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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 05 018 52946 Office: NEBRASKA SERVICE CENTER Date: SEP 13 2006

IN RE: Petitioner: [redacted]
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:

[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, Nebraska Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed. The petition will be denied.

The petitioner provides information technology consulting and staff augmentation services. The petitioner 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).

The record includes: (1) the Form I-129 and supporting documents; (2) the director's February 17, 2005 request for further evidence (RFE); (3) counsel's May 6, 2005 response to the director's RFE; (4) the director's June 13, 2005 denial decision; and (5) the Form I-290B and a revised version of counsel's response to the director's RFE in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On June 13, 2005, the director denied the petition. On appeal, counsel for the petitioner asserts: that CIS's decision is arbitrary and capricious; that the alien is qualified to perform the proffered position; and, that the company has sufficient business to employ the beneficiary in the offered position. Counsel provides a statement similar to his statement submitted in response to the director's request for evidence and re-submits documents previously provided. Counsel does not address the issues raised in the director's decision of June 13, 2005.

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v).

Although this matter will be summarily dismissed for failure to articulate an erroneous conclusion of law or statement of fact for the appeal, the AAO concurs with the director's decision that: (1) the record presents contradictory information regarding where the beneficiary will ultimately be employed; and (2) the petitioner fails to provide a comprehensive description of the beneficiary's ultimate employment.

In an October 15, 2004 letter submitted in support of the petition, the petitioner stated the beneficiary would work under the direct supervision of a project manager and would be responsible for the following:

> As a Programmer analyst, the beneficiary will 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. More specifically, the beneficiary will formulate plans outlining steps required to develop programs using structured analysis and design in addition to preparing flowcharts and diagrams to convert project specifications in detailed instructions and logical steps for coding into languages processed by computers. The beneficiary may also write manuals and document operating procedures and assist users to solve problems. The beneficiary will also replace, delete[,] and modify codes to correct errors, analyze, review[,] and alter programs to increase operating efficiency and adapt the

> system to new requirements; and, oversee the installation of software and provide technical assistance to clients. Furthermore, the beneficiary will be assigned to various projects, which will require him to maintain client networks and software builds. He will also coordinate with various locations during transitioning, oversee network administration[,] and create test scripts and applications to manage and test the various functionalities of builds and network administration.

The LCA that the petitioner filed with the Department of Labor (DOL), dated October 13, 2004, listed the beneficiary's place of work as South Elgin, Illinois as a programmer analyst.

On February 17, 2005, the director requested additional evidence from the petitioner. The director requested clarification of the petitioner's relationship with the beneficiary and documentation of the client contract relating to the services to be performed by the petitioner for the actual end user client. The director noted that such documentation could include the contract between the petitioner and the third party for whom services would be rendered or a letter signed by an authorized representative of the client organization which indicates the nature of the project, the specific dates of the project's or contract's duration, a description of the services to be performed, the location where the beneficiary would perform the service(s) and the name of the beneficiary.

In a May 6, 2005 response, counsel for the petitioner listed a wide variety of services it provided and stated: "[t]ypically, [redacted] is engaged by U.S. businesses to provide full services solutions for specific turnkey project development." Counsel noted that "there is generally no agreement to supply a particular individual for a particular job," but that "[a]t any given time, we always have some consultants working on in-house projects. Such is the situation in underlying case. [redacted] intends to place the beneficiary initially in the company HQ located at Sough Elgin, Il." Counsel further indicated that [redacted] assumes direct responsibility for the salary and benefits paid to the beneficiary while working for its clients, thus a valid employer-employee relationship exists. Counsel provided the same description of responsibilities for a programmer analyst as had been provided in the initial letter of support.

Counsel referenced the 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). Counsel noted that the memorandum stated: "[t]he itinerary does not have to be so specific as to list each and every day of the alien's employment in the United States. . . ." Counsel also included an excerpt from Interpreter Releases, March 25, 1996, pertaining to employment contractors and a copy of an AAO decision overturning a Nebraska Service Center denial of a petition on behalf of a software design engineer.[1] Counsel also included an addendum to a master contracting agreement between the petitioner and a third party listing the beneficiary as a consultant who

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[1] **The AAO decision referenced by counsel can be distinguished.** The referenced decision noted the comprehensive description of the beneficiary's work to be performed for the ultimate employer. In the matter at hand, as discussed below, the petitioner has not provided a comprehensive description of the beneficiary's proposed work either for the petitioner or for a third party.

would work as a crystal reports developer beginning October 11, 2004.

On June 13, 2005 the director denied the petition. The director noted she was unable to determine, based on the record, that the beneficiary would in fact perform services at the petitioner's headquarters, observing that the master contracting agreement addendum in the record showed the beneficiary would perform services for a third party not in-house. The director also noted that the master contracting agreement addendum indicated that the beneficiary would be employed as a crystal report developer but that no further description of the beneficiary's actual duties had been provided. The director determined that although the petitioner had described the duties of a typical programmer analyst, the petitioner had not provided a description of the beneficiary's ultimate employment so that the Citizenship and Immigration Services (CIS) could determine that the underlying duties qualified as a specialty occupation.

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.

Preliminarily, the AAO finds that the evidence of record is sufficient to establish that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.[2] *See* 8 C.F.R. § 214.2(h)(4)(ii). However, the record does not clearly indicate where the beneficiary will be employed or the specific nature of the beneficiary's employment. Counsel's statement in response to the director's RFE indicates that the beneficiary will initially be employed in South Elgin, Illinois at the petitioner's headquarters. The petitioner's LCA confirms that the beneficiary will be employed in South Elgin, Illinois. However, this information conflicts with the petitioner's agreement and addendum with a third party that identifies the beneficiary as a consultant with the third party company starting October 11, 2004. Counsel does not address or otherwise explain this inconsistency on appeal. 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). The AAO agrees with the director's determination that the record does not clearly set forth the location of the beneficiary's employment.

[2] *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).

Moreover, the petitioner provides a broad overview of the duties of a programmer analyst. It is not possible to determine from the general statement of responsibilities for the programmer analyst position how these duties relate to the specific tasks of the petitioner, its particular business interests, or to the services to be performed by the beneficiary for the third party.

When a petitioner is an employment contractor, the entity ultimately employing the alien or using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, Citizenship and Immigration Services (CIS) will determine whether the duties require 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 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 in the instant matter offers no meaningful description of the proffered position's responsibilities, the petitioner has not established that the duties of the position are those of a programmer analyst. Without a description of the beneficiary's actual duties from the entity utilizing the beneficiary's services, and a general description of the responsibilities of a programmer analyst performing work for the petitioner, the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty.[3] Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(*1*).

In that the record does not offer a comprehensive description of the duties the beneficiary would perform for the petitioner or a description of the beneficiary's duties for the petitioner's client, the petitioner cannot establish that the proffered position meets the requirements of any of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a listing of the duties the beneficiary would perform under contract,

[3] The AAO observes that the *Handbook* reports that there are many training paths available for programmers and that although bachelor's degrees are commonly required, certain jobs may require only a two-year degree or certificate; and that there is no universally accepted way to prepare for a job as a computer systems analyst, although most employers place a premium on some formal college education and many employer's seek applicants who have at least a bachelor's degree in computer science, information science or management information systems.

the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

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.

As counsel does not address the issues raised in the director's decision, the record before the AAO does not contain evidence or argument identifying an erroneous conclusion of law or statement of fact. Thus, the appeal will be summarily dismissed.

Of note, the beneficiary obtained a bachelor's degree in textile engineering in August 1998 from the University of Gulbarga in India. The credentials evaluation service concluded that the beneficiary's foreign degree and "at least three years" of qualifying experience and training is the equivalent of a bachelor's degree in computer information systems, one of the degrees the *Handbook* reports can be used as an avenue to employment as a computer analyst. However, when attempting to establish that a beneficiary has the equivalent of a degree based on his or her combined education and employment experience under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*), a petitioner may not rely on a credentials evaluation service to evaluate a beneficiary's work experience. A credentials evaluation service may evaluate only a beneficiary's educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*). To establish an academic equivalency for a beneficiary's work experience, a petitioner must submit an evaluation of such experience from an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*). The Silvergate evaluation does not establish that the beneficiary's four-year degree in textile engineering is equivalent to a bachelor's degree in computer information systems or a related discipline. Thus, the record fails to demonstrate that the beneficiary holds the equivalent of a baccalaureate degree in a field directly related to the proffered position. For this additional reason, the petition will be denied.

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. 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 summarily dismissed. The petition is denied.