U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 05 234 51243 Office: NEBRASKA SERVICE CENTER Date: AUG 20 2007

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 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 product development and technical consulting business that seeks to employ the beneficiary as a programmer analyst. It states that it employs seven personnel and had net annual revenue of $500,000.00 when the petition was filed. 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 director denied the petition on March 6, 2006 finding that, although the petitioner submitted copies of consulting agreements with its two end-user clients, it failed to submit sufficient documentation of the specific duties to be performed by the beneficiary while working for these clients. The director also determined that the petitioner failed to submit sufficient documentation that its ClarifyTeam.com project, which was launched in July 2005, requires the beneficiary's services or that it requires the services as described in the proposed duties. The director additionally found that the photographs of the petitioner's premises do not demonstrate that the petitioner has adequate facilities to conduct in-house software design and development activities. The director concluded that, at the time of filing, the petitioner had not demonstrated that it had sufficient H-1 level work immediately available to employ the beneficiary at the location listed on the labor condition application (LCA).

On appeal, counsel for the petitioner asserts that the director misunderstood the petitioner's evidence. Counsel asserts that the petitioner indicated at the time of filing, and in response to the RFE, that the beneficiary would begin his employment assigned to the petitioner's own in-house project, Clarifyteam.com, and that the petitioner provided third-party contracts only "to confirm that there is available third-party work for the beneficiary upon his arrival in the United States." Counsel contends that all 942 square feet of the petitioner's facility is utilized by the business and that, due to its steady growth and continued success, the petitioner recently acquired more than 1,000 square feet of new office space, 500 square feet of which has been reserved for in-house software development projects. Counsel concludes that by submitting "the requested financial documentation and evidence of ongoing work, [the petitioner] has sustained the burden of proof, by the preponderance of evidence, that the job offer is bona fide and work is immediately available for the beneficiary."

The record includes: (1) the Form I-129 and supporting documents; (2) the director's November 9, 2005 request for further evidence (RFE); (3) counsel's undated response to the director's RFE; (4) the director's March 6, 2006 denial decision; and (5) the Form I-290B, counsel's brief, and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(l) of 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)(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 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.

In an August 1, 2005 letter submitted in support of the petition, the petitioner provided a synopsis of the proffered position of programmer analyst. The petitioner indicated that the duties of the position included:

> Analyze, design, develop, modify and implement software/systems applications in a client/server environment using Java, C, C++, JSP, HTML, SQL and PL/SQL on Linux and Windows operating systems; Specific projects may include development of various modules that interface extensively with middle tier business objects written in C++ using JSP, Java, JavaBeans and JavaScript, design, customization and implementation of DART (Developers

> Automated Regression Tool) in order to verify usage, pricing, billing and APIs, design and maintenance of relational database schema and customization of table structures, Unit testing and development of key modules using JSP, Servlets and JDBC; Will work alongside other programmer analysts in a team environment developing user-friendly software/systems applications in accordance with project specifications; Will also work under the supervision of the project manager. Environments may include: Java, C, C++, JSP, Servlets, JDBC, JavaBeans, EJB, JavaScript, HTML, XML, SQL, PL/SQL, Web Servers, WebLogic, WebSphere, Apache Tomcat, HP-UX, Solaris, Linux, AIX, UML, UNIX, J2EE and Windows.
>
> [The beneficiary] would be employed by [the petitioner] for the temporary period extending until September 30, 2008 with our offices in Thornton, Colorado. In addition, [the beneficiary] may provide onsite professional services to [the petitioner's] clients, always in accordance with a Department of Labor, certified Labor Condition Application.

The record also includes an LCA listing the beneficiary's work location in Thornton, Colorado as a programmer analyst.

On November 9, 2005, the director requested additional evidence from the petitioner, including a copy of the specific contract between the petitioner and its client for whom the beneficiary would be performing services, along with any addendums and work orders.

In a September 20, 2005 response, counsel for the petitioner stated that, as the beneficiary's actual employer, the petitioner had assigned the beneficiary to work on its in-house project, Clarifyteam.com. Counsel indicated that any work to be performed by the beneficiary at the sites of the petitioner's clients would be assigned "in accordance with both LCA and Department of Labor procedures." Though contending that the adjudicating officer had not articulated a specific basis for the request, counsel submitted the documents requested on the RFE, including contracts between the petitioner and its clients, the petitioner's financial statements, federal income tax returns, quarterly wage reports, lease agreements, photographs of the premises, and W-2 forms.

As discussed above, in denying the petition the director found that, although the petitioner submitted copies of consulting agreements with its two end-user clients, it failed to submit sufficient documentation of the specific duties to be performed by the beneficiary while working for these clients. The director also determined that the petitioner failed to submit sufficient documentation that its ClarifyTeam.com project, which was launched in July 2005, requires the beneficiary's services or that it requires the services as described in the proposed duties. The director additionally found that the photographs of the petitioner's premises do not demonstrate that the petitioner has adequate facilities to conduct in-house software design and development activities. The director concluded that, at the time of filing, the petitioner had not demonstrated that it had sufficient H-1B level work immediately available to employ the beneficiary at the location listed on the LCA. Counsel for the petitioner asserts on appeal that the director misunderstood the petitioner's evidence. Counsel asserts that the petitioner indicated at the time of filing, and in response to the RFE, that the beneficiary would begin his employment assigned to the petitioner's own in-house project, Clarifyteam.com, and that the petitioner provided third-party contracts only "to confirm that there is available

third-party work for the beneficiary upon his arrival in the United States." Counsel contends that all 942 square feet of the petitioner's facility is utilized by the business and that, due to its steady growth and continued success, the petitioner recently acquired more than 1,000 square feet of new office space, 500 square feet of which has been reserved for in-house software development projects. Counsel concludes that by submitting "the requested financial documentation and evidence of ongoing work, [the petitioner] has sustained the burden of proof, by the preponderance of evidence, that the job offer is bona fide and work is immediately available for the beneficiary."

Preliminarily, counsel's assertion on appeal that the petitioner's consulting agreements were submitted only to demonstrate that the petitioner "is steadfastly growing" and that the beneficiary would work in-house on the petitioner's Clarifyteam.com's software design project, which requires a team of programmer analysts and software engineers, is noted. Counsel, however, has not submitted any evidence demonstrating that the petitioner employs a team of programmer analysts and software engineers for its in-house project. The record also lacks sufficient evidence to substantiate counsel's assertions that "Clarifyteam.com's software design is incredibly sophisticated" and that "Clarify.team.com requires a team of Programmer Analysts and Software Engineers to insure its continued growth and development." Moreover, the petitioner's 2004 federal income tax return reflects only $111,527.00 paid in salaries and wages. Without documentary evidence to support the claim, the assertions of counsel 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).

The petitioner indicated in its August 1, 2005 letter that the beneficiary might also provide onsite professional services to the petitioner's clients. The Aytes memorandum[1] indicates that the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised his discretion to request additional information regarding the beneficiary's ultimate employment, as the petitioner's August 1, 2005 letter indicated that the beneficiary might also provide onsite professional services to the petitioner's clients and the record contains evidence of the petitioner's consulting agreements with two end-user clients. Although the AAO declines to find that the petitioner is acting as the beneficiary's agent, the petitioner in this matter is employing the beneficiary to work for its clients, and thus can be described as an employment contractor. The evidence of record in this matter indicates that the beneficiary would provide services at the petitioner's location and at the locations of the petitioner's clients.

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

[1] *See* 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).

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.

When a petitioner is acting as an employment contractor, the entity ultimately 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, 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.

In the August 1, 2005 letter attached to the petition, the petitioner provided an overview of the types of duties the beneficiary might be required to provide as a programmer analyst. It is noted that the petitioner's July 5, 2005 employment offer letter to the beneficiary did not identify any job duties attached to the proffered position. Moreover, the evidence of record does not include any work orders or statements of work requesting the beneficiary's services. It is not possible to conclude from the brief description of the duties associated with the beneficiary's ultimate employment that the beneficiary's ultimate employment will include the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation.

The record of proceeding lacks evidence that establishes the specific work that the beneficiary would perform in-house for Clarify.team.com and that such work would require the theoretical and practical application of at least a bachelor's degree level of knowledge in a specific specialty.

Each petitioner must detail its expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. In circumstances where the beneficiary will provide services to a third party, the third party must also provide details of its expectations of the position. Such descriptions must correspond to the needs of the petitioner and/or the third party and be substantiated by documentary evidence. To allow otherwise would require acceptance of any petitioner's generic description to establish that its proffered position is a specialty occupation. CIS must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business and what the third party contractor expects from the beneficiary in relation to its business and what the proffered position actually requires, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty. [2]

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[2] The AAO observes that the Department of Labor's *Occupational Outlook 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; that most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of a variety of computer systems and technologies for positions of computer software engineer; and that there is no universally accepted way to prepare for a job as a systems analyst, although most employers place a premium on some formal college education.

The petitioner does not provide substantive evidence that the duties of the proffered position incorporate the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a bachelor's degree or higher degree in the specific specialty or its equivalent as a minimum for entry into the occupation in the United States. Only a detailed job description from the entity that requires the alien's services will suffice to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). 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)).

In this matter without a comprehensive description of the beneficiary's actual duties from the entities utilizing the beneficiary's services, and without concrete information as to the specific duties that the beneficiary would perform with regard to Clarifyteam.com, the AAO is precluded from determining that the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(*1*).

Regarding the director's finding that the photographs of the petitioner's premises do not demonstrate that the petitioner has adequate facilities to conduct in-house software design and development activities, counsel asserts on appeal: "[The petitioner] takes particular offense to allegations made by the Service that the Petitioner's office appears to be a 'residential dwelling' and that the petitioner does not have 'adequate facilities to conduct in-house software design and development activities.'" Counsel states further: "The petitioner attests that all 942 square feet of the leased space is utilized by this business. As a result of steady growth and continued success, [the petitioner] has recently acquired new headquarter offices in Alpharetta, Georgia. The new office space, spanning over 1,000 square feet; of which, 500 square feet has been reserved for in-house software development projects." The petitioner's new lease is noted. The petitioner, however, 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). As discussed above, it is not clear what employees make up the team of programmer analysts and software engineers who work in-house on the petitioner's Clarifyteam.com's software design project. It is also not clear that the petitioner has experienced steady growth, as asserted by counsel on appeal. Information reflected on the petition that was signed by the petitioner's president on August 1, 2005, reflects that the petitioner has seven employees and a 2005 gross annual income of $500,000. The petitioner's quarterly wage report for the third quarter ending on September 30, 2005, however, reflects only three employees. The record contains no explanation for the inconsistency in the number of employees claimed on the petition and the number reflected on the quarterly wage report for the same time period. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. The record also contains no evidence in support of the petitioner's claim of a 2005 gross annual income of $500,000. 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)).

In that the record does not offer a comprehensive description of the duties the beneficiary would perform for Clarifyteam.com and for the petitioner's clients, the petitioner has also failed to satisfy 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 the two alternate prongs of the second criterion. Absent a detailed listing of the duties the beneficiary would perform in-house and under contract to third parties, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion; and absent such evidence the petitioner cannot 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.

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.