

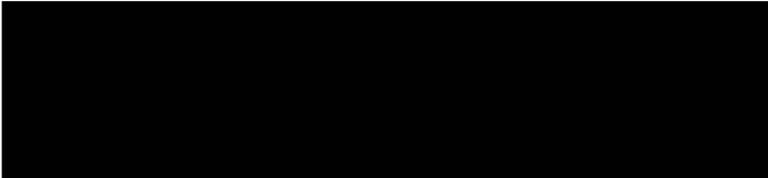
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U.S. Citizenship  
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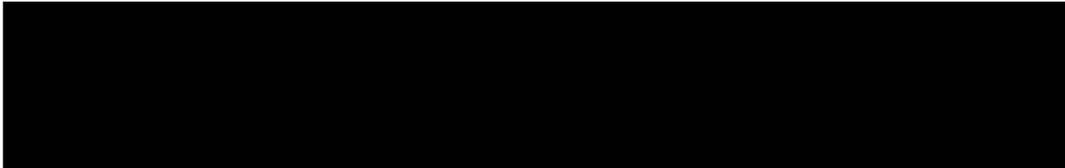


FILE: WAC 07 011 51809 Office: CALIFORNIA SERVICE CENTER Date: **MAR 03 2008**

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, 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 computer systems integration services to hi-tech companies. The petitioner seeks to employ the beneficiary as a systems 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 Form I-129 filed October 11, 2006 and supporting documents; (2) the director's February 2, 2007 request for further evidence (RFE); (3) counsel's April 22, 2007 response to the director's RFE; (4) the director's May 3, 2007 denial decision; (5) the director's June 20, 2007 denial of the petitioner's motion to reopen and reconsider the matter; and (6) the Form I-290B and documents in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On June 20, 2007, the director denied the petitioner's motion to reconsider noting that the denial decision remained unchanged. The director, in the May 3, 2007 denial decision, determined that the evidence did not establish that the petitioner had or would have a systems analyst position available for the beneficiary; thus the record did not establish the proffered position as a specialty occupation. The director also determined that the record did not establish the petitioner as the beneficiary's employer or agent. The director further determined that the petitioner had failed to provide sufficient information to enable the director to determine the petitioner's compliance with the Form ETA-9035, Labor Condition Application (LCA).

On appeal, counsel for the petitioner submits a brief and attachments.

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.

When filing the Form I-129 petition, the petitioner averred that it employed 10 persons and had a gross annual income of \$1.2 million. In a September 29, 2006 letter submitted in support of the petition, the petitioner stated that the job duties of the systems analyst position included:

1. Analyze current operating systems to develop and implement software applications per user requirements (approximately 15% of daily work time);
2. Analyze, review and alter programs to increase operating efficiency or adapt to new requirements and provide documentation to describe program development, logic and coding (approximately 15% of daily work time);
3. Develop programming standards for new software tools (approximately 15% of daily work time);
4. Utilize MS-DOS, Win 95, Win NT, and Unix operating systems; Pascal, C, C++, HTML programming languages and Oracle 8.0 as back end tool and Developer 2000, Visual Basic 6.0 as front end tools in design, development and implementation of business and financial software applications (approximately 20% of daily work time);
5. Code, test, debug and troubleshoot (approximately 15% of daily work time);
6. Conduct upgrades and participate in the analysis, design programming, testing, maintenance, and support (approximately 10% of daily work time);
7. Develop manuals for users to describe installation and operating procedures and assist users (approximately 10% of work time)[.]

The LCA that the petitioner filed with the Department of Labor (DOL) listed the beneficiary's place of work as Columbus, Ohio and the position as a systems analyst.

On February 2, 2007, the director requested, among other things: clarification regarding where the beneficiary would actually work; and if the petitioner was involved in employment staffing or job placement, evidence to establish whether a specialty occupation existed for the beneficiary; and evidence of specialty occupation work with the actual end client company where the work would ultimately be performed.

In an April 22, 2007 response, counsel for the petitioner attached a copy of an undated letter from [REDACTED]. The letter confirmed that the beneficiary is currently working at [REDACTED] as a software engineer in Troy, Michigan and that the beneficiary is involved in "software program technical analysis and design, creating software programs and components and execut[ing] detailed testing of software programs." The author of the letter indicated that the beneficiary is scheduled to work from March 13, 2007 through June 30, 2007. The petitioner also included a pay stub showing the petitioner's payment of salary to the beneficiary for the pay period beginning April 1, 2006 to April 15, 2007.

The director denied the petition on June 20, 2007. As noted above, the director determined that the evidence did not establish that the petitioner had or would have a systems analyst position available for the beneficiary and that the record did not establish the proffered position as a specialty occupation; that the record did not establish the petitioner as the beneficiary's employer or agent; and that the petitioner had failed to provide sufficient information to enable the director to determine the petitioner's compliance with the Form ETA-9035, Labor Condition Application (LCA).

On appeal, counsel for the petitioner re-submits copies of pay stubs showing that the petitioner paid the beneficiary a salary from November 1, 2006 to April 30, 2007. Counsel asserts that the pay stubs show that the proffered position is not speculative; thus the director's request for end-user contracts is unnecessary and unreasonable. Counsel references a May 14, 2007 letter prepared by a corporate attorney for Compuware, wherein Compuware indicates the beneficiary is working for Compuware but that Compuware is not the beneficiary's employer. Compuware's attorney further represents that the beneficiary "shall work at our office according to the LCA filed by the Vendor, but reviewed and approved by Compuware," and that the project is renewable every year contingent upon satisfactory performance. Counsel also includes an employment letter between the petitioner and the beneficiary dated September 20, 2006 indicating that the beneficiary's wage is guaranteed "even if [the beneficiary] is on the bench," and that the beneficiary will work at the petitioner's client's but shall remain the petitioner's employee. Counsel also notes that it is difficult for a small company, like the petitioner, to sign contracts with the ultimate end-user of its consultants' services, and contends that the petitioner's reliance on contracts with "tier-one" vendors who often refuse to release their contracts results in an inability to produce those contracts.

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 finds that the petitioner would 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 LCA for the beneficiary's work location.

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)

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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).

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.

The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at multiple locations to perform services established by contractual agreements for third-party companies. The AAO observes that the petitioner initially indicated that the beneficiary would work in Columbus, Ohio as a systems analyst. In response to the director's RFE, the petitioner provided an undated letter from a third party company, [REDACTED] indicating the beneficiary would work in Troy, Michigan as a software engineer, a position different than that initially requested. In a May 14, 2007 letter submitted on motion and on appeal, a third party entity, Compuware, indicates that the beneficiary will work at its offices in Detroit, Michigan as a programmer/system analyst, according to the LCA filed by the vendor but reviewed and approved by Compuware. The record, thus presents an inconsistent picture of the beneficiary's job title and actual work location. The record does not contain contracts, work orders, or statements of work describing the duties the beneficiary would perform for the petitioner's clients or its clients' clients. Therefore, the petitioner has not established that the proffered position is a specialty occupation.

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.

The petitioner has provided a generic description of the types of duties the beneficiary would perform upon his employment with the company, but no evidence that establishes the 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 Department of Labor's *Occupational Outlook Handbook* in discussing an occupational title, e.g., a programmer writes programs; a computer systems 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 analyzing operating systems, altering programs, developing programming standards, utilizing various operating systems and languages, and conducting and upgrading, and participating in designing, testing, maintenance, and support, the description does not demonstrate that he would perform the duties of a programmer/systems analyst or a software engineer for the petitioner's client. 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)).

As the third party employers do not provide a description of the proposed duties, relying instead on a conclusion that the job requires a baccalaureate degree, the AAO is unable to conclude that the requirements of third party employers will include duties that incorporate the theoretical and practical application of a body of highly specialized knowledge that require 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. The Department of Labor's *Handbook* indicates 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. Without a detailed job description from the entity that requires the alien's services, the AAO is unable to conclude that the third party's projects are projects that incorporate the duties of a specialty occupation. Again, 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. at 165.

The AAO acknowledges counsel's statements regarding the petitioner's size and its work with client companies that have contracts with the ultimate end-user of the beneficiary's services. The AAO also acknowledges counsel's assertion that the beneficiary's employment is not speculative and thus the director's request for contracts is unnecessary and unreasonable. The AAO disagrees. For this visa classification, CIS must have a comprehensive description of the beneficiary's actual duties to ascertain whether those duties comprise the duties of a specialty occupation. As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. 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).

In addition, the AAO finds that the evidence of record suggests that the petitioner has not complied with the submitted LCA showing that the beneficiary will work in Columbus, Ohio. Both the Kelly Services letter and the Compuware letter indicate that the beneficiary will work in the metropolitan area of Detroit, Michigan. Although Compuware indicates that the beneficiary will work at its office according to the LCA filed by the "vendor" and reviewed and approved by Compuware, the record does not contain an LCA for work to be performed in the Detroit, Michigan area. The submitted LCA for work in Columbus, Ohio is not valid for the Detroit, Michigan work location. For this additional reason, the petition will be denied.

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. 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.