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U.S. Citizenship  
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FILE: WAC 04 128 51197 Office: CALIFORNIA SERVICE CENTER Date: DEC 21 2005

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

*Robert P. Wiemann*

Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is a systems integration and software development company. It seeks to employ the beneficiary as a computer programmer and to classify him 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 on the grounds that the record failed to establish that the beneficiary would perform services in a specialty occupation, that the petitioner is the beneficiary's employer, as defined in 8 C.F.R. § 214.2(h)(4)(ii), or the beneficiary's agent within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(F), or that the petitioner is in compliance with the terms of the labor condition application (LCA) filed with the Department of Labor.

Section 214(i)(1) of 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.

As provided in 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 criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In its initial documentation, including Form I-129 and an accompanying letter, the petitioner described itself as a provider of technology-based business solutions focused on getting businesses to market faster with better, more robust systems. The petitioner stated that it was founded in 1995, had approximately 210 employees, and earned a gross annual income of \$22.7 million. The petitioner indicated that it wished to hire the beneficiary as a computer programmer and, in the certified Labor Condition Application (LCA) filed with the petition, stated that the work location would be Walnut Creek, California. The petitioner stated that, while the beneficiary might provide services to an off-site client, the petitioner would have the power to terminate his employment, direct his employment-related activities, and direct the number of hours he would work, as well as when and where he worked. The duties of the proffered position were described as follows:

Our Computer Programmers participate as members of an engineering team involved in the development, implementation and customization of client/server or web-enabled business applications utilized by corporations for finance, supply and distribution. This position is primarily responsible for computer programming, database design, development and testing, including (but not limited to) coding in Oracle and Oracle development tools with commonly utilized operating system environments, such as UNIX and/or Windows NT; and writ[ing] program code for software which functions or relational databases and over a variety of computer network configurations. A successful candidate must: enter program codes into a computer system; input test data into computer, observe computer monitor screen to interpret program-operating codes; correct program errors using methods such as modifying program or altering sequence of program steps.

The minimum educational requirement, the petitioner stated, is a bachelor's degree or the equivalent in computer science, computer engineering or another engineering specialty, information sciences, physics, or mathematics, plus one year of relevant experience. The beneficiary is qualified for the position, the petitioner indicated, by virtue of his bachelor of science degree in computer engineering from Central Colleges of the Philippines, granted on October 30, 1999, and over thirteen years of experience in software application development.

In the RFE the director requested, among other things, LCAs for all locations where the beneficiary would work; an itinerary of the beneficiary's employment including client names and worksite locations; and copies of the contractual agreements between the petitioner and the beneficiary and between the petitioner and the clients for whom the beneficiary would provide consulting services. In response to the RFE the petitioner stated that it was uncertain whether the beneficiary would work only at company headquarters in Walnut Creek, California, or for clients at other locations. The petitioner did not submit any additional LCAs, but stated that "[s]hould another location be required, [redacted] will obtain any new LCAs and file any amended H-1B petitions as required by law." The petitioner stated further that "we fully believe that [the beneficiary] will be employed by one (if not all) of our assignments with [redacted] [and] [redacted]. The petitioner submitted

copies of its contracts with these three clients, but indicated that no employment contract yet existed with the beneficiary.

In his decision, the director found that the petitioner's contracts with its clients failed to establish that there was available work for the beneficiary (though he neglected to mention the [REDACTED]). Neither the [REDACTED] nor the [REDACTED] contract in the record includes a statement of work – detailing the services to be provided by the petitioner – despite being referenced in the contract documents and stated to be incorporated therein as attachments. The contracts do not indicate a work site in conformance with that identified by the petitioner in the LCA. The director found that the petitioner could not be considered the beneficiary's employer because it would not exercise control over the work being performed for clients. Nor did the petitioner meet the regulatory definition of an agent, the director determined, because the record did not include an itinerary of definite employment for the beneficiary in the context of valid service contracts between the petitioner and its clients. Finally, the director stated that without valid contracts between the petitioner and its clients it was not possible to verify whether the petitioner was in compliance with the terms of the LCA in regard to the wage rate, work location, and conditions of employment offered to the beneficiary.

On appeal the petitioner reiterates that, although the beneficiary may be assigned to different client locations, the petitioner will be his employer because it retains the power to hire, pay, fire, and supervise him, thus meeting the key definitional elements of an employer set forth in the regulation at 8 C.F.R. § 214.2(h)(4)(ii)(2). The petitioner asserts that an employer, under the regulations defining "United States employer," is not required to provide an itinerary of the beneficiary's employment in service contracts with its clients. The petitioner also references an internal memorandum of the legacy Immigration and Naturalization Service (INS) in December 1995 ("*Aytes Memorandum*") interpreting the term "itinerary" in the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) as it relates to the H-1B nonimmigrant classification. The subject regulation, which deals with the "filing of petitions," provides that "[a] petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training." The *Aytes Memorandum* states that:

[I]n the case of an H-1B petition filed by an employment contractor, a general statement of the alien's proposed or possible employment is acceptable since the regulation does not require that the employer provide the Service with the exact dates and places of employment. As long as the officer is convinced of the bona fides of the petitioner's intentions with respect to the alien's employment, the itinerary requirement has been met. The itinerary does not have to be so specific as to list each and every day of the alien's employment in the United States.

According to the petitioner, the information it has provided about the beneficiary's prospective employment in the United States meets the criteria of the *Aytes Memorandum* and satisfies the requirements of 8 C.F.R. § 214.2(h)(2)(i)(B).

"United States employer" is defined in the regulation at 8 C.F.R. § 214.2(h)(4)(ii), as follows:

*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.

Based on the entire record, including copies of numerous service contracts between the petitioner and its clients, the AAO is persuaded that the petitioner meets the foregoing definition of a U.S. employer and would be the beneficiary's employer in the United States. In accord with the director's decision, however, the AAO determines that the record fails to establish that the beneficiary would be performing the services of a specialty occupation.

The petitioner has not stated with specificity where and for whom the beneficiary would work. While indicating that the beneficiary might work part of the time at company headquarters in Walnut Creek, California, the petitioner indicated it was more likely that the beneficiary would work for one or more of the following three clients: [REDACTED]. The petitioner's contracts with those three clients, however, contain no information about what services are to be provided. The [REDACTED] and [REDACTED] contracts each contain references to an attached statement of work describing the work product to be provided by the petitioner to the client. The petitioner has not provided any such attachment to either contract, however, detailing the work to be performed for [REDACTED] and [REDACTED]. The [REDACTED] contract makes no reference to an attached statement of work and contains no information in the body of the contract describing the work product to be provided by the petitioner. Nor have any of the three clients provided information about the work product the petitioner would deliver under their service contracts. Thus, the record does not show what tasks the beneficiary would be performing under the service contracts. Accordingly, the AAO cannot determine whether the beneficiary's employment meets the statutory definition of a specialty occupation at section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1).

With regard to the *Aytes Memorandum* and its interpretation of "itinerary" in the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B), the document states that "[t]he purpose of [the regulation] is to insure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment." Thus, the *Aytes Memorandum* addresses the issue of whether the itinerary of employment the petitioner submits with a petition involving multiple work locations contains sufficient information to establish that there is a job for the beneficiary in the United States. It does not address the issue of whether that job meets the statutory definition of a specialty occupation. To make that determination, the AAO must have evidence from the petitioner and the clients of the duties to be performed by the beneficiary in the various work locations. No such evidence has been submitted by the petitioner in the instant proceeding.

In *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000), a federal appeals court held that the INS (now Citizenship and Immigration Services) reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the alien workers in a particular position require a bachelor's degree for all employees in that position. The court determined that the degree requirement should not originate with the entity that brought the aliens to the United States for employment with its clients. In the instant petition, the record contains service agreements between the petitioner and various clients, for whom the beneficiary would work, but no description of the

beneficiary's proposed duties from an authorized representative of the clients. Without such descriptions, the petitioner has not demonstrated that the work the beneficiary would perform for its clients requires a bachelor's degree in a specific specialty, thereby qualifying the position as a specialty occupation.

According to the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*, a resource upon which CIS routinely relies in determining whether a position qualifies as a specialty occupation, computer programmer positions may be filled by individuals without baccalaureate degrees in computer science or a related specialty, if they have a two-year associate's degree in the field or extensive work experience with computers. In the absence of a job description of the work to be performed in the proffered position, the AAO is unable to determine whether the position requires a baccalaureate or higher degree in a specific specialty, or may be filled by an individual with a two-year degree or experience in the computer field. Thus, the petitioner has not established that the position meets the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). Furthermore, without a description of the job duties the AAO is unable to determine whether a degree requirement is common to the petitioner's industry in parallel positions among similar organizations, whether the client normally requires a degree or its equivalent for the position, or whether the position is so complex, unique, or specialized that it can only be performed by an individual with a specialty degree. Thus, the petitioner has not established that the proffered position qualifies as a specialty occupation under any of the alternative criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), (3), and (4).

Based on the foregoing analysis, the AAO determines that the record fails to establish that the beneficiary would be performing services in a specialty occupation, as defined in section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1).

In addition, the instant petition may not be approved because the record does not establish that the petitioner is in compliance with the LCA certified by the Department of Labor. In that document the petitioner identified Walnut Creek, California, the location of its company headquarters, as the beneficiary's work location. The petitioner acknowledges, however, that Walnut Creek is probably not where the beneficiary will actually work. The three clients for whom the petitioner indicates the beneficiary is likely to perform services are located elsewhere in California – in Palo Alto [REDACTED], Mountain View [REDACTED] and Santa Ana [REDACTED]. While the first two are in the San Francisco Bay Area and could be viewed as in the same metropolitan area as the petitioner, Santa Ana is located in Greater Los Angeles, which cannot be viewed as covered by the work location, and its prevailing wage, identified on the LCA. Thus, the petitioner is not in compliance with the LCA. The petition must be denied on this basis as well.

For the reasons discussed above, the petitioner has failed to establish the beneficiary's eligibility for classification as a nonimmigrant worker employed in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act.

The petitioner bears the burden of proof in these proceedings. See section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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