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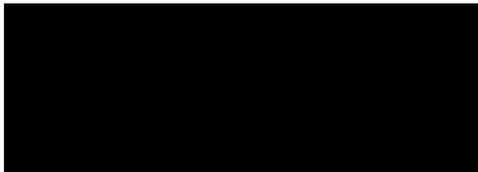
U.S. Department of Homeland Security  
20 Mass Ave., N.W., Rm. 3000  
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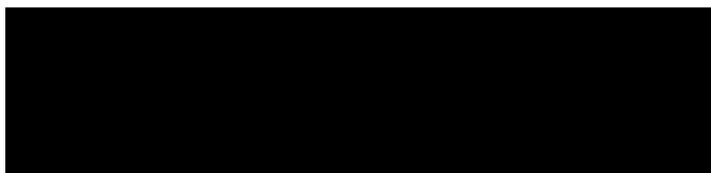
FILE: WAC 06 067 50283 Office: CALIFORNIA SERVICE CENTER Date: OCT 02 2007

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 service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the matter will be remanded for further consideration.

The petitioner is a software development and consultancy business. It states that it employs 58 personnel and had net annual revenue of \$9 million when the petition was filed. It seeks to employ the beneficiary as a software engineer. 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 Form I-129 and supporting documents; (2) the director's January 9, 2006 request for further evidence (RFE); (3) counsel's February 9, 2006 response to the director's RFE; (4) the director's February 23, 2006 denial decision; and (5) the Form I-290B, counsel's brief, and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

On February 23, 2006, the director denied the petition determining that the petitioner had not established that it qualified as the beneficiary's United States employer or agent, and that the beneficiary does not qualify for an extension of his nonimmigrant status. The director also noted that a prior petition filed on behalf of the beneficiary by the petitioner was denied and a subsequent motion dismissed.

The AAO disagrees with the director's finding that the evidence of record was insufficient 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.

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 December 23, 2005 letter submitted in support of the petition, counsel for the petitioner provided the following description of the proposed duties:

The beneficiary will be working on the Monarch web-based application project for the client McGraw Hill Inc. for the development, design, implementation and support of web-enabled solutions. The beneficiary is a key member of the functionality testing of the application. His functional title is that of a QA Analyst. He is responsible for the preparation and

implementation of all aspects of product quality assurance related to the new development and maintenance of the existing systems. He will also be responsible for the creation of test plans based on the Business Use cases/requirements, execution and automation of test labs within the structure of the Software Development Life Cycle. The beneficiary is working on the test execution and automation utilization Mercury Suites.

The record also includes an LCA listing the beneficiary's work location in Monterey, California as a software engineer.

On January 9, 2006, the director requested additional evidence from the petitioner, including a copy of the specific contract between the petitioner and the beneficiary, and an itinerary of definite employment where the beneficiary would be performing services.

In a February 9, 2006 response, counsel for the petitioner submitted an itinerary for the beneficiary indicating that he would be working on a project for the petitioner's client, McGraw Hill Inc. in Monterey, California, pursuant to the previously submitted master contract. The January 19, 2000 consulting agreement indicated that the petitioner would provide consulting services to CTB/McGraw-Hill (CTB) pursuant to work orders signed by authorized representatives of both parties. The record includes work orders for several of the petitioner's employees to perform services at CTB, and an itinerary for the beneficiary to perform services at CTB and, in the alternative, at the petitioner's worksite in Cupertino, California. The record also includes an employment agreement, dated September 21, 2006, between the petitioner and the beneficiary indicating that the beneficiary will serve the petitioner as a software engineer and "such other position(s) as the Company's Management may determine with the agreement of the Employee from time to time."

The director denied the petition on February 23, 2006 finding that the petitioner's client, CTB, exerts active control over the beneficiary's proposed employment, and thus the petitioner had not established that it qualified as a United States employer.

On appeal, counsel for the petitioner asserts that the petitioner's contract with CTB specifically states that the petitioner has control over its employees working onsite at CTB. Counsel contends that the petitioner is not an agent nor acting as a representative for multiple employers, and cites an unpublished decision in order to substantiate his contention. Counsel indicates that the beneficiary will work at the petitioner's client site and at all times his work will be supervised by the petitioner's project manager.

The AAO notes that the consulting agreement between the petitioner and CTB specifies the following: "All services performed by [the petitioner] shall be documented in a Work Order signed by authorized representatives of both parties. Each Work Order shall set forth, at a minimum, the work to be done, the name(s) of [the petitioner's] personnel to be assigned to CTB's work[site], the duration of each individual's assignment, and the fees for the work to be performed." The AAO 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 contract with CTB and

in the petitioner's September 21, 2006 employment agreement with the beneficiary.<sup>1</sup> See 8 C.F.R. § 214.2(h)(4)(ii). Thus, the decision of the director has been overcome.

The director also found that the beneficiary was ineligible to extend status. The AAO notes that, pursuant to 8 C.F.R. § 214.1(c)(5), there is no provision for an appeal from the denial of an application for extension of stay filed on Form I-129 or I-539. As this office does not have jurisdiction over the portion of the director's decision regarding the beneficiary's request for an extension of stay, this issue will not be reviewed.

The petition may not be approved, however, as the record does not reflect that the position is a specialty occupation. The Aytes memorandum cited at footnote 1, indicates 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 additional information regarding the beneficiary's ultimate employment as the LCA submitted showed that the beneficiary would be working off-site at the petitioner's client's location in Cupertino, California. Although the AAO declines to find that the petitioner is acting as the beneficiary's agent, the petitioner in this matter is employing the beneficiary to work for its client, and thus can be described as an employment contractor. The beneficiary is not working at the petitioner's location. The beneficiary in this matter is providing services to another firm.

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> 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 acting as an employment contractor, the entity ultimately 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, 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.

In this matter, counsel for the petitioner provided an overview of the proposed duties in his December 23, 2005 letter. The petitioner's September 21, 2006 employment agreement with the beneficiary did not identify any job duties attached to the proffered position. Moreover, the record does not contain a work order requesting the beneficiary's services. Thus, it is not possible to determine whether the duties associated with

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<sup>1</sup> 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 beneficiary's ultimate employment will include the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation.

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.

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 (5<sup>th</sup> 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'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, 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 as presently constituted 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 AAO notes further that the beneficiary has reached the maximum period of stay under Section 214(g)(4) and 8 C.F.R. § 214.2(h)(13)(iii)(A). The petition indicates that the beneficiary had worked in the United States from May 17, 1999 to January 2002, which is two years and seven months. According to the petition, the beneficiary returned to the United States in June 2002, and has remained in the United States through the current filing date of December 27, 2005, which is another three years and six months, even with the recapture of the six months spent outside the United States, which is not proved.

In view of the foregoing, the matter will be remanded for the director to determine whether the proffered position qualifies as a specialty occupation and whether the beneficiary has reached the maximum period of stay in H1B status. The director may afford the petitioner reasonable time to provide evidence pertinent to the issues discussed herein, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's February 23, 2006 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.