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FILE: WAC 05 218 51213 Office: CALIFORNIA SERVICE CENTER Date: FEB 05 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:



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 technology consulting services. The petitioner seeks to employ the beneficiary as a computer 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 August 3, 2005 Form I-129 and supporting documents; (2) the director's August 9, 2005 request for further evidence (RFE); (3) the petitioner's October 19, 2005 response to the director's RFE; (4) the director's November 2, 2005 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 November 2, 2005, the director denied the petition determining: (1) that the beneficiary's job duties and work location specified in the initial Form I-129 documentation differed from the job duties and work location provided in response to the director's RFE; (2) that the work order signed by a third party (Perficient, Inc.) requesting the beneficiary's services as a programmer/analyst was signed October 14, 2005, almost two months after the petition was filed; and (3) that the petitioner initially did not reference any in-house projects assigned to the beneficiary and that the nature of the petitioner's business is to provide services to third parties, not to use programming/analyst's services in-house. The director determined that the duties the petitioner had described required the theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation but that the petitioner would not be the entity requiring the beneficiary to perform the duties. The director further concluded that the petitioner had not established that a valid job offer existed when the petition was filed.

On appeal, counsel for the petitioner notes the director's error when determining the petitioner's corporate address and explains that the beneficiary can complete most of its contracted work at the petitioner's corporate office in Fremont, California but that the beneficiary may need to occasionally visit the premises of the third party, [REDACTED], in Austin, Texas. Counsel indicates that the Labor Condition Application (LCA) initially submitted with the petition listed the beneficiary's workplace as its corporate offices in Fremont, California and that the LCA submitted in response to the director's RFE listing the beneficiary's workplace as Austin, Texas was submitted to support any brief trips the computer programmer analyst would make to the client's (Perficient, Inc.) corporate office.

Counsel also notes that the petitioner's June 22, 2005, Services Provider Agreement, with [REDACTED] shows that the petitioner had a contract for work for the beneficiary's services prior to filing the petition. Counsel further notes that the petitioner has numerous additional business relationships with other clients for which work for the beneficiary was readily available when the petition was filed. Counsel references the contracts with other clients that had been submitted in response to the director's RFE. Counsel asserts that the [REDACTED] contract and the other contracts submitted establish that there was work available for a computer programmer analyst when the petition was filed.

Counsel contends that the Form I-129 petition clearly states the beneficiary's workplace will be at the petitioner's corporate office and that the petitioner had explained in response to the director's RFE that when the beneficiary is not assigned to work at one of the petitioner's clients' projects he will perform in-house activities relating to software development at the petitioner's principal place of business.

The Form I-129 shows that the beneficiary's worksite is at the petitioner's corporate offices in Fremont, California and the initial LCA indicated that the beneficiary would work in Fremont, California. In a July 25, 2005 letter appended to the petition, the petitioner described the proffered position:

As a Programmer/Analyst with [the petitioner], [the beneficiary's] core duty will be to design, develop, and deliver Computer Software Systems according to our Customer's requirements. He will also involve in activities that lead to the development of Software Applications such as Customer Stakeholders interviews, Business Requirements gathering, Business Function Analysis, design of Application Conceptual Model, white board presentation and Application Design.

[The beneficiary] will also involve in hands-on development and programming of software application code using technologies such as Java, Visual Basic, Oracle and other Internet technologies. He will also engage in documenting application design, test cases and test procedures according to our Customers IT department's documentation standards. [The beneficiary] will also assist and support our Customers during software application deployment and maintenance of the same.

The petitioner also indicated that the beneficiary would spend 100 percent of his time programming and provided approximate percentages on duties to be performed as follows:

- 10%: Analysis of software requirements to determine feasibility of design within time and cost constraints.
- 50%: Analysis, design, and development of computer software systems.
- 20%: Development of software systems testing procedures, programming and documentation.
- 20%: Consultation with customers concerning maintenance of software systems.

On August 9, 2005 the director requested clarification of the petitioner's employer-employee relationship with the beneficiary, noting that Citizenship and Immigration Services (CIS) needed to examine the beneficiary's ultimate employment. The director indicated that depending on the petitioner's employment circumstances, the evidence might include: contractual agreements or statements of work from authorized officials of the ultimate client companies where the work will actually be performed; an itinerary that specifies 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 required; and a description of the conditions of employment, such as contracts or letters from authorized officials of the ultimate client companies, listing salary or wages paid, hours worked,

benefits, a brief description of who will supervise the beneficiary and their duties, or any other related evidence.

In an October 19, 2005 response to the director's RFE, the petitioner provided a June 27, 2005 employment agreement between the petitioner and the beneficiary indicating that the beneficiary's contractual base location would be the company's offices in Fremont, California but that the beneficiary must expect to work either on a temporary or permanent basis, when requested, at other locations of the company, the group, or customers' sites. The petitioner also provided a June 22, 2005 consulting services agreement between the petitioner and a third party (██████████) and an October 14, 2005 statement of work attached to the contract. The October 14, 2005 statement of work listed the beneficiary as the consultant, indicated the start date of the services as November 1, 2005 and the termination date as October 31, 2006, with an extension on a bi-yearly basis upon mutual agreement. The statement of work indicated that the services to be rendered included:

[The beneficiary] shall provide EAI [Enterprise Application Integration] Consulting Services for Perficient. These Services shall include but not [be] limited to all aspects of solution development including analysis, architecture, design, and development. [The beneficiary] will perform the role of an EAI/TIBCO Programmer Analyst and assist Perficient technical staff through research and development, training and mentoring in order to provide the best possible guidance to Perficient. [The beneficiary] will be a Perficient sub-contractor and will report to the Project Manager, . . . or the Project Manager in charge at the time of his joining the duty.

The petitioner also stated:

When the Beneficiary is not assigned to work at one of Petitioner's Customers' Projects, he will be engaged in performing in-house activities relating to Software Development at the Petitioner's principal place of business. These activities will include maintenance and enhancements of software applications such as payroll, time and labor, HR and Finance Systems and other website development and enhancement activities. The Beneficiary will also assist in technical aspects of the Petitioner's business development initiatives (software projects related) by providing inputs into software development methodologies, processes, suggesting best practices and writing technical papers etc.

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)(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's corporate address is in Fremont, California, the work location of the petitioner's initial LCA on behalf of the beneficiary. The AAO finds that the petitioner has submitted an adequate explanation regarding the inconsistency between the beneficiary's initial work location as stated on the Form I-129 and the beneficiary's work location as stated in the response to the director's RFE. The AAO also determines that the professional services agreement between the petitioner and Perficient, Inc. allows the petitioner to add "statements of work" for different beneficiaries and for different projects as needed by Perficient, Inc. Thus, the statements of work may be dated subsequent to the date of the professional services agreement as addendums to the professional services agreement and such later dated statements of work do not require the conclusion that the petitioner did not have work available for the beneficiary when the petition was filed. The AAO further finds that the evidence of record is sufficient to establish that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary as set out in the petitioner's June 27, 2005 offer of employment and the beneficiary's July 14, 2005 acceptance.¹ See 8 C.F.R. § 214.2(h)(4)(ii).

The Aytes 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 initial record provided confusing evidence regarding the petitioner's type of business, a service that provided consultants to third parties and the actual location(s) of the beneficiary's ultimate employment. The initial record suggested that the beneficiary would be providing services to third party customers, not to the petitioner; thus, the director

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).

properly requested an itinerary of definite employment, listing the location(s) and organization(s) where the beneficiary would be providing services. In addition, the June 27, 2005 employment agreement between the petitioner and the beneficiary confirmed that the beneficiary would be expected to work either on a temporary or permanent basis, when requested, at other locations of the company, the group, or customers' 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.

When a petitioner is an employment contractor, the entity ultimately employing the alien or using the alien's services 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 this evidence, Citizenship and Immigration Services (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.²

In this matter the petitioner initially stated that the beneficiary's "core duty will be to design, develop, and deliver Computer Software Systems according to our Customer's requirements," and that "[h]e will also engage in documenting application design, test cases and test procedures according to our Customers IT department's documentation standards," and that he "will also assist and support our Customers during software application deployment and maintenance of the same." The petitioner did not further detail the beneficiary's duties relating to its customers' requirements or the customer's actual requirements. The AAO disagrees with the director's conclusion that the job description is sufficient to conclude that the proffered position is a specialty occupation. Rather, the initial description is insufficient to determine the scope of the beneficiary's duties and thus whether the duties require the theoretical and practical application of a body of highly specialized knowledge.

In response to the director's RFE, the petitioner indicated that the beneficiary would provide enterprise application integration services for the petitioner's client including analysis, architecture, design, and development and would act as an enterprise application integration programmer analyst assisting the petitioner's client through research, development, training, and mentoring. The petitioner added that when the beneficiary was not working for third party clients, the beneficiary would maintain and enhance the

² The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

petitioner's software applications as well as assisting in the technical aspect of the petitioner's business development.

The petitioner's generic description of the types of duties the beneficiary would perform upon his employment with the petitioner again is insufficient to establish that the proffered position is a specialty occupation. The petitioner has not provided evidence discussing the details of the proffered position's 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 involve designing, developing, and delivering software systems and documenting application design, test cases, and test procedures, and deploying and maintaining software, the description is insufficient to show that the beneficiary's daily activities would include work as a programmer analyst. Likewise, the petitioner's indication the beneficiary would provide enterprise application integration services including analysis, architecture, design, and development and would assist in research, development, training, and mentoring and when not working for third party clients would maintain and enhance the petitioner's software applications as well as assisting in the technical aspect of the petitioner's business development provides only an overview of a computer occupation. It is not possible to discern from the description provided that the beneficiary will engage primarily in computer programming, system analysis, or a type of computer engineering.

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.³

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

³ The AAO observes that the *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; that most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of a variety of computer systems and technologies for positions of computer software engineer; and that there is no universally accepted way to prepare for a job as a systems analyst, although most employers place a premium on some formal college education.

(5th Cir. 2000). 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)).

In this matter, without a comprehensive description of the beneficiary's actual duties from the entity utilizing the beneficiary's services, 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)(1).

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, 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 detailed listing of the duties the beneficiary would perform under contract and/or in-house, 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 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.