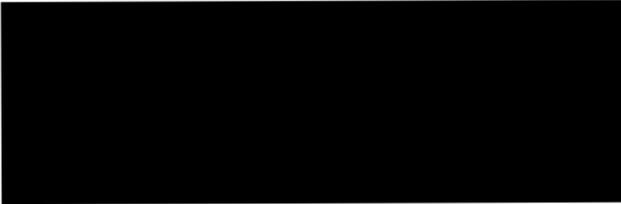


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U.S. Citizenship
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FILE: WAC 07 173 51620 Office: CALIFORNIA SERVICE CENTER Date: **MAY 30 2008**

IN RE: Petitioner:
Beneficiary:



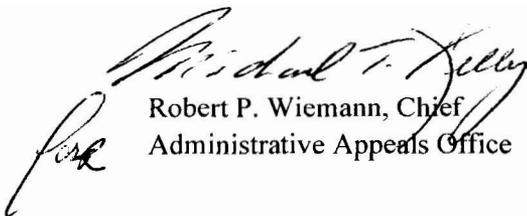
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 develops server information systems for its clients and employs approximately 85 consultants who are placed at various client sites throughout Michigan and the United States. It seeks to continue the employment of the beneficiary in the occupation of a computer 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).

On July 13, 2007, the director denied the petition determining that the petitioner had not established that it was an employer or an agent and had not established the proffered position as a specialty occupation. On appeal, the petitioner submits a brief and documents in support of the appeal.

The record includes: (1) the Form I-129 filed May 21, 2007 and supporting documents; (2) the director's June 8, 2007 request for further evidence (RFE); (3) the petitioner's June 28, 2007 response to the director's RFE and supporting documentation; (4) the director's July 13, 2007 denial decision; and (5) the Form I-290B, counsel's brief, and supporting 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 an undated letter appended to the petition, the petitioner stated that it sought "to employ [the beneficiary] in the position of Computer System Analyst, a position which requires specialized knowledge and skills to plan and direct activities concerned with development, application, and maintenance of computer software applications." The petitioner stated that the duties of the computer systems analyst will consist of:

1. Research, [d]esign, and develop computer software systems applying knowledge of computer theory and dynamic programming methods. (40% of work time).
2. Analyze software requirements to define need and feasibility of design within time and cost constraints. (40% of work time).
3. Expand, modify, and update existing programs to enhance their capability and functionality. (10% of work time).
4. Evaluate interface between hardware and software systems to enhance their capability and functionality and stimulation of future programs. (10% of work time).

The record also includes an ETA Form 9035E, Labor Condition Application (LCA) listing the beneficiary's work location as Plymouth, Minnesota in the position of a "computer system analyst." The petitioner also provided: samples of its contracts with various clients in various locations; an employment agreement with

the beneficiary dated March 25, 2005 offering the beneficiary a position as a programmer/analyst and noting that the beneficiary may be required to relocate to or from a customer's site; and copies of advertisements for positions of computer systems analysts and a programmer analyst.

On June 8, 2007, the director requested, among other items: evidence establishing that a specialty occupation existed and that the beneficiary's work would be under the control of the petitioner; an itinerary that specified 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 requested; a description of the conditions of employment from the actual end-client firm where the work will actually be performed; a contract between the petitioner and the client that required the beneficiary's services in Minnesota to comport with the Labor Condition Application (LCA) certified by the Department of Labor.

In a June 28, 2007 response, the petitioner re-submitted the March 25, 2005 contract of employment with the beneficiary. The petitioner also submitted a September 14, 2006 contract between Cognizant Technology Solutions, Inc. (Cognizant) and the beneficiary as "consultant," that referenced an undated agency agreement between Cognizant and the petitioner. The record also contains a September 18, 2006 purchase order that references a June 24, 2005 agency agreement between Cognizant and the petitioner that names the beneficiary as the consultant. The purchase order names the client as United Health Group, the client location in Minneapolis, Minnesota, the start date as September 25, 2006 and the end date three months later with an indication that it is extendable. The purchase order does not identify the type of work the consultant will perform. The petitioner emphasizes that it is the beneficiary's employer and that it employs an additional 85 consultants who are placed at various clients' sites throughout Michigan and the United States. The petitioner indicates that the beneficiary will not be working at any other location and if the beneficiary does relocate, a new LCA and amended petition would be submitted.

The director determined that without the end contract between Cognizant and the firms that ultimately defined the work of the beneficiary and that would benefit from the services of the beneficiary, the petitioner had not established who had actual control over the beneficiary's work or duties; thus the petitioner had not established that it qualified as a United States employer. The director noted that the petitioner might be an agent but that the petitioner had also failed to produce contracts showing the arrangements between the petitioner and third parties who desired the beneficiary's services. The director also found that the petitioner had not provided an itinerary and had not provided contracts identifying the beneficiary and the scope and condition of his employment. The director further determined that the petitioner had not provided evidence of the actual duties the beneficiary would be performing or 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, the petitioner asserts that it is the beneficiary's employer and that the beneficiary is employed in a specialty occupation. The petitioner states that due to time and privacy issues, no "end contract" is available and notes that the underlying application is not for new employment but for continuing employment. In that regard, the petitioner submits an August 6, 2007 letter signed by the Manager, OM Production support for Uniprise, a United Health Group Company. The OM Production manager indicates that the beneficiary has

been working in Plymouth, Minnesota since September 2006 on "various Siebel implementations" within the United Health Group and that she intends to leverage the beneficiary's unique skill set through June of 2008 and beyond if possible. The petitioner also attaches additional advertisements from Internet job search sites for positions of systems analyst to substantiate that the proffered position is a specialty occupation.

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 (5th 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.¹ *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.² As the petitioner has not submitted an itinerary, the petition may not be approved.

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. Although the September 18, 2006 purchase

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).

² 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."

order names a client and the client location in Minneapolis, Minnesota, and indicates that the three month project is extendable, the purchase order does not describe the actual work the beneficiary has been doing or will be doing. Likewise, the August 6, 2007 letter from the OM Production manager, although indicating the beneficiary has been working on "various Siebel implementations" within the United Health Group, is insufficient to explain the actual daily duties the beneficiary has been or will be performing. 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. In this matter, the ultimate end user of the beneficiary's services does not reveal the actual work the beneficiary has performed or will perform. Thus neither the AAO nor CIS is able 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 notes 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 or the petitioner's clients' 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. 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 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.

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.

Beyond the decision of the director, the petitioner has also failed to establish that the Labor Condition Application (LCA) is valid for all work locations. The AAO acknowledges the petitioner's assertion that the beneficiary would not be working at any other location and that if the beneficiary does relocate, a new LCA and amended petition would be submitted. However, when a petitioner is an employment contractor, the petitioner must provide an itinerary detailing the actual names and addresses of the actual end-users of the beneficiary's services and the time period the beneficiary would be working for various end-uses. The AAO observes that the petitioner has requested the beneficiary's H-1B services through May 15, 2010, but that the OM production manager of the current project suggests that the end date of the beneficiary's services will be June of 2008 with the possibility of extension. The AAO finds this information inherently inconsistent with the petitioner's statement that the beneficiary would not be working at any other location. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, as the record does not contain an itinerary of employment, as required when the petitioner is an employment contractor, 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.