

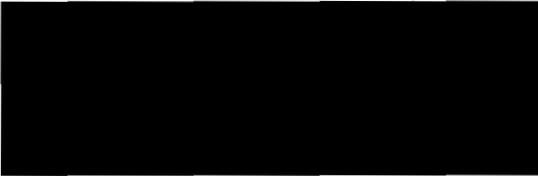


U.S. Citizenship
and Immigration
Services

PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

D2



FILE: WAC 07 131 51362 Office: CALIFORNIA SERVICE CENTER

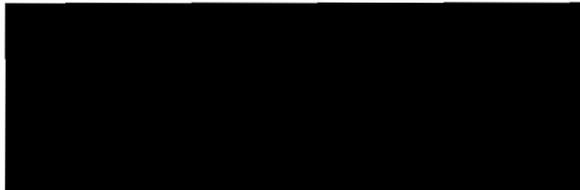
Date: **SEP 29 2008**

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.

Robert P. Wiemann, 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 information technology solutions. It claims to employ over 125 personnel and to have 13.1 million dollars in gross annual income when the petition was filed.¹ It seeks to employ the beneficiary as a programmer analyst. Accordingly, 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).

On September 18, 2007, the director denied the petition. On appeal, the petitioner submits the Form I-290B, Notice of Appeal or Motion and indicates a brief and/or additional evidence will be submitted to the AAO in 30 days.

The record includes: (1) the Form I-129 filed April 2, 2007 and supporting documents; (2) the director's May 2, 2007 request for further evidence (RFE); (3) counsel for the petitioner's July 24, 2007 response to the director's RFE and supporting documentation; (4) the director's September 18, 2007 denial decision; and (5) the Form I-290B, and counsel's statement on the Form I-290B in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(1) of the Immigration and Nationality Act (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

¹ Also on April 2, 2007, the petitioner submitted a separate petition (WAC 07 145 51392) for a different beneficiary and used as its office address, an address in Urbandale, California. In the separate petition, the petitioner claimed to employ 151 personnel and to have \$7,144,000 in gross annual income when the petition was filed. Counsel's assertion on appeal that the petitioner has properly filed all income, payroll and withholding tax returns in all states, does not address the inherent misrepresentations to Citizenship and Immigration Services regarding the petitioner's number of employees and gross annual income as both petitions were filed on the same day.

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.

In a March 29, 2007 letter appended to the petition, the petitioner stated that the petitioner sought to employ the beneficiary in the position of programmer analyst. The petitioner provided the following job description for the position of its programmer analyst:

[The beneficiary's] job duties shall include analyzing and evaluating existing and proposed systems and devices, computer programs and systems, as well as related procedures to process data. He shall prepare charts and diagrams to assist in problem analysis and submit recommendations for solutions. He will prepare program specifications and diagrams and develops coding logic flowcharts. Furthermore, he will [be] responsible for diagrams,

encoding, testing, debugging and installing operations programs and procedures in conjunction with user departments.

The petitioner also provided breakdown of the proposed job duties indicating the beneficiary would spend 45 percent of his time analyzing the user's needs; 30 percent of the time testing and implementing proposed modifications and providing support; and 10 percent of the time on miscellaneous activities. The record also includes a Form ETA 9035E, Labor Condition Application, (LCA) listing work locations for a programmer analyst in Santa Clara, California and in Urbandale, Iowa. The petitioner states that the beneficiary will be its employee and will be assigned work out of its office listed on the LCA but due to the nature of the work to be done; the petitioner cannot determine the future locations of work.

On May 2, 2007, the director requested, among other items: a more detailed description of the product the beneficiary would be working in-house; clarification of the petitioner's employer-employee relationship with the beneficiary; a complete itinerary that specified 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; and contractual agreements, statements of work, work orders, service agreements, letters from authorized officials of the ultimate client companies where the work will actually be performed, that provide a detailed description of the duties the beneficiary would perform.

In a July 24, 2007 response, counsel for the petitioner provided a description of "in-house product development" projects for an unrelated company identified as "ESI." Counsel also noted the itinerary for the work to be done by the Beneficiary is as follows:

The present beneficiary has been working on a project for Yahoo at Sunnyvale, CA. He will be working there by virtue of the contract between [the petitioner] and Stratitude Inc. The current PO is valid from October 2007 for a period of 18 months and is extendable beyond that after review of the project. Based on current work at the client site, the Beneficiary is likely to work there till the end of his H-1B tenure.

Counsel noted further: "Even though the Beneficiary is working at the client site, the beneficiary will work on project [sic] that are assigned to him and approved by [the petitioner]. Counsel indicated that the beneficiary would work at the petitioner's office site for the end user client, and if the beneficiary's services were not required for the "said project," before the termination of the H-1B classification, the petitioner would absorb the beneficiary's services in other "ongoing software application development projects as stated above." Counsel also indicated that the beneficiary "will work on projects that are assigned to him and at all times his work will be supervised by the project manager for ESI." Counsel does not explain the statement "[t]he beneficiary has been working on a project for Sprint at Santa Clara, CA,"² and does not further identify the "ESI" company.

The petition is for new employment and the petitioner does not indicate or otherwise substantiate that the beneficiary is currently in valid nonimmigrant status and eligible to work in the United States.

Counsel also cited a December 29, 1995 memorandum signed by Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, that clarified legacy Immigration and Naturalization Service's regulations regarding the requirement of itineraries, and an unpublished decision from the AAO.

The petitioner also submitted the first and last page of a service provider agreement between the petitioner and Stratitude Inc., a company located in Fremont, California, dated May 7, 2007 and a copy of a purchase order dated May 7, 2007 identifying the contractor as the beneficiary who has been short listed for the "roll of Programmer in CRM Applications" the client name as Yahoo, the start date as October 2007, the duration as 24 months, to be extended upon client's request, and the scope of work as: "Programmer in CRM Applications." The purchase order does not include a further description of the beneficiary's proposed duties.

On September 18, 2007, the director denied the petition. The director noted that the petitioner's California State Employment Development Department, Forms DE-6, Quarterly Wage and Withholding Reports for the last two quarters of 2006 showed that many of the petitioner's H-1B employees worked part-time, thus it did not appear the petitioner had a *bona fide* position to offer the beneficiary. The director observed that the petitioner's contract with Stratitude Inc. submitted in response to the director's RFE was dated after the April 2, 2007 filing date of the petition. Citing the regulation at 8 C.F.R. § 103.2(b) and *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), the director found that the petitioner had not established eligibility when the petition was filed. The director determined that the petitioner: had not established that it was an employer or an agent; had not established the proffered position as a specialty occupation and that it had sufficient work for the requested period of intended employment.

On appeal, counsel for the petitioner asserts: that there is an existing qualifying project and the need for an H-1B employee; that the petitioner is a qualified United States employer; that the petitioner is owned by a holding company and provides software product development in two locations, Santa Clara, California and Urbandale, Iowa and also provides party rentals out of a location in Rancho Cucamonga, California; and that not all employees are involved in product development work and some consulting, implementation and integration issues require a large number of petitioner's employees to be based out of the client locations throughout the United States. Counsel contends that the petitioner has properly filed all income, payroll and withholding tax returns in all states.

Counsel also asserts that CIS has erroneously concluded that Yahoo is the end-user of the beneficiary's services, and in fact, the end-user is actually Stratitude Inc. Counsel indicates that Stratitude Inc. has entered into a consulting service agreement with Yahoo and is responsible for several ongoing projects assigned by Yahoo. Counsel then indicates that the beneficiary will work on the managed services of Yahoo for CRM Applications and will be working on an independent project which will be done on site at Yahoo's premises around 50 percent of the time and 50 percent of the time at the petitioner's premises. Counsel avers that due to confidentiality reasons, the master agreement and statements of work regarding the project between Stratitude Inc and Yahoo was not released to the petitioner. Counsel provides, in its place, a copy of an October 17, 2007 letter signed by the director of Stratitude Inc. indicating that the beneficiary has been selected to work on such software development projects as required by its clients.

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.³ See 8 C.F.R. § 214.2(h)(4)(ii). The AAO finds that the evidence of record establishes that the petitioner is an employment contractor and that the petitioner will place the beneficiary at different work locations to perform services according to various agreements with third-party companies. Based on the inconsistencies in the record of proceeding regarding the proposed position and the general references to different projects, and to unrelated third party companies such as "ESI," the AAO is unable to determine the scope of the proposed position or the project or projects underway at the petitioner's offices or at other locations to which the beneficiary would be assigned. The petitioner initially provided an overview of the duties of a programmer analyst and noted that the beneficiary will be assigned work out of its office listed on the LCA but due to the nature of the work to be done the petitioner could not determine the future locations of work. This statement suggests that the petitioner did not have a definitive employment available for the beneficiary when the petition was filed. Moreover, counsel for the petitioner indicated in response to the director's RFE that the present beneficiary has been working on a project for Yahoo at Sunnyvale, CA and will be working there by virtue of the contract between [the petitioner] and Stratitute Inc. As footnoted above, the record does not contain evidence that the beneficiary was in valid nonimmigrant status when the petition was filed. It is not possible to conclude from the variety of information in the record regarding the proposed position where the beneficiary will work and what duties the beneficiary will actually perform. The petitioner has not established that it had a definite and credible position to offer the beneficiary when the petition was filed.

In this matter, counsel's description of "in-house product development" projects for an unrelated company identified as "ESI," and the indefinite assertions regarding the possible locations⁴ of the beneficiary's employment confirms that the petitioner sought to hire the beneficiary for speculative possible employment in an undefined computer-related position.⁵ The petitioner has not provided evidence of a contract in place when the petition was filed and has not provided evidence of a specific project in-house to which the beneficiary would be assigned. The AAO observes that 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). For this reason, the petition may not be approved.

To determine whether a particular job qualifies as a specialty occupation, CIS does not 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. *Cf. Defensor v. Meissner*, 201 F. 3d

³ 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).

⁴ The LCA shows that the beneficiary will work in Santa Clara, California or Urbandale, Iowa. Counsel indicates that the beneficiary will work in-house for ESI at an unknown location, at a work location in Sunnyvale, California, or for Stratitute Inc. which appears to be located in Fremont, California.

⁵ 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."

384 (5th 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. Although the title of a particular position is not the critical element in determining whether a position is a specialty occupation, the title of the proffered position provides some insight on the various duties that the petitioner expects the beneficiary to perform.

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, 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 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 documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients or the petitioner's clients' clients for the duration of the H-1B classification, the AAO is unable to analyze whether the duties of the proposed position 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)(iii)(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). Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations. For this additional reason, the petition may not be approved

Beyond the decision of the director, the AAO finds that although the petitioner would be the beneficiary's employer, the record establishes that the petitioner is an employment contractor. When a petitioner is an employment contractor, the petitioner must provide an itinerary detailing the actual names and addresses of the actual end-users of the beneficiary's services and the time period the beneficiary would be working for various end-users. In such an instance, 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. While the Aytes memorandum cited at footnote 3 broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. As the evidence contained in the record at the time the petition was filed did not establish that the petitioner had three years of work for the beneficiary to perform, the director properly exercised her discretion to require an itinerary of employment. The petitioner in this matter, through counsel, alluded to possible work locations at the petitioner's offices, at the offices of a third party client, and on appeal at a different third party client's client. The speculative and indefinite employment for the beneficiary not only fails as an itinerary, it reinforces the need for one. As the petitioner has not submitted an itinerary, the petition may not be approved.

In addition, the indefinite nature of the proffered position and the reference to different work locations, including locations at client sites, does not establish that the two submitted certified LCAs are valid for all work locations. The petitioner, through counsel, has indicated that the beneficiary will work in the two locations specified on the LCA, but in response to the RFE and on appeal indicates that the beneficiary would work for Yahoo and/or Stratitude Inc., as end user clients but without adequately and consistently defining the work location. The record does not present consistent information regarding the beneficiary's actual work location, job title, or the nature of the work or projects. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As the record does not contain an itinerary of employment, as required in this instance, it cannot be determined that the LCA is valid for all the locations of actual employment. For this reason, the director's decision will be affirmed.

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. As always, in visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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