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U.S. Citizenship
and Immigration
Services

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FILE: LIN 05 212 51043 Office: NEBRASKA SERVICE CENTER Date: **MAY 01 2007**

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:

SELF-REPRESENTED

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, Nebraska 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 information technology consulting services. The petitioner seeks to employ the beneficiary as a programmer analyst. 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).

The record includes: (1) the July 8, 2005 Form I-129 and supporting documents; (2) the director's September 15, 2005 request for further evidence (RFE); (3) counsel's November 5, 2005 response to the director's RFE; (4) the director's February 6, 2006 denial decision; and (5) the Form I-290B and documents in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On February 6, 2006, the director denied the petition determining that the petitioner had failed to establish that it had sufficient H-1B level employment immediately available for the beneficiary at the work location identified on the Labor Condition Application (LCA) when the petition was filed. The director also found that the evaluations submitted did not establish that the beneficiary possessed the equivalent of a U.S. bachelor's degree in a field directly related to the proffered position.

On appeal, the petitioner submits a letter asserting that it has purchase orders and work orders from several third party companies; it executes fixed price projects at its location in Dearborn, Michigan; its personnel travel to client locations to integrate solutions with the existing applications; and it has multiple projects on hand to execute and will do so using its personnel resources on different projects based on their skills and the client 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
- (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.

When filing the Form I-129 petition, the petitioner averred that it employed 15 personnel, provided information technology consulting services, and had two million dollars in gross annual income. In a June 20, 2004 letter submitted in support of the petition, the petitioner noted that it is a computer consulting firm, not an employment agency, and that while employees may perform part of their programming and software development at clients' sites, the petitioner is the actual employer. The petitioner stated that the beneficiary would spend a minimum of 60 percent of time performing user requirement analysis and the remainder of the time would be spent in programming. The petitioner outlined the programmer analyst functions as:

1. Analyzing client's software and software systems (15% of work time);
2. Designing software to meet client's needs (10% of work time);
3. Creating and maintaining relational database management system in a client/server environment using Oracle and other database design (10% of work time);
4. Validating, calculating, coding, testing and updating data (10% of work time);
5. Engineering modifications and solutions to client's software system problem (15% of work time);
6. Implement client/server communication portal as application programming interface (15% of work time);
7. Manage local area network system (10% of work time);
8. Using necessary software tools, including Oracle and C language (10% of work time);
9. Updating latest web technologies like Java (EJB, XML), (5% of work time).

The LCA that the petitioner filed with the Department of Labor (DOL) listed the beneficiary's place of work as Dearborn, Michigan as a programmer analyst.

On September 15, 2005, the director requested additional evidence from the petitioner. The director noted that the beneficiary would be performing services pursuant to a third party contract, either at a client location or in-house; thus the director requested documentation of the client contract related to services to be performed by the beneficiary for the actual end user client, including a description of the services to be performed by the beneficiary. The director noted copies of statements of work, work orders, and contract addendums would be accepted if sufficiently detailed.

In a November 5, 2005 response, the petitioner attached copies of several contracts between the petitioner and third party clients. None of the contracts contained work orders or addenda identifying the beneficiary as the individual who would perform work pursuant to the contract and none of the contracts listed specific work to be performed by the beneficiary.

On February 6, 2006, the director denied the petition determining that the petitioner had not established that it had sufficient work at the H-1B level for the beneficiary at the work location listed on the LCA, at the time the petition was filed.

On appeal, the petitioner emphasizes that it has purchase orders and work orders to perform work for third parties and that it would not fire the individual performing the work pursuant to a particular contract based on a client's request, but would move the individual to another project.

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.

Preliminarily, the AAO observes that the petitioner has established that it will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.¹ See 8 C.F.R. § 214.2(h)(4)(ii). In the September 15, 2005 RFE, the director requested documentation of the projects the beneficiary would be working on as well as a description of the specific duties the beneficiary would perform and the location(s) where the beneficiary would be providing services. The Aytes

¹ See Memorandum from [REDACTED], 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).

memorandum cited at footnote 1, states that the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised his discretion to request an employment itinerary as the petitioner indicated that the beneficiary would be working in-house as well as at client sites.

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 although the petitioner may not be a typical employment contractor, the petitioner is outsourcing the beneficiary's services to third parties on different projects. Thus the record must contain information detailing the beneficiary's daily work duties and the qualifications that are required to perform the duties. When a beneficiary is performing duties, such as analyzing user requirements for third parties for example, the record must contain a detailed job description of the actual daily duties encompassed within that endeavor to enable CIS to 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.

The petitioner has provided a generic description of the types of duties the beneficiary would perform upon his employment with the petitioner, but no evidence that establishes the specific duties. A petitioner cannot establish employment as a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title, e.g., a programmer writes programs; a computer system analyst designs and updates software; a computer software engineer designs, constructs, tests, and maintains computer applications software. Although the petitioner asserts that the beneficiary's duties would include performing user requirement analysis 60 percent of the time and programming the remainder of the time, the record does not contain information that details the user requirement analysis or the type of programming the end user might need. Such analysis or programming could vary greatly depending upon the particular end user. The petitioner also acknowledges that the beneficiary could be moved from project to project. The petitioner's general statements regarding the type of work the beneficiary would perform are not substantiated by documentation of particular projects or the specific requirements of each of the petitioner's clients. 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)). It is not possible to conclude from these general statements that the beneficiary's work would include duties that require knowledge obtained through a four-year course of university-level education.

The AAO observes that the Department of Labor's Occupational Outlook *Handbook* (*Handbook*) reports that there are many training paths available for programmers and that although bachelor's degrees are commonly

required, certain jobs may require only a two-year degree or certificate. The *Handbook* also reports that most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of a variety of computer systems. However, without a detailed description of the beneficiary's daily duties relating to specific projects, the AAO is precluded from determining whether the offered position is one that would require only experience, a two-year degree, a certificate in a particular computer language, or 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)(4)(iii)(A)(I).

In that the record does not offer a description of the duties the beneficiary would be required to perform for the petitioner in-house, or for the petitioner's clients, 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 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 listing of the duties the beneficiary would perform under contract, 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.

The next issue in this matter is whether the petitioner established that the beneficiary is qualified to perform the duties of a specialty occupation. The director determined that the evaluations submitted showed that the beneficiary had completed a three-year course of study at Osmania University and that the three-year course of study was equivalent to three years of study toward a bachelor of science degree in computer science from an accredited U.S. institution. The director, however, found that neither evaluation adequately explained and evaluated the beneficiary's foreign course of study toward a master of computer application degree at Sikkim-Manipal University of Health, Medical and Technological Sciences.

The December 6, 2005 evaluation notes that the beneficiary had not provided evidence that she had completed the master's of computer applications degree. The evaluator however, determined that the beneficiary's additional coursework at Sikkim-Manipal University of Health, Medical and Technological Sciences is indicative of completion of at least a bachelor's-level academic concentration in computer science and that the nature of the courses and the credit hours involved indicate that the beneficiary had attained the equivalent of a bachelor's of science degree in computer science from an accredited U.S. institution of higher education.

The record contains the beneficiary's transcripts from Sikkim-Manipal University of Health, Medical and Technological Sciences for the second and third semester of the master's in computer application program.

The transcripts show that the beneficiary passed three courses and failed one course in the second semester and passed all four courses taken in the third semester. The petitioner on appeal explains that the master's of computer applications at Sikkim-Manipal University is a six-semester course through a distant education program and that the first semester had been waived as the beneficiary had completed a three-year bachelor's level program. The petitioner also stated that the beneficiary would make up the second semester-failed subject when she began her fifth semester at Sikkim-Manipal University. The petitioner referenced the completion of a fourth semester and the accompanying transcript as part of the record, but the transcript for a fourth semester is not in this record of proceeding. Moreover, there is no evidence that the beneficiary had completed a fourth semester of study in the master's program when the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). In addition, 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."

The evidence of record substantiates only that the beneficiary has completed a three-year bachelor's program at Osmania University and one full semester and a portion of a second semester at Sikkim-Manipal University. In *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977), the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. As the director observed, the evaluator does not address the failed course and how the failure of this course is indicative of a failure of the beneficiary to complete a fourth year of study. The evaluator does not explain how an incomplete year of study can be regarded as equivalent to a similar and fourth year of university-level training in the United States.

The record does not provide evidence that the beneficiary has satisfied any other criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C) qualifying the beneficiary to perform the duties of a specialty occupation. The AAO determines that the record is insufficient to establish that the beneficiary is eligible to perform the duties of a specialty occupation.

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. 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. Accordingly, the AAO will not disturb the director's denial of the petition.

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