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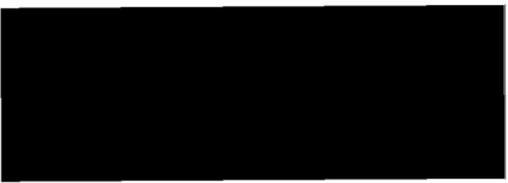
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship and Immigration Services

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FILE: WAC 07 040 50590 Office: CALIFORNIA SERVICE CENTER Date: JUN 0 2 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:  
[Redacted]

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.

*Michael T. Kelly*  
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 software development services to its clients, either onsite at client locations or offsite at their offshore software development center. It seeks to extend the employment of 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).

On March 8, 2007, the director denied the petition. The director observed that the record contained inconsistencies that had not been resolved. The director determined that the petitioner had not established that it was an employer, had not provided an itinerary or contracts detailing the beneficiary's proposed work, and had not satisfied the elements of regulatory eligibility. On appeal, counsel for the petitioner submits a brief and documentation, including many documents that were previously submitted, all in support of the appeal.

The record includes: (1) the Form I-129 filed November 29, 2006 and supporting documents; (2) the director's January 24, 2007 Notice of Intent to Deny, requesting evidence, including evidence to resolve inconsistencies in the record (NOID); (3) counsel's February 20, 2007 response to the director's NOID and supporting documentation; (4) the director's March 8, 2007 denial decision; and (5) the Form I-290B, counsel's brief, and 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 a November 14, 2006 letter appended to the petition, the petitioner indicated it wished to employ the beneficiary in the position of a programmer/analyst. The petitioner stated that the position would include the following duties:

Design activities, write and develop Client Server and/or Web-based Applications using appropriate systems languages, exercise and test programs, train and assist other team members and clients as needed in the intricacies of the newly developed programs and testing the Quality Assurance. Develop and code the Client Server and/or Web-based applications, administer the databases, administer the Systems, improve the Operations of the systems, support production environment.

The record also includes an ETA Form 9035E, Labor Condition Application (LCA) listing the beneficiary's work location as Pittsfield, Maine and New York, New York in the position of a programmer analyst.

On January 24, 2007, the director requested, among other items: evidence establishing the validity of the petitioner; evidence establishing whether a *bona fide* job existed when the petition was filed; evidence of the ultimate employment of the beneficiary; clarification of the petitioner's employer-employee relationship with the beneficiary; and an itinerary of definite employment including copies of contracts between the employers. The director also observed several inconsistencies in the record and requested clarification and resolution of the inconsistencies.

In a February 20, 2007 response, counsel for the petitioner emphasized that the petitioner is the beneficiary's employer and asserts that the petitioner met the criteria establishing its *bona fides* as a United States employer. Counsel noted that the petitioner "hires employees and assigns them to both in-house and off site assignments, as it deems fit." Counsel also references a contract between the petitioner and Netpixel, a client of the petitioner's located in New York City and notes that the submitted LCA lists the beneficiary's work location in New York City as well as Pittsfield, Maine. A review of the Netpixel contract shows that it is dated January 2, 2007 and is for a two-year term with the possibility of an extension. Counsel also submits a purchase order attached to the Netpixel contract, dated January 2, 2007 that lists the beneficiary as the individual performing the work for Netpixel, indicates the duration is 18-24 months with possible extension, and indicates that the services include: "Web based development. Design, develop, code, implement web based applications using Java, J2EE, C, C++, Oracle, PL/SQL, Win, NT, Unix. Net Pixel shall define the Business & system requirements." The petitioner also submitted a number of other master contracts with third party companies indicating generally that the petitioner would provide consulting, professional, and technical services per work or purchase orders.

The director denied the petition on March 8, 2007. The director observed that the petitioner had failed to resolve a number of inconsistencies pointed out in the NOID. The director noted that the petitioner had been requested to provide employment reports from the State of Maine to confirm that it employed personnel in the State of Maine; that the petitioner had been requested to clarify if mail received in Pittsfield, Maine was forwarded to a location in New Jersey; and that the petitioner had been requested to provide local business licenses for each of its locations. The director determined that the petitioner's failure to provide the requested information required the denial of the petition. The director also determined that the petitioner did not qualify as a United States employer or as an agent as discussed at 8 C.F.R. § 214.2(h)(2)(i)(F)(2). The director further determined that the petitioner had not provided an itinerary and had not provided contracts identifying the beneficiary and the scope and condition of his employment; thus the director could not verify if the LCA submitted was valid for all the locations where the beneficiary would be employed. The director finally determined that the petitioner had not provided evidence that it had a specialty occupation position available for the beneficiary when the petition was filed and thus the beneficiary would be waiting to perform computer related work at the petitioner's location.

On appeal, counsel for the petitioner asserts that the petitioner is the beneficiary's employer. Counsel attaches the previously submitted Netpixel contract and purchase order and states that the beneficiary is working full time in New York City; thus the petitioner has complied with the LCA submitted. Counsel contends that the

proffered position of programmer/analyst is a specialty occupation as the duties and responsibilities are so complex that they can only be performed by a person who has earned, at minimum, a bachelor's degree (or foreign equivalent) in information systems, engineering, or related fields. Counsel asserts that the "position mandates the assignment of a professional level IT professional," and that the petitioner consistently requires that the Programmer-Analyst possesses a Baccalaureate Degree, and such a degree requirement emanates from the fundamentally quantitative-analytic nature of the work for which the company is retained.

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 (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.

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.<sup>1</sup> *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 petition may not be approved, however, as the petition does not establish that the beneficiary will be employed in a specialty occupation or that the employer has submitted an itinerary of employment. The AAO concludes that, although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor and that the petitioner will place the beneficiary at different work locations to perform services according to various agreements with third-party companies. 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 in such situations. While the Aytes memorandum cited at footnote 1 broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. As the evidence contained in the record at the time the petition was filed did not establish that the petitioner had three years of work for the beneficiary to perform, the director properly exercised her discretion to require an itinerary of employment.<sup>2</sup> As the petitioner has not submitted an itinerary, the petition may not be approved.

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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).

<sup>2</sup> As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."

Further, although the petitioner is an employment contractor and will be the beneficiary's actual employer, the record does not contain a detailed description of the beneficiary's actual daily duties. The petitioner initially provided a broad statement of the beneficiary's potential duties. In the Netpixel contract and purchase order,<sup>3</sup> the beneficiary's duties are broadly described and include the statement that Netpixel shall define the business and system requirements. 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. In this matter, the ultimate end user of the beneficiary's responsibilities provided a limited description of the beneficiary's duties, a description that does not enable CIS to determine whether the proffered position incorporates 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 AAO observes that the Department of Labor's *Occupational Outlook Handbook (Handbook)* indicates that there are a number of computer-related positions, 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. As the record does not contain documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients for the duration of the H-1B classification, the AAO is unable to analyze whether the duties of the proposed position would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation or whether the position could be performed by individuals proficient in computer languages learned through certification courses and at the associate degree level. Accordingly, the petitioner has 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) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I).

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

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<sup>3</sup> The AAO observes that the Netpixel contract is dated January 2, 2007 and that the start date of duties under the contract is January 2, 2007, a month after 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."

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. Neither the petitioner nor the third party contractor describes the project(s) the beneficiary will work on in detail.

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, or the petitioner's client'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 has not established the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguished 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 has not established that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither has the petitioner satisfied 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. For this additional reason, the petition may not be approved.

The petitioner has also failed to establish that the Labor Condition Application (LCA) is valid for all work locations. As the record does not contain an itinerary of employment, it cannot be determined that the LCA is valid for all the locations of employment. For this additional reason, the petition may not be approved.

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. 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 not been met.

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