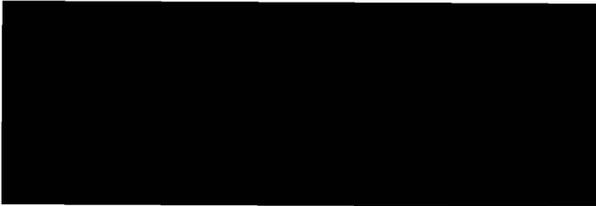


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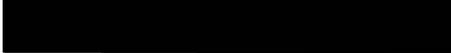
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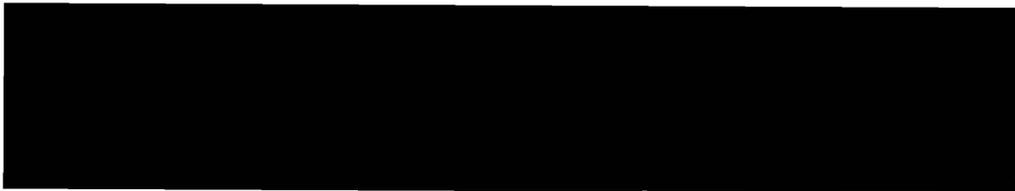
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FILE: WAC 06 194 53198 Office: CALIFORNIA SERVICE CENTER Date: **APR 03 2008**

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:



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.

for Michael T. Willy
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 appeal will be dismissed. The petition will be denied.

The petitioner is a computer software development and consulting firm 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 determined, in part, that the petitioner failed to submit requested wage reports to establish the number of employees it employs. The director stated that the petitioner's tax returns noted wages paid of \$128,795, and that this information was inconsistent with the Form I-129 which states that the petitioner has 48 employees, and CIS records which indicate that the petitioner has petitioned for 131 employees since 2004. Based on these perceived discrepancies, the director denied the petition finding that the petitioner had failed to demonstrate that it had a credible offer of employment. On appeal, the petitioner submitted a statement from its accountant which explained that the petitioner paid salaries and wages of \$2,443,467 in 2005, not \$128,795 as stated by the director. The explanation offered by the accountant overcomes the concerns of the director in this regard. The petitioner also submitted tax records to establish the number of employees it had during the year 2005.

The director also determined that the petitioner failed to establish that the beneficiary would be employed in a specialty occupation. The issue to be determined is whether beneficiary would be employed in 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields 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.

The petitioner seeks the beneficiary’s services as a programmer analyst. Evidence of the beneficiary’s duties is set forth in the Form I-129 petition and supporting attachment. According to evidence provided by the petitioner the beneficiary would:

- Plan, develop, test and document computer programs and apply broad knowledge of programming techniques and computer systems to evaluate user requests for new or modified programs;
- Formulate plans outlining the steps required to develop programs using structured analysis and design in addition to preparing flowcharts and diagrams to convert project specifications into detailed instructions and logical steps for coding into languages processed by computers;
- Write manuals and document operating procedures and assist users to solve problems;
- Replace, delete and modify codes to correct errors, analyze, review, and oversee the installation of software and provide technical assistance to clients;
- Maintain client networks and software builds; and
- Coordinate with various locations during transitioning, oversee network administration and create test scripts and applications to manage and test the various functionality of builds and network administration.

The petitioner requires a minimum of a bachelor’s degree in information systems, engineering or related fields for entry into the proffered position.

The director’s decision indicated, in part, that the petitioner had not established that the beneficiary would be employed in a specialty occupation. The director’s Request For Evidence (RFE) issued on June 14, 2006, specifically asked that the petitioner provide an itinerary of the beneficiary’s employment during the term of his intended stay in the United States (since the petitioner is a consultant, and the beneficiary would likely be employed in more than one location). The director also asked the petitioner to provide copies of contracts between the petitioner and clients under which the beneficiary would perform services. The petitioner provided copies of numerous client contracts, none of which provided work orders calling for the beneficiary’s services.

The petitioner provided only one contract, with an accompanying work order, calling for the beneficiary's services. That contract was entered into on June 2, 2006 (the Form I-129 was filed on June 7, 2006), and was accompanied by a work order requiring the beneficiary's services from June 5, 2006 for an undisclosed, or "open ended" time frame. The duties to be performed by the beneficiary were not provided in detail, however, with the work order providing simply that the beneficiary would perform tasks identified as "J2EE Architect."

The petitioner states, in effect, in materials supporting the Form I-129, that the beneficiary will be employed on client projects as needed. The documentation submitted in response to the director's RFE does not establish a complete itinerary¹ for the beneficiary's services during the period of his intended stay in the United States (from June 7, 2006 – June 6, 2009). 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.

The petitioner provided sample copies of contracts between it and various clients for whom the beneficiary may perform services. The petitioner indicated that the beneficiary would perform some work at the petitioner's business location, but would primarily be available for work on various client projects at multiple, but unspecified, locations. 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. The documentation contained in the record does not establish a complete itinerary for the beneficiary from June 7, 2006 through June 6, 2009. Accordingly, the petitioner has failed to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition must be denied.²

The beneficiary's position has been identified by the petitioner as a programmer analyst. The Department of Labor's *Occupational Outlook Handbook (Handbook)* notes that although there are many training paths available for programmers due to varied employer needs, 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 associate degree is a widely used entry-level credential for prospective computer programmers. In the absence of a degree, substantial specialized experience or expertise may be needed, and employers appear to place more emphasis on previous experience even when hiring programmers with a degree. Some computer programmers hold a college degree in computer science, mathematics, or information systems, while others have taken special courses in computer programming to supplement degrees in other fields. Thus, it is evident that while some programmer positions justify the hiring of an individual with a baccalaureate level education, others require only an associate's degree or some other form of certification.

The petitioner, however, has provided no contracts, work orders or statements of work from any petitioner client for whom the beneficiary will actually perform services specifically describing the duties the beneficiary would

¹ 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).

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."

perform and, therefore, has not established the proffered position as a specialty occupation. The only work order calling for the beneficiary's services under a petitioner consulting agreement states simply that the beneficiary will perform tasks identified as "J2EE Architect." This description of the beneficiary's duties, from the end user of his services, does not specifically detail the tasks to be performed by the beneficiary so that it can be determined whether those services require the theoretical and practical application of a body of highly specialized knowledge requiring a baccalaureate-level education in a specific specialty. The unsupported statement of the petitioner to that effect is insufficient to establish that the proffered position qualifies as a specialty occupation. Simply going on the 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 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. As the record does not contain any documentation from the end users of the beneficiary's services (the petitioner's clients) that establish the specific duties the beneficiary would perform under contract, and that their performance involves the application of at least a bachelor's degree level of highly specialized knowledge, 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)(I). For this additional reason, the petition must be denied.

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 failed to sustain that burden.

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