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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: WAC 04 800 58143 Office: CALIFORNIA 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, 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 is an information technology-consulting firm. 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 November 8, 2004 request for further evidence (RFE); (3) counsel's January 28, 2005 response to the director's RFE; (4) the director's February 10, 2005 denial decision; and (5) the Form I-290B and counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

On February 10, 2005, the director denied the petition, determining that the record failed to establish that the beneficiary is eligible for classification as a specialty occupation worker. On appeal, counsel for the petitioner submits a brief and documentation in support of the appeal.

In a September 11, 2004 letter submitted in support of the petition, the petitioner provided the following information regarding the proffered position:

> The duties of our Programmer/Analyst position include analyzing and evaluating existing and proposed systems and devices, computer programs and systems, as well as related procedures to process data. The Programmer/Analyst prepares charts and diagrams to assist in problem analysis and submits recommendations for solutions. He will prepare program specifications and diagrams and develops [sic] coding logic flowcharts. Furthermore, he will be responsible for encoding, testing, debugging[,] and installing operating programs and procedures in conjunction with user departments. [The beneficiary's] daily task activities will include: system analysis 60%, design 20%, prepare diagrams and charts 10%, test and code 10%

The LCA filed with the Department of Labor (DOL), on the beneficiary's behalf is dated August 25, 2004, and lists the beneficiary's place of work as Santa Clara, California as a programmer analyst.

On November 8, 2004, the director requested additional evidence from the petitioner. The director requested, among other things, a more detailed job description of the work done, including specific job duties and the percentage of time to be spent on each duty; copies of contracts between the petitioner and the beneficiary and between the petitioner and its clients; as the petitioner's business appears to outsource computer consultants to clients outside the petitioner's worksite, a complete itinerary of services or engagements where the beneficiary will perform those services.

In a January 28, 2005 response, counsel for the petitioner added to the above description indicating the programmer analyst:

> [W]ill work as a member of a team and will be supervised by a Team Leader/Project Manager; and will use established methods and procedures to implement the project at the client site. Additionally, the beneficiary will be required to study and analyze the existing system on which the development work will be carried out. This will require the beneficiary to interact with the users of the systems – understand the functionality of the system, the specifications and the requirements of the users.

Counsel also referenced a web application, "QFoods," that would bring together a cell phone company and fast food chains, currently under development by the petitioner. Counsel also indicated that the beneficiary would remain "the employee of [the petitioner] at all times," and that the petitioner is the actual employer and will hire, compensate, provide medical coverage, supervise, and otherwise control the work of the beneficiary. Counsel also 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 indicated that when the petitioner is an employment contractor, a general statement of the beneficiary's proposed or possible employment is acceptable and that the 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 further referenced a previous AAO decision regarding a beneficiary who would work at the petitioner's facility and the AAO's conclusion that an itinerary of definite employment was not required by regulation. Under the heading "Agents as employers," counsel observed "[n]o such contracts exist since the H-1B employment, as with all temporary work, is at will."

The director denied the petition on February 10, 2005, determining: that the record did not contain a written contract between the petitioner and the beneficiary outlining his duties and terms of employment; that the record did not contain evidence of the beneficiary's proposed duties from an authorized representative of the petitioner's client where the beneficiary would ultimately work; that without a description of the beneficiary's actual duties, the petitioner could not establish that the proffered position was a specialty occupation; that the record did not contain sufficient evidence to determine whether the petitioner would be the beneficiary's employer or his agent; and that the labor condition application could not be verified as the record lacked evidence of contracts establishing the beneficiary's employment and wage.

On appeal, counsel for the petitioner asserts that the petitioner is the beneficiary's employer as it is responsible for paying, hiring, firing, supervising, and controlling the beneficiary. Counsel notes that the AAO has previously determined that a programmer analyst position is a specialty occupation. Counsel lists prior AAO decisions in support of his contention. Counsel also on appeal provides a comprehensive description of the beneficiary's duties that will be performed on a specific assignment relating to "QFoods." Counsel avers that the job duties listed clearly demonstrate that the proffered position comprises a specialty occupation. The petitioner also provides a copy of its August 10, 2004 offer of employment and other documentation in support of the appeal.

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.[1] *See* 8 C.F.R. § 214.2(h)(4)(ii). However, the record before the director did not clearly indicate where the beneficiary would be employed or the specific nature of the beneficiary's employment.

Counsel submitted inconsistent statements regarding the beneficiary's ultimate employment. Initially, the petitioner provided a broad overview of duties performed by a programmer analyst. The petitioner did not indicate how the general duties described would relate to the specific tasks of the petitioner or, if the beneficiary's services were utilized off-site, how the general tasks would relate to the beneficiary's ultimate employment.

In addition, counsel's response to the director's RFE further confused matters. In the January 28, 2005 letter, counsel added a sentence to the general description of duties for the petitioner's "programmer analyst" suggesting that the beneficiary would work as a member of a team, would be supervised by a Team Leader/Project Manager, and would use established methods and procedures to implement the project at the client site. In the same January 28, 2005 letter, counsel's reference to a specific in-house project, "Qfoods" and indication that the beneficiary would remain the petitioner's employee at all times, suggested that the petitioner would utilize the beneficiary's services in-house and that the beneficiary would not work at a client's work site. 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). Thus, the record before the director does not clearly demonstrate where the beneficiary will work. The director's decision relied on the petitioner's initial indication that the beneficiary would work off-site; thus the director properly concluded that the record did not contain evidence of the beneficiary's proposed duties from an authorized representative of the petitioner's client where the beneficiary would ultimately work; that without a description of the beneficiary's actual duties, the petitioner could not establish that the proffered position as a specialty occupation; and without knowledge of the actual location of the beneficiary's work, the LCA could not be verified.

On appeal, counsel for the petitioner acknowledges that the petitioner indicated in the petition that the beneficiary would work at the client site; but counsel states that now the petitioner intends for the beneficiary

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[1] *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).

to work at the petitioner's facility on an in-house project. The petitioner, however, must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. In this matter if the petitioner intended that the beneficiary work off-site when the petition was filed, the petitioner is obligated to submit an itinerary with the dates and locations of employment pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), if requested by the director. Further, the petitioner must provide a definitive description of the beneficiary's proposed duties with the ultimate employer to enable Citizenship and Immigration Services (CIS) to evaluate the nature of work and whether the work qualifies as a specialty occupation.

The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at multiple locations to perform services established by contractual agreements for third-party companies. The petitioner, however, has provided no contracts, work orders or statements of work describing the duties the beneficiary would perform for its clients and, therefore, has not established the proffered position as a specialty occupation.

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 any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients, 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)(*1*).

In this matter, the petitioner initially failed to provide documentation regarding the dates and locations of the beneficiary's proposed employment. The petitioner likewise failed to provide this information in response to the director's RFE. The record did not contain evidence establishing that the beneficiary would work at the petitioner's on-site facility, but only indications that the petitioner as an employment contractor would be outsourcing the beneficiary's services to a third party. 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. Upon review of the record before the director, the petitioner failed to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B).

Further, it is not possible to determine from the petitioner's broad overview of the duties of a programmer analyst how these duties relate to the specific tasks of the petitioner's client. As the record before the director in the instant matter offered 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. With only a general description of the responsibilities of a programmer analyst and without a description of the beneficiary's actual duties from the entity utilizing the beneficiary's services, CIS is precluded from determining that the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty.[2] 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'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, 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 record before the director, 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 beneficiary's ultimate employment is a specialty occupation within the meaning of the regulations.

Of note, counsel's more specific description of the beneficiary's duties for the petitioner as it relates to the nature of the petitioner's specific project on appeal is submitted to show how those duties require the theoretical and practical application of a body of highly specialized knowledge. However, where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Moreover, as observed above, the petitioner cannot materially amend a petition on appeal, but instead must submit a new petition for adjudication when it changes the proffered position.

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[2] 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.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of a specialty occupation. The credentials evaluation service determined that the beneficiary's foreign bachelor's of science degree issued by the University of Kerala, India, is equivalent to three years of university level credit from a regionally accredited college or university in the United States. The credentials evaluation service further determined that the beneficiary's three years of experience is equal to one year of university level credit in the United States. The credentials evaluation service concluded, based on both the beneficiary's foreign degree and three years of experience, that the beneficiary has 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 Universal Evaluations and Consulting, Inc.'s evaluation does not establish that the beneficiary's foreign degree is equivalent to a bachelor's degree in computer information systems or a related discipline, but rather relies on the beneficiary's foreign degree and his work experience. 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.