U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 05 171 53050 Office: NEBRASKA SERVICE CENTER Date: OCT 25 2006

IN RE: Petitioner: [redacted]
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 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 an information technology consulting firm 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 because the petitioner failed to establish that it would employ the beneficiary in a specialty occupation. The petitioner submits a timely appeal.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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)(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 director denied the petition, stating that the submitted evidence shows that the petitioner regularly serves as a vendor to other independent contracting/staffing companies that are brokers which supply the petitioner's

employees to third party entities. In finding that the record did not contain detailed descriptions or corroborating evidence of current internal projects that the beneficiary would work on at the petitioner's Irving, Texas, work location as shown on the labor condition application (LCA), the director questioned whether there was a specialty occupation available there at the time the petitioner filed the H-1B petition. The director noted that the record contained H-1B approval notices regarding other petitions filed by the petitioner. The director stated that she is not required to approve petitions where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous.

On appeal, the petitioner states that it had submitted, in response to the director's request for evidence, its contract with Adroit Business Solutions. The petitioner submits on appeal: the contract and work order entered into with Adroit Business Solutions; the services agreement between Adroit Business Solutions and RealNetworks, Inc.; letters from Adroit Business Solutions outlining the beneficiary's duties; and a copy of the beneficiary's badge.

Based on the evidence in the record, the AAO concurs with the director's conclusion that the record fails to establish that the beneficiary would be employed in a specialty occupation.

The petitioner is seeking the beneficiary's services as a programmer/analyst. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. The petitioner's May 3, 2005 letter that accompanied the H-1B petition describes the beneficiary's job duties as analyzing business operations and computing needs of clients and designing and developing work flow processes specific to their needs; enhancing and modifying existing information specifications and parameters and existing software and architecture to improve e-commerce capabilities including business, interface, and data layers. The petitioner's August 5, 2005 letter, submitted in response to the director's request for additional evidence, stated that the beneficiary will be employed in-house and will provide technical assistance and back-up to the petitioner's consultants who are in the field. This letter describes the beneficiary as assisting the consultants in resolving design and development software and systems problems, troubleshooting specific technical issues, and serving as an additional resource to ensure that all schedule deadlines are met; designing, developing, implementing, and supporting the petitioner's internal software network, database, and customized software needed for the petitioner to operate and manage its affairs.

The record contains documents, independent contractor agreements, contractor services agreements, work orders, master agreements, consulting agreements, cooperative placement agreements, vendor subcontractor agreements, subcontractor agreements, non-disclosure agreements, and purchase orders. On appeal, the petitioner submitted a document entitled "Work Order to Sub-Contractor Agreement," which was entered into by the petitioner and Adroit Business Solutions, Inc. This agreement indicates that the beneficiary would perform consulting duties for 12 months, with the right to extend, for RealNetworks, Inc., the client of Adroit Business Solutions, Inc. The petitioner also submitted letters from Adroit Business Solutions, Inc., which certify that Adroit Business Solutions, Inc. intends to employ the beneficiary as a consultant and state that the beneficiary has been working onsite with RealNetworks, Inc. for over two years.

The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at multiple work locations to perform services established by contractual agreements for third-party companies. The petitioner, however, has provided no contracts, work orders, or statements of work from a representative of RealNetworks, Inc., the entity for whom the beneficiary would perform consulting services, describing the duties the beneficiary would perform for RealNetworks, Inc. As such, the petitioner has not established the proffered position as a specialty occupation. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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)).

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, the 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 evidence in the record of a copy of a badge and a letter from Adroit Business Solutions, Inc. is insufficient to support the petitioner's assertion that the beneficiary would perform consulting services for RealNetworks, Inc. requiring a four-year degree in a specialty. The record does not contain evidence from an authorized representative of RealNetworks, Inc. describing the specific duties that the beneficiary would perform for RealNetworks, Inc. As *Defensor* indicates that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner, the petitioner needed to submit evidence that the proposed position qualifies as a specialty occupation on the basis of the job requirements imposed by RealNetworks, Inc., the entity for which the petitioner contends the beneficiary would provide programmer/analyst consulting services, and the evidence needed to identify the beneficiary as assigned by RealNetworks, Inc. to provide the programmer/ analyst services.

The AAO notes that the petitioner submitted no evidence to support its assertion that the beneficiary would design, develop, implement, and support the petitioner's internal software network, database, and customized software. We also note that the petitioner had not previously described this duty in its May 3, 2005 letter. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed is a specialty occupation. *See Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Here, the AAO finds that the duties to design, develop, implement, and support the petitioner's internal software network, database, and customized software materially change the scope of the proposed position's job responsibilities

in that the duties previously described in the petitioner's May 3, 2005 letter related specifically to performing consulting services on behalf of the petitioner's clients. Thus, these duties will not be considered in this proceeding.

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)(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)*(1)*.

The director found that the petitioner had not established that it would employ the beneficiary at its premises in Irving, Texas. 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 if the beneficiary's duties will be performed in more than one location.[1]

In his request for evidence, the director asked for the beneficiary's employment itinerary. In the Aytes memorandum cited at footnote 1, 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 an employment itinerary. The submitted Work Order to Sub-Contractor Agreement states that the beneficiary would perform consulting duties for RealNetworks, Inc. for 12 months, with a right to extend. The beneficiary's period of employment, as indicated in the Form I-129 petition, is from October 1, 2005 to July 15, 2008. Thus, the 12-month work order does not cover the full duration of the beneficiary's **period of employment to July 15, 2008. The itinerary submitted by the petitioner does not satisfy** 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of the beneficiary's employment by the petitioner. As the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), the petition must be denied.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition on this ground.

Beyond the decision of the director, the petitioner has not filed an LCA valid for the place of employment. The petitioner indicates in its contract with Adroit Business Solutions that the beneficiary will work in Seattle, Washington, for RealNetworks, Inc. The LCA filed with the petition indicates that the beneficiary

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[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).

will work in Irving, Texas. The petitioner has failed to file an LCA for Seattle, Washington. For this additional reason, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361 The petitioner has not sustained that burden.

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