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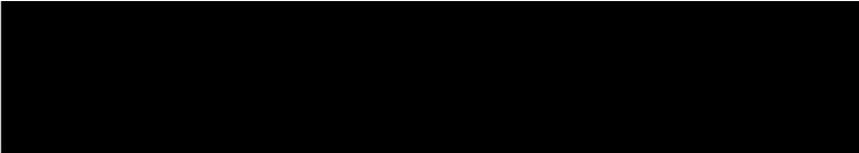


FILE: WAC 04 800 61007 Office: CALIFORNIA SERVICE CENTER Date: DEC 04 2006

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The petition will be denied. The appeal will be dismissed.

The petitioner is a California company that seeks to employ the beneficiary as a Programmer Analyst. 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 director denied the petition because: (1) the petitioner failed to establish that its company met the definition of an agent or U.S. employer, as set forth in 8 C.F.R. §§ 214.2(h)(2)(i)(F) and 214.2(h)(4)(ii); (2) the petitioner failed to submit an itinerary of employment, as set forth in 8 C.F.R. § 214.2(h)(2)(i)(B); and (3) the record contained insufficient evidence to establish that the proffered position qualified as a specialty occupation as set forth in section 101(a)(15)(H)(i)(b) of the Act.

On appeal the petitioner, through counsel, submits a statement, an offer of employment letter, client contracts, and wage and tax information. The petitioner asserts that it has sole authority to hire, pay, fire, supervise, or otherwise control the work of the beneficiary, and that the petitioner is therefore the beneficiary's employer for immigration purposes. The petitioner additionally asserts that the beneficiary will be engaged in in-house employment for the petitioner, and that the beneficiary will not be sent to client sites to service products at the clients' request. The petitioner contends that it is thus not necessary to submit client service itineraries or contracts of employment. The petitioner asserts further that the evidence contained in the record establishes that the proffered position meets the definition of a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for a Nonimmigrant Worker (Form I-129) and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial letter; and (5) Form I-290B, Notice of Appeal to the AAO (Form I-290B) and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner states that it is seeking the beneficiary's services as a programmer analyst. Evidence of the beneficiary's employment status and duties include: the Form I-129 and a September 27, 2004, letter of support from the petitioner; the petitioner's response to the director's January 27, 2005, RFE; the petitioner's September 18, 2004, offer letter to the beneficiary; and the petitioner's Form I-290B, and supporting documentation.

Based on the information contained in the Form I-129, and the September 2004 letter of support, the petitioner is an information technology consulting company that caters to major Fortune 500 companies with on-site consulting and offshore project development. According to the evidence, the petitioner offers complete project implementation for its clients, and provides its clients, "with qualified technical personnel subcontracted through other companies." The evidence reflects that the proffered position consists of the following duties:

Analyzing and evaluating existing and proposed systems and devices, computer programs and systems, as well as related procedures to process data;

Preparing charts and diagrams to assist in problem analysis and submitting recommendations for solutions;

Preparing program specifications and diagrams and developing coding logic flowcharts;

Encoding, testing, debugging and installing operating programs and procedures in conjunction with user departments.

A September 2004, offer letter to the beneficiary reflects that the beneficiary would work for the petitioner as a programmer analyst, and that he would “render all reasonable services expected of a programmer analyst” and would “provide such services at locations designated by Enterprise Solutions and/or its customers.”

The AAO notes that pursuant to 8 C.F.R. § 214.2(h)(4)(ii), the term “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 [IRS] Tax identification number.

Upon review of the evidence contained in the record, the AAO finds that the petitioner in this matter is the beneficiary’s direct employer for 8 C.F.R. § 214.2(h)(4)(ii) purposes, as the evidence of record establishes that the petitioner would engage the beneficiary to work within the United States, that the petitioner has an IRS Tax identification number, and that the petitioner has the authority to hire, pay, supervise or otherwise control the work of the beneficiary.

In its response to the director’s RFE and on appeal, the petitioner reiterates the programmer analyst position duties. The petitioner additionally asserts that the beneficiary, “will be working from Enterprise’s Santa Clara, CA office on an in-house product and not at a client-site.” The petitioner states further that the beneficiary’s “assignment will be focused on its company’s Qfoods product.” According to the petitioner, “Qfoods is a comprehensive web application accessible on the mobile phones being developed at Enterprise Solutions inc. [sic].” The petitioner states that the beneficiary will work on the Qfoods product for the three years of his requested H-1B visa application, and the petitioner states that the beneficiary will not be providing consulting services at this time.

The petitioner explains that the Qfoods “product is [sic] not yet been sold in the market and is still at the development stage. Therefore we do not have any contract agreements to submit from Enterprise’s clients at this time. However, we have enclosed a brief review of our product for USCIS’s review.” The petitioner provided a one-half page typed description giving an overview of the idea behind the product. No other evidence relating to the Qfoods product or its actual development and production by the petitioner was provided.

In the present matter, the petitioner makes inconsistent claims regarding the beneficiary's proposed worksite and duties, and it is unclear where the beneficiary will work throughout the three-year period requested in the petitioner's Form I-129, or what the beneficiary will be doing.

The petitioner asserts on appeal that the beneficiary will work only on in-house product development of the petitioner's Qfoods product. However, the petitioner submitted no independent evidence to corroborate its assertion, or to establish that Enterprise Solutions, Inc. is in any way involved in the development, or production of a Qfoods product. Accordingly, the AAO is unable to determine whether the beneficiary will work on an in-house project at Enterprise Solutions, Inc. The AAO is also unable to determine what the in-house project would entail, or the length of time that the beneficiary would work on such a project. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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)).

The AAO notes that the record contains strong evidence to indicate that the petitioner is a staffing agency, and in fact plans to place the beneficiary at off-site work locations to perform services established by contractual agreements for third-party companies. Significantly, the petitioner's Form I-129 and letter of support state that the petitioner is an information technology consulting company that caters to major Fortune 500 companies with on-site consulting and off-shore project development, and that the petitioner offers complete project implementation for its clients, and provides its clients, "with qualified technical personnel subcontracted through other companies." Furthermore, the petitioner's September 2004 offer letter states that the beneficiary will perform programmer analyst services at locations designated by the petitioner or its customers. The offer letter contains no reference to the petitioner's in-house production work. Moreover, the petitioner provided copies of several of its contractual agreements with its clients. All of the contractual agreements reflect agreements by the petitioner to contract-out/provide information systems service employees and consultants to the client companies. In particular, a July 30, 2004, Consulting Services Agreement between the petitioner and Pacific West Corporation, Inc. (PWC), and a May 9, 2005, Attachment to the agreement, specify that the beneficiary will provide consulting services to PWC beginning May 23, 2005, for a term of "Net 30 days" and a duration of "14 months extendable." The beneficiary's project/assignment contained in the attachment states, "ASP.NET, C#, ASP, VB, XML, XSLT, Java, Java Servlets, ODBC, JDBC, HTML, DHTML, Java Script, VBScript, and SQL Server." No further details are provided regarding the beneficiary's job description at PWC.

The AAO finds that the evidence provided by the petitioner is inconsistent and fails to establish where the beneficiary will work for the entire three-year period requested in the Form I-129 petition, or what the beneficiary will do.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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 if the beneficiary's duties will be performed in more than one location, when requested at the discretion of the director. The AAO finds that the director properly exercised his discretion to request an itinerary of employment in the present matter. 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).

A director maintains the discretion to request any evidence that he or she independently requires in order to adjudicate an H-1B petition, which may include contracts between a petitioner and the beneficiary or its client(s). See 8 C.F.R. § 214.2(h)(9)(i). In the present matter the director requested that the petitioner submit copies of employment contracts between the petitioner, its clients, and the beneficiary. Moreover, the submission of a contract between the petitioner and the alien is provided for at 8 C.F.R. § 214.2(h)(4)(iv)(B), which states that an H-1B petition involving a specialty occupation shall be accompanied by "copies of any written contracts between the petitioner and beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract."

The evidence establishes that the beneficiary will work in off-site locations, but does not contain a complete itinerary of employment. The petitioner has thus not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B),

The director also found that without reliable contracts and an itinerary of employment, the petitioner did not establish that the beneficiary would be employed in a specialty occupation. The AAO agrees that the petitioner has failed to establish that the proffered position is 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.

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.

U.S. 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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply 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. *See Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> 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.

To determine whether the position duties described above are those of a specialty occupation, the AAO first considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining these criteria include: whether the Department of Labor’s *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports that the industry requires a degree; 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)).

The petitioner has characterized its position as that of a programmer analyst. The AAO therefore turns to the 2006-2007, *Handbook’s* description of that occupation. The *Handbook* states on page 105, that, “*programmer-analysts* are responsible for both the systems analysis and the actual programming work.” The *Handbook* states further on page 104, that computer programmers:

[W]rite, test, and maintain the detailed instructions, called programs, that computers must follow to perform their functions. Programmers also conceive, design, and test local structures for solving problems by computer.

....

Programmers write programs according to the specifications determined primarily by computer software engineers and system analysts. After the design process is complete, it is the job of the programmer to convert that design into a logical series of instructions that the computer can follow. The programmer codes these instructions in a conventional programming language such as COBOL; an artificial intelligence language such as Prolog; or one of the most advanced object-oriented languages, such as Java, C++, or ACTOR. . . . Many programmers update, repair, modify, and expand existing programs.

The *Handbook* discusses the occupation's educational requirements on page 105, and states in pertinent part that:

Although there are many training paths available for programmers, mainly because employers' needs are so varied, the level of education and experience employers seek has been rising due to the growing number of qualified applicants and the specialization involved with most programming tasks. Bachelor's degrees are commonly required, although some programmers may qualify for certain jobs with 2-year degrees or certificates.

The *Handbook* describes the computer systems analyst occupation on page 116, and states in pertinent part that:

Computer systems analysts solve computer problems and apply computer technology to meet the individual needs of an organization. They help an organization to realize the maximum benefit from its investment in equipment, personnel, and business processes. Systems analysts may plan and develop new computer systems or devise ways to apply existing systems' resources to both hardware and software, or add a new software application to harness more of the computer's power. Most systems analysts work with specific types of systems . . . that vary with the kind of organization.

....

In some organizations, *programmer-analysts* design and update the software that runs a computer. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas.

The *Handbook* discusses the computer systems analyst position's educational requirements on pages 116 and 117, and states in pertinent part that:

[W]hile there is no universally accepted way to prepare for a job as a systems analyst, most employers place a premium on some formal college education. . . . Many employers seek applicants who have at least a bachelor's degree in computer science, information science, or management information systems (MIS). . . . Despite employers' preference for those with technical degrees, persons with degrees in a variety of majors find employment as system

analysts. The level of education and type of training that employers require depend on their needs. . . . Employers usually look for people who have broad knowledge and experience related to computer systems and technologies, strong problem-solving and analytical skills, and good interpersonal skills.

Thus, while both a computer systems analyst and a computer programmer position may require a baccalaureate degree in a specialty, the information contained in the *Handbook* reflects that a worker may enter either occupation with less than a baccalaureate degree, and that for those positions that require degrees, the degree may be in a broad range of backgrounds.

The AAO finds that the duties of the proffered programmer analyst position as described by the petitioner, provides no meaningful description of the specific tasks that the beneficiary would perform for the petitioner or its clients on a daily basis. The same lack of specificity is found in the petitioner's response to the director's RFE, and in the information submitted on appeal.

The present record fails to demonstrate the specific duties the beneficiary would perform under contract for the petitioner's clients. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000) held that for purposes 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 to be performed is for an entity other than the petitioner. Accordingly, the court held that the legacy Immigration and Naturalization Service (Service, now CIS) had reasonably interpreted the Act and regulations to require that a petitioner produce evidence that the proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

In the present matter, the petitioner has provided no employment contracts or evidence describing the specific duties the beneficiary would perform for the petitioner's clients. The AAO is therefore unable to analyze whether the proffered position duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. The petitioner has thus 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).

The AAO notes the petitioner's assertion that it has had many of its previous programmer analyst, Form I-129 petitions approved. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior cases. In the absence of all of the corroborating evidence contained in those records of proceeding, the AAO is unable to determine whether the positions offered in the prior cases were similar to the position in the instant petition.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. The AAO notes that if a prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988).

Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

The director additionally found that the petitioner did not comply with the terms stipulated on the LCA because the evidence established that the beneficiary would be employed at a location other than the petitioner's place of business. The director found that without employment contracts CIS was unable to determine whether the petitioner complied with the terms of the LCA or whether the LCA was proper in relationship to the area of employment or the wage offered the beneficiary.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), a petitioner must submit a statement that it will comply with the terms of the LCA for the duration of the alien's period of authorized stay. While it is unclear where the beneficiary will work, both of the proposed locations at PWC or at the petitioner's office are located in Santa Clara, which is the location specified in the LCA. Thus the LCA appears valid for the first fourteen months of employment. However, as the record does not establish where the beneficiary will be working after the proposed tour of duty at PWC, the AAO is unable to determine whether the LCA that was certified prior to filing the I-129 petition is valid or whether the petitioner has complied with the terms of the LCA.

Based upon a thorough review of the present record, the AAO finds that the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation as set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has also failed to submit an itinerary of employment as required at 8 C.F.R. § 214.2(h)(2)(i)(B). 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 its burden in the present matter. The appeal will therefore be dismissed.

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