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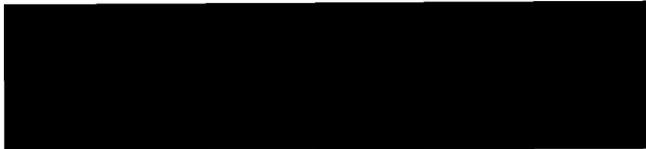
U.S. Department of Homeland Security
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U.S. Citizenship
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FILE: WAC 07 144 53744 Office: CALIFORNIA SERVICE CENTER Date: SEP 12 2008

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 of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a software consulting, training, and development business that seeks to employ the beneficiary as a programmer analyst. The petitioner, therefore, 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 director denied the petition determining that the petitioner had not established that it qualifies as a U.S. employer or agent, that the proffered position is a specialty occupation, or that the petitioner has sufficient work for the requested period of intended employment.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel and the petitioner's responses to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief and documentation in support of the appeal. The AAO reviewed the record in its entirety before reaching 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.

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.

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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply 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).

In a March 29, 2007 letter submitted in support of the petition, the petitioner stated that, as a programmer analyst, the beneficiary would be responsible for the following:

- SAP basis module;
- SAP security, client maintenance, performance monitoring;
- Transport processes;
- User administration;
- Maintenance of authorizations and profiles;

- Remote communication;
- Understanding the needs of the technical and functional people; and,
- System and performance tuning.

The record also includes a certified labor condition application (LCA) submitted at the time of filing listing the beneficiary's work location in Golden Valley, Minnesota as a programmer analyst.

In an RFE, the director requested additional information from the petitioner, including an itinerary and copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or service agreements for the beneficiary.

In response to the RFE, the petitioner stated that the beneficiary will work exclusively for the petitioner and under the petitioner's control, and that the beneficiary will work at its Golden Valley office on a project it has with American Business Partners International, Inc. (ABPII). The petitioner also stated that it contracts for specific projects, not for specific people. As supporting documentation, the petitioner submitted: a withdrawal letter for individuals who did not show up at the embassy; the petitioner's March 29, 2007 job offer letter to the beneficiary; a list of the petitioner's previous petitions and employees' immigration status; the petitioner's 2005 federal income tax return and a request for an extension in 2006; W-2 forms for 2005 and 2006; the petitioner's State of Minnesota tax documentation; the petitioner's quarterly federal tax returns for 2005 and 2006; printouts from the petitioner's website; the petitioner's job advertisements, payroll information, and lease agreement; work orders for the petitioner's employees; purchase orders assigning the petitioner's employees, other than the beneficiary, to various end-clients; sales invoices; an ABPII "Proposal for Application Development and Support for Pioneer Mortgage Systems"; a Master Subcontractor Agreement, signed on April 18, 2007, between the petitioner and ABPII, for the petitioner to provide "certain services and/or develop products for ABPII's customers"; and a "Project Referral Agreement," dated May 30, 2007, between ABPII and Synigent Technologies, Inc. (ST), for ST, as a "finder," to find software projects, and ABPII to execute and/or implement such software projects from end-to-end.

The director denied the petition on the basis that the petitioner had not submitted a contract between the third party contractor and the end-client for whom the beneficiary would provide his services. The director concluded that, without such a contract, the petitioner had not established that it qualifies as a U.S. employer or agent, that the proffered position is a specialty occupation, or that it has sufficient work for the requested period of intended employment.

On appeal, counsel states, in part, that, while it was entered into after the filing date of the petition, the Master Subcontractor Agreement between the petitioner and ABPII was submitted only to demonstrate that the petitioner is the actual employer and maintains full control of its employees for all purposes, and that this contract is only one example of the petitioner's several ongoing projects with ABPII and other vendors. Counsel also states that the petitioner only hires individuals with baccalaureate degrees, which is consistent with the industry standard. Counsel states further: "The Service's requirement that [the petitioner] provide a specific contract related to a person has been rendered economically impossible." As supporting

documentation, counsel submits Internet job announcements and a copy of the previously submitted Master Subcontractor Agreement, signed on April 18, 2007, between the petitioner and ABPII.

Preliminarily, 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 July 23, 2007 letter.¹ See 8 C.F.R. § 214.2(h)(4)(ii).

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 her discretion to request additional information regarding the beneficiary's ultimate employment, as the nature of the petitioner's business is software consulting, training, and development, and 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.² 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.

Counsel states that CIS' requirement that the petitioner provide a specific contract naming the beneficiary who will be providing services is economically impossible. When a petitioner is an employment contractor, however, 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. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). 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, 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 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 (5th Cir. 2000). The petitioner did not submit the requested evidence in the director's RFE pertaining to contracts, statements of work, work orders, and/or service agreements between the petitioner and the clients for whom the beneficiary would be performing services, along with any statements of work, work orders, or service agreements for the beneficiary. On appeal, counsel resubmits a copy of the Master Subcontractor

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."

Agreement between the petitioner and ABPII, for the petitioner to provide “certain services and/or develop products for ABPII’s customers” and concedes that this contract is dated April 18, 2007, after the April 2, 2007 filing date of the petition. As such, it does not comply with the requirement that 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). 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.”

While the petitioner states that the beneficiary will perform work on the ABPII contract in-house, the master services contract was not submitted with any subsequent orders to perform the work. Even if the AAO were to accept the Master Subcontractor Agreement between the petitioner and ABPII and the “ABPII Proposal for Application Development and Support for Pioneer Mortgage Systems” project as timely, the submission would still be deficient, as the record does not contain a contract between ABPII and Pioneer Mortgage Systems or a purchase order pertaining to the work to be performed by the beneficiary, and thus the exact nature of the proposed duties is not clear. 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. 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 addition, the record does not contain a detailed description of the work to be performed by the beneficiary from Pioneer Mortgage Systems, the end-user of the beneficiary’s services. As the nature of the proposed duties remains unclear, 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)(I).

The AAO observes that the Department of Labor’s *Occupational Outlook 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. The general overview of the beneficiary’s duties described in the petitioner’s March 29, 2007 and July 23, 2007 letters, and in the ABPII “Proposal for Application Development and Support for Pioneer Mortgage Systems” is insufficient to determine whether the duties of the proffered position could be performed by an individual with a two-year degree or certificate or could only be performed by an individual with a four-year degree in a computer-related field.

In that the record does not provide a sufficient job description from the end user of the beneficiary's services, 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 job description detailing the specific duties, 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 descriptive listing of the programmer analyst 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 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.

Beyond the decision of the director, the petitioner has not demonstrated compliance with the terms and conditions of the labor condition application, in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(B). As discussed above, the petitioner did not submit the requested evidence in the director's RFE pertaining to contracts, statements of work, work orders, and/or service agreements between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work, work orders, or service agreements listing the location of the end-client business. While the petitioner states that it would be employing the beneficiary in-house, it further states that it has not yet assigned the beneficiary to a specific contract. As the beneficiary's ultimate worksite remains unclear, it has not been shown that the work would be covered by the location on the LCA. 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.

Nor has the petitioner demonstrated that the beneficiary is qualified to perform a specialty occupation that requires a bachelor's degree in a computer-related field, as the record does not contain an evaluation of the beneficiary's credentials from a service that specializes in evaluating foreign educational credentials as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(3).

For these additional reasons, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.