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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 04 227 51005 Office: NEBRASKA SERVICE CENTER Date: JUN 23 2006

IN RE: Petitioner:
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a software consulting and development company that seeks to employ the beneficiary as a programmer analyst. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the petitioner failed to establish the existence of a specialty occupation. Counsel submits a timely appeal.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), defines the term "specialty occupation" as an occupation that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation the position must meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

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.

Pursuant to 8 C.F.R. § 214.2(h)(2)(i)(F):

> A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, in place of, the employer as its agent. A petition filed by a United States agent is subject to the following conditions;
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> *(1)* An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.
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> *(2)* A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify 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. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.
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> *(3)* A foreign employer who, through a United States agent, files a petition for an H nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274a.

In denying the petition, the director found that the petitioner did not qualify as the employer of the beneficiary and did not establish the existence of a specialty occupation. The director found the submitted labor condition

application (LCA) inadequate in specifying the location(s) where the beneficiary will perform work. The director stated that the LCA is not for Lombard, Illinois, which is the specified location of employment.

On appeal, counsel states that the petitioner, a software consulting and development company, is the beneficiary's employer. Counsel asserts that the petitioner has total control over its employees and hires, evaluates, pays, terminates, and controls them. Counsel refers to submitted financial records and master service agreements to substantiate his assertion. Counsel states that CIS regulations and case law do not permit CIS to consider a company's ability to pay its employees, or to request a specific itinerary concerning an H-1B petition. The letter submitted from the petitioner on appeal indicates that the petitioner has in-house projects and offers consulting services. The petitioner states that the submitted promotional brochures relate to its in-house projects, and the master consulting agreements reflect projects for clients. The petitioner states that when employees join the company they work on in-house projects, as this familiarizes them with the petitioner's systems, procedures, policies, and culture. Later, the employee is scheduled to work on a client project, and when it ends the employee works on an in-house or a client project. The petitioner states that it complied with the December 29, 1995 memorandum issued by Mr. Michael L. Aytes of the Office of Adjudications (HQADN), and with the prior AAO decision shown in the June 30, 2000 *Interpreter Releases*.

Based on the evidence in the record, the AAO concurs with the director's conclusion that the petitioner failed to establish that the beneficiary will ultimately perform a specialty occupation.

The AAO finds that the evidence of record establishes that an employer/employee relationship would exist between the petitioner and beneficiary. The submitted contract agreements indicate that when the employees of the petitioner provide consulting services for the petitioner's clients, the petitioner is their employer.

The evidence of record does not establish that the beneficiary will actually perform a specialty occupation. In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now CIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the foreign nurses require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the nurses to the United States for employment with the agency's clients.

With the situation here, the petitioner on appeal refers to "promotional brochures" to show its in-house projects; however, the AAO notes that the record contains no promotional brochures. 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)). None of the submitted contractual agreements with companies indicates that the beneficiary will perform consulting services for those companies. Thus, the record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of a client company. Without this evidence, the petitioner cannot demonstrate that the work that the beneficiary will ultimately perform will qualify as that of a specialty occupation.

With respect to the prior AAO decision, as shown in the *Interpreter Releases* (June 30, 2000), the AAO observes that the decision reflects that the petitioner and its client for whom the beneficiary would ultimately provide services submitted a description of the beneficiary's proposed duties. Thus, the facts in the instant proceeding are distinguishable from those in the prior AAO decision, as the petitioner here did not submit a description of the beneficiary's proposed duties from the entity or entities ultimately employing the beneficiary.

As the beneficiary will be placed at multiple work locations established by contractual agreements between the petitioner and third-party companies, the petitioner is also an agent, as described at 8 C.F.R. § 214.2(h)(2)(i)(F):

> A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent . . . .

The regulation governing agents at 8 C.F.R. § 214.2(h)(2)(i)(F)*(1)* requires the submission of an itinerary of definite employment to cover the entire period of time requested in the petition. Employers, pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), must also submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(F)*(1)* requires a petitioner that is also an agent to submit an itinerary with the dates and locations of employment to cover the entire period of employment. The record does not contain an itinerary for the proposed employment. As the petitioner did not submit an itinerary of work, the petitioner is unable to establish that the LCA contained in the record is valid for the period and place of employment.

Based on the evidence of record, the AAO concludes that the petitioner satisfied none of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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.