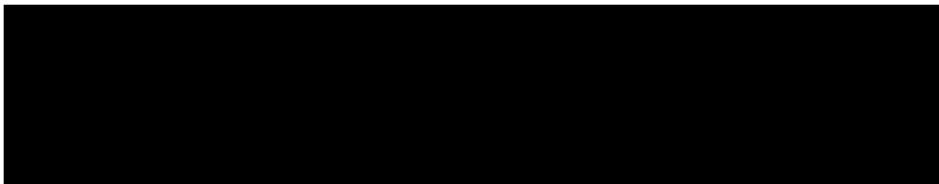


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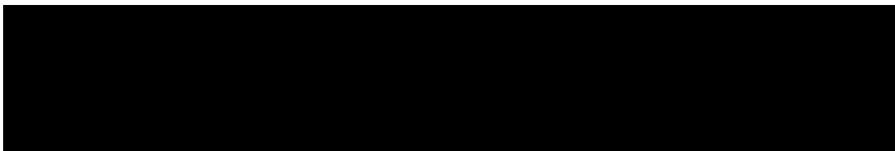
*D2*

FILE: WAC 04 258 50309 Office: CALIFORNIA SERVICE CENTER Date: JAN 18 2007

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*

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is a California company that seeks to employ the beneficiary as a Programmer Analyst. 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 director denied the petition because: (1) the petitioner failed to establish that its company met the definition of an agent or U.S. employer, as set forth in 8 C.F.R. §§ 214.2(h)(2)(i)(F) and 214.2(h)(4)(ii); (2) the petitioner failed to submit an itinerary of employment, as set forth in 8 C.F.R. § 214.2(h)(2)(i)(B); and (3) the record contained insufficient evidence to establish that the proffered position qualified as a specialty occupation, as set forth in section 101(a)(15)(H)(i)(b) of the Act.

On appeal the petitioner, through counsel, submits a statement, an offer of employment letter, an employee contract, client contracts, and wage and tax information. The petitioner asserts that it has sole authority to hire, pay, fire, supervise, or otherwise control the work of the beneficiary, and that the petitioner is therefore the beneficiary's employer for immigration purposes. The petitioner asserts that the beneficiary will be primarily engaged in in-house employment for the petitioner, but that the beneficiary will also work off-site for its client, [REDACTED]. The petitioner submits an employment contract with [REDACTED] as evidence of the beneficiary's service itinerary and definite employment, and the petitioner asserts that the evidence contained in the record establishes that the proffered position meets the definition of a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for a Nonimmigrant Worker (Form I-129) and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial letter; and (5) Form I-290B, Notice of Appeal to the AAO (Form I-290B) and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The regulations at 8 C.F.R. § 214.2(h)(4)(ii), provide that the term, "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 [IRS] Tax identification number.

Upon review of the evidence contained in the record, the AAO finds that the petitioner is the beneficiary's employer for 8 C.F.R. § 214.2(h)(4)(ii) purposes, as the offer letter, employment contract and wage and tax information establish that the petitioner would engage the beneficiary to work within the United States, that the petitioner has an IRS Tax identification number, and that the petitioner has the authority to hire, pay, supervise or otherwise control the work of the beneficiary.

The petitioner states that it seeks the beneficiary's services as a programmer analyst. Evidence of the proffered position's duties include: 1) the Form I-129, and letter of support from the petitioner; 2) the petitioner's response to the director's RFE; 3) the petitioner's offer letter to the beneficiary; and 4) the petitioner's Form I-290B, and supporting documentation.

Based on the information contained in the petitioner's letter of support and the petitioner's response to the director's RFE, the petitioner is an information technology development and consulting company that provides technology computer/engineering services for clients' hardware environments and software applications. The petitioner states that the proffered position's duties consist of:

- Analyzing data processing requirements to determine client computer software needs, and using the software to design and implement a computer system to efficiently process client data;
- Explaining the system development process to management, and addressing management and client concerns about the system;
- Revising the system when necessary to respond to unanticipated software problems;
- Analyzing existing system and user needs;
- Communicating and interacting with current system users;
- Designing and developing a new computerized system;
- Writing and testing newly designed programs;
- Implementing newly developed systems;
- Providing technical support after system implementation.

The petitioner states further that on a day-to-day basis, the beneficiary's time would be allocated in the following manner:

- Analysis of software requirements – 25%;
- Evaluation of interface feasibility between hardware and software – 10%;
- Software system design – 30%;
- Unit and integration testing – 25%;
- System installation – 5%;
- Systems maintenance – 5%.

The Form I-129, letter of support and response to the director's RFE reflect that the beneficiary would work at the petitioner's facility located at [REDACTED], in Tempe, Arizona. The September 2004, offer letter to the beneficiary reflects that the beneficiary would work for the petitioner as a programmer analyst, and that his employment would commence, "on the day you report to work at one of our offices or project sites." On appeal, the petitioner states, through counsel that it:

[H]as full-time development teams in Tempe, AZ who collaborate with the on-site consultants to develop customized software applications. [The Beneficiary] will spend the

majority of his time working from the Tempe, AZ corporate office location involved in the designing and development of the application.

The petitioner additionally asserts on appeal, however, that it has consultants working on-site at Honeywell Inc., a large electronic controls manufacturer, and that the:

[S]ervice agreements and statement of work between IT People and its client, Honeywell, Inc., . . . . acts as an itinerary of definite employment as it contains the dates of service, work to be performed, location of services, and actual employer for the Beneficiary.

In the present matter, the petitioner makes varying claims regarding the beneficiary's worksites and duties, and it is unclear where the beneficiary will work, or what the petitioner will be doing throughout the three-year period requested in the petitioner's Form I-129.

The petitioner asserts in its letter of support and in its response to the director's RFE, that the beneficiary will work on in-house product development of the petitioner's applications. The petitioner submitted no independent evidence to describe or explain what its application products are, however, or to establish that the petitioner is presently involved in the development, or production of an applications product. Accordingly, the record does not establish that the beneficiary will work on an in-house project for the petitioner. The record also does not establish what the in-house project would entail, or the length of time that the beneficiary would work on such a project. 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 AAO notes that the record contains strong evidence to indicate that the petitioner is a staffing agency, and in fact plans to place the beneficiary at off-site work locations to perform services established by contractual agreements for third-party companies. The petitioner's Form I-129, and letter of support state that the petitioner is an information technology development and consulting company that provides technology computer/engineering services for clients' hardware environments and software applications. Furthermore, the petitioner's September 2004 offer letter states that the beneficiary will perform programmer analyst services at one of its offices or work sites. As discussed above, the petitioner failed to establish that it is presently involved in in-house development or production of an applications product. Moreover, the petitioner asserts on appeal, through counsel, that the beneficiary would work for its client, Honeywell, Inc., and that the petitioner's contract with Honeywell, Inc., "acts as an itinerary of the beneficiary's definite employment as it contains the dates of service, work to be performed, location of services, and actual employer for the Beneficiary."

The record contains a July 2004, contract between the petitioner and Honeywell. The contract reflects clearly that it is a consulting services agreement, and that the, "supplier [the petitioner] and Honeywell each intend that the Services will be performed primarily at the Honeywell location." See section 5, and page 1 of the contract. It is noted that the petitioner's contract with Honeywell Inc., does not refer to, or mention the beneficiary in any way. Rather, section 5 of the contract indicates that the petitioner, "shall appoint sufficient staff of suitable training and skills to provide the Basic Services," as defined in the contract.

The director found that the petitioner did not comply with the terms stipulated on the labor condition application (LCA) because the evidence indicated that the beneficiary would be employed at a location other than the petitioner's place of business. The director found that without specific employment contracts, U.S. Citizenship and Immigration Services (CIS) was unable to determine whether the petitioner complied with the terms of the LCA or whether the LCA was proper in relationship to the area of employment or the wage offered the beneficiary.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), a petitioner must submit a statement that it will comply with the terms of the LCA for the duration of the alien's period of authorized stay. The petitioner makes varying claims regarding the beneficiary's worksites, and it is unclear where the beneficiary will work throughout the three-year period requested in the petitioner's Form I-129. The AAO is therefore unable to determine whether the LCA that was certified prior to filing the I-129 petition, as required by 8 C.F.R. § 214.2(h)(4)(i)(B)(1) and 20 C.F.R. § 655.700(b), is valid or whether the petitioner has complied with the terms of the LCA.

Moreover, 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, when requested at the discretion of the director. The AAO finds that the director properly exercised his discretion to request an itinerary of employment in the present matter. See 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).

In addition, a director maintains the discretion to request any evidence that he or she independently requires in order to adjudicate an H-1B petition, which may include contracts between a petitioner and the beneficiary or its client(s). See 8 C.F.R. § 214.2(h)(9)(i). In the present matter the director requested that the petitioner submit copies of employment contracts between the petitioner, its clients, and the beneficiary. The AAO notes that a review of an employment contract between a petitioner and a beneficiary is important because it reflects the terms of the beneficiary's employment. Moreover, the submission of a contract between the petitioner and the alien is provided for at 8 C.F.R. § 214.2(h)(4)(iv)(B), which states that an H-1B petition involving a specialty occupation shall be accompanied by "copies of any written contracts between the petitioner and beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract."

The record contains an employment contract between the petitioner and the beneficiary, which states that the petitioner is engaged in the business of providing computer consulting services to clients, and desires to employ the beneficiary as a programmer/analyst, "to perform analysis, design, coding and testing of hardware/software as required." The contract fails to establish where the beneficiary will work, what specifically he will do, or for whom. The September 2004, offer letter contained in the record states that the beneficiary will report to work as a programmer analyst at one of the petitioner's offices or project sites. This letter also fails to clarify where the beneficiary will work, and what specifically he will do and for whom. The petitioner states in its Form I-129 letter of support and in its response to the director's RFE, that the beneficiary will work on in-house production of its application products in Tempe, Arizona. However, the

petitioner also states on appeal that the beneficiary will perform services for Honeywell, Inc. in accordance with the employment contract contained in the record. The Honeywell, Inc. employment contract does not refer to, or mention the beneficiary. The AAO thus finds that the record does not contain a complete itinerary of employment with the dates and locations of the beneficiary's work in multiple locations, as set forth in 8 C.F.R. § 214.2(h)(2)(i)(B).

The petitioner has also failed to establish that the proffered position is a specialty occupation. 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.

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.

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.

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. See *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> 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.

To determine whether the position duties described above are those of a specialty occupation, the AAO first considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The petitioner has characterized its position as that of a programmer analyst. The AAO therefore turns to the 2006-2007, *Handbook's* description of that occupation. The *Handbook* states on page 105, that, "programmer-analysts are responsible for both the systems analysis and the actual programming work." The *Handbook* states further on page 104, that computer programmers:

[W]rite, test, and maintain the detailed instructions, called programs, that computers must follow to perform their functions. Programmers also conceive, design, and test local structures for solving problems by computer.

....

Programmers write programs according to the specifications determined primarily by computer software engineers and system analysts. After the design process is complete, it is the job of the programmer to convert that design into a logical series of instructions that the computer can follow. The programmer codes these instructions in a conventional programming language such as COBOL; an artificial intelligence language such as Prolog; or one of the most advanced object-oriented languages, such as Java, C++, or ACTOR. . . . Many programmers update, repair, modify, and expand existing programs.

The *Handbook* discusses the computer programmer's educational requirements on page 105, and states in pertinent part that:

Although there are many training paths available for programmers, mainly because employers' needs are so varied, the level of education and experience employers seek has been rising due to the growing number of qualified applicants and the specialization involved with most programming tasks. Bachelor's degrees are commonly required, although some programmers may qualify for certain jobs with 2-year degrees or certificates.

The *Handbook* describes the computer systems analyst occupation on page 116, and states in pertinent part that:

Computer systems analysts solve computer problems and apply computer technology to meet the individual needs of an organization. They help an organization to realize the maximum benefit from its investment in equipment, personnel, and business processes. Systems analysts may plan and develop new computer systems or devise ways to apply existing systems' resources to both hardware and software, or add a new software application to harness more of the computer's power. Most systems analysts work with specific types of systems . . . that vary with the kind of organization.

. . . .

In some organizations, *programmer-analysts* design and update the software that runs a computer. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas.

The *Handbook* discusses the computer systems analyst position's educational requirements on pages 116 and 117, and states in pertinent part that:

[W]hile there is no universally accepted way to prepare for a job as a systems analyst, most employers place a premium on some formal college education. . . . Many employers seek applicants who have at least a bachelor's degree in computer science, information science, or management information systems (MIS). . . . Despite employers' preference for those with technical degrees, persons with degrees in a variety of majors find employment as system analysts. The level of education and type of training that employers require depend on their needs. . . . Employers usually look for people who have broad knowledge and experience related to computer systems and technologies, strong problem-solving and analytical skills, and good interpersonal skills.

Thus, while both a computer systems analyst and a computer programmer position may require a baccalaureate degree in a specialty, the information contained in the *Handbook* reflects that a worker may enter either occupation with less than a baccalaureate degree, and that for those positions that require degrees, the degree may be in a broad range of backgrounds.

The AAO finds that the duties of the proffered programmer analyst position as described by the petitioner, provide no meaningful description of the specific tasks that the beneficiary would perform for the petitioner or its clients on a daily basis.

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000) held that for purposes 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 to be performed is for an entity other than the petitioner. Accordingly, the court held that the legacy Immigration and Naturalization Service (Service, now CIS) had reasonably interpreted the Act and regulations to require that a petitioner produce evidence that the proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

In the present matter, the petitioner has provided no evidence to describe the specific duties the beneficiary would perform for the petitioner or its clients. The AAO is therefore unable to analyze whether the proffered position's 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 AAO finds that the petitioner has also failed to establish that the proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which states that a, "[d]egree 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." The record contains no parallel position or common industry evidence. The record also contains no information from a professional association in the petitioner's industry, and the record contains no letters or affidavits from firms or individuals in the industry attesting to the educational requirements of the proffered position. Moreover, as noted above, the petitioner has failed to provide evidence containing a detailed description of the job duties for the proffered position. The AAO is thus unable to assess the uniqueness or complexity of the proffered position. Accordingly, the petitioner has failed to establish that the proffered position is a specialty occupation under the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has additionally failed to establish that the proffered position qualifies as a specialty occupation under the third prong of 8 C.F.R. § 214.2(h)(4)(iii)(A), which states that, "the employer normally requires a degree or its equivalent for the position." The record contains no evidence relating to the petitioner's past hiring practices for the proffered position. The petitioner therefore failed to establish that the position is a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). The AAO notes further that the record also fails to establish that the job itself involves the theoretical and practical application of a body of highly specialized knowledge.

The record also fails to establish that the proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which states that, "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." As previously discussed, the lack of a job description from the entities for which the beneficiary will provide services does not allow the AAO to determine the specific tasks that the beneficiary would perform on a daily basis for the petitioner's clients. The petitioner's job duties do not reflect any specific tasks that the beneficiary will perform. It is thus impossible to assess whether the proffered position's duties meet the specialized and complex threshold of the fourth criterion contained in 8 C.F.R. § 214.2(h)(4)(iii)(A).

Accordingly, the AAO finds that the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation as set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has also failed to submit an itinerary of employment as required at 8 C.F.R. § 214.2(h)(2)(i)(B). The record also does

not establish that the petitioner has submitted an LCA valid for the work location. The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained its burden in the present matter. The appeal will therefore be dismissed.

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