employment, as required by the alternate prongs of the second criterion. Absent a detailed listing of the duties the beneficiary would perform under contract, the petitioner has not established that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither has the petitioner satisfied the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

For this reason, the petition may not be approved.

Beyond the decision of the director, the AAO also finds that, although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor and that the petitioner will place the beneficiary at different work locations to perform services according to various agreements with third-party companies. Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment in such situations. While the

Aytes memorandum cited at footnote 2 broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. As the evidence contained in the record at the time the petition was filed did not establish that the petitioner had three years of work³ for the beneficiary to perform at one location, the director properly exercised her discretion to require an itinerary of employment.⁴ As the petitioner has not submitted an itinerary, the petition may not be approved.

The petitioner has also failed to establish that the Labor Condition Application (LCA) is valid for all work locations. As the record does not contain an itinerary of employment, it cannot be determined that the LCA is valid for all the locations of employment. Although the AAO notes that the petitioner could file an amended LCA if the petitioner placed the beneficiary in a different location, the failure of the petitioner to provide an itinerary indicating where the beneficiary would be employed for the subsequent two years of the requested classification prohibits a determination that the LCA is valid for all work locations. For this additional reason, the petition may not be approved.

Further, the AAO observes that the record indicates that the beneficiary has remained in the United States in H-1B status for longer than six years. The record does not include evidence that the petitioner has satisfied the requirements for an extension of stay under the "American Competitiveness in the Twenty-First Century Act," (AC-21) as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ Authorization Act). For this additional reason, the petition will not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. As always, in visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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

³ The contractor agreement addendum indicates that the term of the employment is for one year and the petitioner has requested H-1B classification for the beneficiary for three years.

⁴ 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."