

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D2

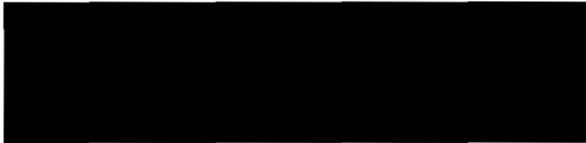


FILE: WAC 07 146 51662 Office: CALIFORNIA SERVICE CENTER Date: OCT 03 2008

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:



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
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 sustained. The petition will be approved.

The petitioner is in the technology staffing industry. It claimed to employ one individual and ten subcontractors when the petition was filed. It seeks to employ the beneficiary in the occupation of a software consultant. 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 August 24, 2007, the director denied the petition, determining that the petitioner: had not established that it was an employer or an agent; had not established the proffered position as a specialty occupation; and had not provided a Form ETA 9035E, Labor Condition Application (LCA) valid for all work locations. On appeal, counsel for the petitioner submits a brief and documents in support of the appeal.

The record includes: (1) the Form I-129 filed April 2, 2007 and supporting documents; (2) the director's May 15, 2007 request for further evidence (RFE); (3) the petitioner's August 2, 2007 response to the director's RFE and supporting documentation; (4) the director's August 24, 2007 denial decision; and (5) the Form I-290B, counsel's brief, and supporting 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 an undated letter appended to the petition, the petitioner stated that it had offered full-time employment to the beneficiary in the position of software consultant. The petitioner described the duties of the position as:

[The beneficiary] will be responsible for creating and developing computer programs and applications which are custom tailored for each individual client using Oracle, SAP Business Information Warehouse, and Windows NT/2000/XP. She will design advanced client/server applications utilizing a variety of object oriented software principles and methodologies. She will employ techniques such as structured analysis, data modeling, and programming. She will plan, develop and test computer programs, applying his [sic] scientific knowledge and computer expertise.

She will design and create new or modified programs based on the clients' current operating procedures and program objectives using C++, SAP, Oracle, *ABAP*, *MS Windows NT/2000/XP*, and *SAQP Business Warehouse*. He [sic] will be responsible for the preparation of flow charts and diagrams to illustrate the sequence of steps the program must follow and to describe the logical operations involved. [The beneficiary] will also be responsible for the

integration and seamless blending of existing hardware, software, and information retrieval systems, with the newly provided programming solutions.

The record also includes an LCA listing the work location as Dayton, Ohio in the position of a "software consultant." The petitioner also provided samples of contracts with three different companies, Sogeti USA LLC, (Sogeti) located in Centerville, Ohio, TeamSoft, Inc. (TeamSoft) located in Middleton, Wisconsin, and Horizon International Trd., Inc. (Horizon) located in Belmont, Massachusetts. The petitioner also submitted several statements of work for different individuals. The statements of work attached to the Sogeti contract listed different clients, did not list a location, but listed different city names as the "Sogeti Unit Name;" for example: Baltimore, Minneapolis, Des Moines, and Columbus. The statement of work appended to the TeamSoft contract did not list a location and referenced another company, Alliant Energy. The statement of work submitted with the Horizon contract listed the work location as Indianapolis, Indiana for the client "ADES."

On May 15, 2007, the director requested, among other items: evidence establishing that a specialty occupation existed; clarification of the petitioner and beneficiary's employer/employee relationship; an itinerary that specified 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 for the period of time that the temporary employment is requested; copies of the petitioner's present and past job vacancy announcements; contracts, statements of work or other documentation from the ultimate client companies where the work would be performed and that provide a comprehensive description of the beneficiary's proposed duties; and documentation of past employment practices showing H-1B employees routinely met conditions of employment and that the petitioner fully paid its workers throughout the time periods requested.

In an undated response, the petitioner indicated that the beneficiary would "work on the projects as specified by the clients and in-house using her skills in computer programming in SAP Business Warehouse reporting functionality." The petitioner also provided information regarding an in-house project, "CarpeLaw Portal," the project plan beginning October 2007 and rolling out in June 2010, and described the beneficiary's duties associated with the project. The petitioner referenced a statement of work dated February 16, 2007 with Horizon noting that the project title was "Financial Investment Solution," the projected start date as October 15, 2007, the work location as in the petitioner's offices. The petitioner provided Horizon's description of the beneficiary's work to be performed on the project.

As referenced above, the director denied the petition determining that the petitioner: had not established that it was an employer or an agent; had not established the proffered position as a specialty occupation; and had not provided a Form ETA 9035E, Labor Condition Application (LCA) valid for all work locations.

On appeal, counsel for the petitioner asserts that the petitioner is the beneficiary's employer and submits documentation to confirm that the petitioner has in-house projects and that it is the ultimate employer. Counsel contends that the petitioner has provided detailed job descriptions of the beneficiary's duties for its in-house project and that the position is a specialty occupation.

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.¹ 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 AAO also finds that although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner places individuals with client companies at different locations to perform services according to various agreements. As such, the director had discretion to require that the petitioner submit the dates and locations of the proposed employment. In this instance, the petitioner's response to the director and information submitted on appeal established that the petitioner would employ the beneficiary in the proffered position at its offices in Dayton, Ohio throughout the requested period of employment. Thus, the LCA submitted is valid for the beneficiary's work in Dayton, Ohio.

Turning to the discussion of the proffered position and whether the position qualifies as a specialty occupation, the AAO has reviewed the detailed description of the petitioner's in-house project and its contract with Horizon. 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.

The AAO notes that the Department of Labor's *Occupational Outlook Handbook (Handbook)* lists a number of computer-related occupations, 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. In this matter, the petitioner has provided sufficient evidence including detailed descriptions of the beneficiary's tasks for the petitioner to demonstrate that the particular position that is the subject of this petition requires 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 a specific specialty as the minimum for entry into the occupation as required by the Act.

The director did not comment on the beneficiary's qualifications to perform the duties of the proffered position as the petition was denied for other reasons. The record is sufficient, however, for the AAO to make that determination. The beneficiary possesses the equivalent of a Bachelor of Science in Electrical Engineering from an accredited university in the United States. The beneficiary's coursework and degree are

¹ 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).

related to the duties of the proffered position. As such, the beneficiary is qualified to perform the duties of the offered position as she satisfies the criterion at 8 C.F.R. §214.2(h)(4)(iii)(C)(2).

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 been met.

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