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U.S. Citizenship
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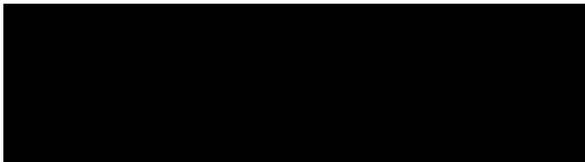
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FILE: WAC 07 131 54354 Office: CALIFORNIA SERVICE CENTER Date: **NOV 24**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

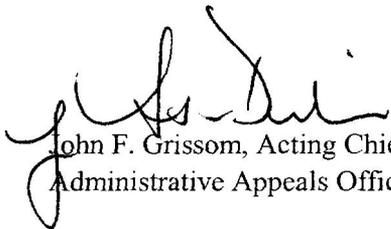
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner provides software development and consulting services. It was established in 2004 and employs approximately 40 personnel. It seeks to employ the beneficiary as a programmer analyst. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On September 20, 2007, the director denied the petition, determining that the petitioner: had not established that it was an employer or an agent; had not established that the Department of Labor's Form ETA 9035E, Labor Condition Application (LCA) was valid for all work locations; and had not established that the proffered position qualified as a specialty occupation. On appeal, counsel for the petitioner submits a brief and documents in support of the appeal.

The record of proceeding before the AAO includes: (1) the Form I-129 filed April 2, 2007 and supporting documents; (2) the director's May 3, 2007 request for evidence (RFE); (3) counsel for the petitioner's July 25, 2007 response to the RFE; (4) the director's September 20, 2007 denial decision; and (5) the Form I-290B, counsel's brief, and documents in support of the appeal.

To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

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.

The petitioner seeks the beneficiary's services as a programmer analyst. In an April 2, 2007 letter appended to the petition, the petitioner provided a description of the beneficiary's role as a programmer analyst indicating he would perform the following functions:

Technical Work: [W]ill be responsible for Technical development aspects of projects that as they related [sic] to upgrades, conversions, migration, and implementations – 70% of time spent on this task.

Support: [A]ssist in providing support to past and present clients – 20% of time spent on this task.

Presentations: Assist the sales department in presenting the technical aspects of the projects to new or potential clients – 5% of time spent on this task.

Analysis & Recommendations: Participate with [the petitioner's] team that provides comprehensive analysis to clients. This analysis includes reviews of previous installations, recommendations for upgrades, data monitoring, security, disaster recovery, etc. – 5% of time spent on this task.

The petitioner noted that the beneficiary would work in Naperville, Illinois. The petitioner provided a copy of an LCA showing the beneficiary's work location in Naperville, Illinois as a programmer analyst.

On May 3, 2007 the director requested, among other items: a complete itinerary that specifies the dates of each service or engagement, the names and addresses of the actual employers and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested; copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end client companies where the work will actually be performed that specifically lists the beneficiary and includes a detailed description of the duties the beneficiary will perform; quarterly wage reports for all employees for 2005, 2006, and the first quarter of 2007; evidence that the petitioner is conducting business at the street address provided on the Form I-129; and clarification of the petitioner's name as the president of the petitioning company is affiliated with other companies that also file H-1B petitions.

In a July 25, 2007 response, counsel for the petitioner asserted that none of the information requested is technically required unless the adjudicator outlines a specific reason for the request and that issuing boilerplate RFEs is also improper. Counsel provided copies of two Service memoranda in support of the assertions. Counsel also asserted that the petitioner will be the petitioner's employer and has ultimate control of its employees. Counsel also included a list of the petitioner's clients throughout the United States and a 2006 statement showing deposits and filings of FUTA information indicating the petitioner had paid employees in the States of California, Florida, Illinois, Indiana, Massachusetts, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Texas, Virginia, and Washington. The record also includes quarterly filings for the first quarter of 2007. The petitioner further provided a list of employees working in different states as of January 2007. Counsel also submitted a consulting agreement between the petitioner and a third party, Hollister Incorporated, located in Libertyville, Illinois dated March 30, 2005. Counsel further included a copy of an overview of the SAP ERP connector solution product provided by the petitioner.

On September 20, 2007, the director denied the petition. The director determined that the petitioner had not established that it is an employer or an agent; thus the petitioner had not established that it is qualified to file petitions for alien H-1B workers. The director observed that thirteen of the eighteen clients listed on the petitioner's client list are organizations that also contract with other firms for computer related services.¹ The director determined that as the petitioner is in the business of placing workers at third party companies, multiple employment locations would be expected. The director noted that the LCA provided indicated that the beneficiary would work in Naperville, Illinois where the petitioner is located but that the petitioner's clients were located in several different states. The director also noted that the only contract submitted was for a company located in Libertyville, Illinois. The director determined that without contracts from the

¹ The record includes copies of these organizations' web sites and their list of offered services.

ultimate end client firm using the beneficiary's services, CIS could not determine whether the LCA submitted was valid for all work locations. The director further determined that without valid contracts between the petitioner and the entity ultimately using the beneficiary's services, the evidence of record did not establish that the work to be completed and the duties to be performed are duties comprising the duties of a specialty occupation.

On appeal, counsel for the petitioner asserts that the RFE was overly broad and burdensome and beyond what is required by the regulations and that the employer is not required to provide a detailed itinerary listing each and every day of the alien's employment in the United States. Counsel provides copies of three CIS memoranda in support of these assertions. Counsel contends that there is nothing in the record that supports the director's conclusion that the petitioner is an employment contractor that subcontracts its workers to third party companies that further subcontract services to end user clients. Counsel references the Hollister contract provided in response to the RFE as an example of a company that is not a computer consulting company but is a medical supply company that requires computer consulting services. Counsel references the petitioner's 40 employees and the petitioner's parent company, Transworld Information Systems, Inc., and indicates that both the petitioner and its parent company have employed numerous H-1B workers in the past and contends that its past employment practices establish that the petitioner is an employer. Counsel asserts that the beneficiary will be working in Naperville, Illinois as stated on the LCA and attaches an undated letter from the petitioner stating that it intends to employ the beneficiary in Naperville, Illinois upon approval of the H-1B petition. Counsel recites the previously provided description of the beneficiary's duties as a "computer programmer" and notes that the Department of Labor's *O*NET Online (O*NET)* indicates that a programmer analyst requires a four-year bachelor's degree. Counsel states that it is obvious that the proffered position is a specialty occupation.

Preliminarily, the AAO finds that the director erred when finding that the petitioner would not act as the beneficiary's employer. The evidence of record establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.² See 8 C.F.R. § 214.2(h)(4)(ii). In view of this evidence, the AAO finds that the petitioner will be the employer of the beneficiary and withdraws the director's decision to the contrary. The petition may not be approved, however, as it does not establish that the beneficiary will be employed in a specialty occupation, that the LCA submitted is valid for all work locations, or that the employer has submitted an itinerary of employment.

Contrary to counsel's contention that the record does not demonstrate that the petitioner is an employment contractor, the AAO finds that the petitioner employs a number of individuals and places these individuals in multiple work locations as evidenced by its employee list, its client list, and the FUTA information supplied to the federal government. This information establishes that the petitioner is an employment contractor as the petitioner does not claim and has not provided evidence that it has branch offices in the number of states listed as locations for its employees and its clients. Neither the initial record nor the information submitted in response to the director's RFE is sufficient to show that the petitioner had almost three years of work for the

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).

beneficiary to perform at one location. As such, the director properly exercised her discretion to require an itinerary of employment.³ 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 in such situations. While the Aytes memorandum cited at footnote 2 (and by counsel) broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. In this matter, the record does not contain sufficient evidence establishing that the beneficiary would work solely in-house on the petitioner's projects. Without documentary evidence to support the claim, the assertions of counsel and the petitioner will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

Also in this matter, the petitioner provided a perfunctory and generic description of the duties of the position and did not identify a specific project or employment for the beneficiary. The record does not contain a detailed description of the beneficiary's actual daily duties. The AAO acknowledges counsel's assertion that the petitioner has indicated that the beneficiary will be employed at the petitioner's offices and the AAO has examined the overview of the SAP ERP connector solution product apparently developed by the petitioner. The petitioner in this matter, however, does not detail the beneficiary's duties relative to this a project or provide anything other than a broad statement describing the occupation of a generic programmer analyst. The petitioner has not submitted sufficient documentary evidence to establish that the beneficiary will work on the assigned project. Accordingly, CIS is precluded from determining whether the proffered position incorporates 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.

The AAO observes that the Department of Labor's *Occupational Outlook Handbook (Handbook)* indicates that there are a number of computer-related positions, some of which require a four-year course of college-level education, some of which require a two-year associate's degree, and some of which only require experience. Regarding the occupation of a programmer analyst, under the title *Computer Programmers*, the *Handbook* reports: "[i]n some organizations, workers known as *programmer-analysts* are responsible for both the systems analysis and programming."

Under the same title, the *Handbook* indicates:

Computer programmers write, test, and maintain the detailed instructions, called programs, that computers follow to perform their functions. Programmers also conceive, design, and test logical structures for solving problems by computer. With the help of other computer

³ 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."

specialists, they figure out which instructions to use to make computers do specific tasks. Many technical innovations in programming—advanced computing technologies and sophisticated new languages and programming tools, for example—have redefined the role of a programmer and elevated much of the programming work done today.

The *Handbook* provides the following regarding the educational requirements for the occupation of a computer programmer:

A bachelor's degree commonly is required for computer programming jobs, although a two-year degree or certificate may be adequate for some positions. Employers favor applicants who already have relevant programming skills and experience. Skilled workers who keep up to date with the latest technology usually have good opportunities for advancement.

Education and training. Most programmers have a bachelor's degree, but a two-year degree or certificate may be adequate for some jobs. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business.

Regarding the occupation of a computer systems analyst, the *Handbook* reports:

All organizations rely on computer and information technology to conduct business and operate efficiently. Computer systems analysts help organizations to use technology effectively and to incorporate rapidly changing technologies into their existing systems. The work of computer systems analysts evolves rapidly, reflecting new areas of specialization and changes in technology.

Computer systems analysts solve computer problems and use computer technology to meet the needs of an organization. They may design and develop new computer systems by choosing and configuring hardware and software. They may also devise ways to apply existing systems' resources to additional tasks.

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To begin an assignment, systems analysts consult managers and users to define the goals of the system. Analysts then design a system to meet those goals. They specify the inputs that the system will access, decide how the inputs will be processed, and format the output to meet users' needs. Analysts use techniques such as structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to make sure their plans are efficient and complete. They also may prepare cost-benefit and return-on-investment analyses to help management decide whether implementing the proposed technology would be financially feasible.

When a system is approved, systems analysts determine what computer hardware and software will be needed to set it up. They coordinate tests and observe the initial use of the system to ensure that it performs as planned. They prepare specifications, flow charts, and process diagrams for computer programmers to follow; then they work with programmers to "debug" or eliminate errors, from the system.

* * *

In some organizations, *programmer-analysts* design and update the software that runs a computer. They also create custom applications tailored to their organization's tasks. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. . . . As this dual proficiency becomes more common, analysts are increasingly working with databases, object-oriented programming languages, client-server applications, and multimedia and Internet technology.

As referenced above, the petitioner in this matter provided a general statement of the beneficiary's proposed duties and did not reference the beneficiary's specific duties in connection with an in-house project or provide a description of duties for a third party company. The description of duties provides an overview of the occupation of a programmer analyst but does not provide the necessary detail to enable an analysis of the beneficiary's actual daily duties. The petitioner has not described specific tasks relative to the beneficiary's assignment, whether working on the petitioner's in-house project or for a third party, that would elevate the proffered position to a position that would normally require a baccalaureate or higher degree in a specific discipline.

In addition, the *Handbook* indicates: [t]raining requirements for computer systems analysts vary depending on the job, but many employers prefer applicants who have a bachelor's degree." The *Handbook* also states: "[r]elevant work experience also is very important. Advancement opportunities are good for those with the necessary skills and experience;" and "[w]hen hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree." When discussing programmers, the *Handbook* reports: "[m]ost programmers have a bachelor's degree, but a two-year degree or certificate may be adequate for some jobs." First, the AAO has long found that employer preference is not synonymous with the "normally required" language of this criterion. Second, based on the *Handbook's* statements, a baccalaureate or higher degree or its equivalent in a specific discipline is not the normal minimum requirement for entry into the particular position. Third the petitioner has not provided sufficient information regarding the duties of the proffered position to establish whether the duties of the proffered position require an individual with a baccalaureate or higher degree in a specific discipline or whether the duties could be performed by an individual with an associate degree or training certificates in particular computer languages.

The AAO acknowledges counsel's reference to *O*NET* and the assertion that *O*NET* reports that a programmer analyst requires a four-year bachelor's degree. However, counsel misunderstands the *O*NET* JobZone Specific Vocational Preparation (SVP) criteria. The AAO does not consider the *O*NET* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty, as it provides only general information regarding the tasks

and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. The AAO observes that although the *O*NET* indicates that most of these occupations (grouping occupations as diverse as programmer analyst, programmer, computer programmer, software developer, Internet programmer, web programmer under one summary) require a four-year bachelor's degree, the *O*NET* also indicates that some do not. Thus, the *O*NET* does not specify a bachelor's degree in a specific discipline, does not acknowledge the disparate duties associated with each of the occupations listed, and does acknowledge that some of the occupations do not require a bachelor's degree. The AAO reiterates that the record in this matter does not provide sufficient information regarding the actual duties of the position to demonstrate that the duties of the proffered position would require the beneficiary to have attained a bachelor's degree or its equivalent in a specific specialty.

The petitioner in this matter has failed to provide a definitive description of the duties that the beneficiary would perform on any in-house project and has not detailed specific tasks associated with the project that would require a baccalaureate or higher degree or its equivalent in a specific discipline as the normal minimum requirement for entry into position. Accordingly, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

In that the record does not offer a comprehensive description of the duties that the beneficiary would perform for the petitioner or the petitioner's client, or the petitioner's client's client, 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 meaningful job description, the petitioner has not established the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguished the position as more complex or unique than similar, but non-degreed, employment, as required by the alternate prongs of the second criterion. Absent a detailed listing of the duties the beneficiary would perform in-house or under contract, the petitioner has not established that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither has the petitioner satisfied the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

The AAO also finds that the petitioner has not established that the LCA provided is valid for all work locations. As the record does not contain an itinerary of employment, it cannot be determined that the LCA is valid for all the locations of employment. Although the AAO acknowledges that the petitioner could file an amended LCA if the petitioner placed the beneficiary in a different location, the failure of the petitioner to provide an itinerary indicating the amount of time the beneficiary would be employed at the Naperville, Illinois prohibits a determination that the LCA is valid for all work locations. For this additional reason, the petition may not be approved.

The AAO acknowledges counsel's concern regarding boilerplate RFEs; however, the petitioner must establish that it has employment available for the beneficiary when the beneficiary is employed and for the duration of the time of requested employment. In addition, the petitioner must provide a description of the specific duties the beneficiary will be performing, whether for the petitioner or for a third party. It is this information that

must be examined and will enable CIS to determine if the petitioner has met the requirements to establish eligibility for an H-1B position. When a petitioner has not provided this basic information when filing the petition, an RFE is in order. The AAO observes that in this matter, even when presented with the opportunity to provide this basic information, the petitioner declined to do so. The AAO is left with the impression that the necessary evidence did not exist when the petition was filed or when the petitioner responded to the RFE. 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).

Beyond the decision of the director, the failure to provide the requested itinerary also precludes approval of this petition. As observed above, the record shows that the petitioner is an employment contractor. Also as determined above, in such situations 8 C.F.R. § 214.2(h)(2)(i)(B) requires that employers submit an itinerary with the dates and locations of employment. The record does not establish that the petitioner had sufficient employment for the beneficiary in-house or for third party companies; thus, the failure to submit an itinerary also precludes the approval of the petition.

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. 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.