U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Room 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

D1

PUBLIC COPY

[redacted]

FILE: WAC 05 204 50053 Office: CALIFORNIA SERVICE CENTER Date: JUN 25 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:

SELF-REPRESENTED

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.

Michael T. Kelly
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director 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 systems, applications, internet, e-commerce, software development, and design services company that seeks to employ the beneficiary as a "Programmer I." The petitioner, therefore, endeavors to extend the beneficiary's classification 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 the basis of her determination that the petitioner had failed to demonstrate that the petitioner meets the definition of a "United States employer," and therefore had not demonstrated the existence of a specialty occupation.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> [A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields 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 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 proposed position.

The term "employer" is defined at 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.

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.[1] *See* 8 C.F.R. § 214.2(h)(4)(ii). The petition may not be approved, however, as the record does not establish that the beneficiary will be employed in a specialty occupation, or that the employer has submitted an itinerary of employment.

The AAO concludes that, although the petitioner will act as the beneficiary's employer, the evidence of record, including the July 9, 2005 employment agreement between the petitioner and the beneficiary, establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at work locations to perform services established by contractual agreements for third-party companies. The employment agreement states that the beneficiary will be working in Campbell, California for a project for the petitioner. At item III(d), the employment agreement states that the beneficiary will be required to sign "project acceptance agreements" for each project on which he would work. The AAO notes that item III(d) does not differentiate between projects for the petitioner and projects for clients of the petitioner, so it appears that such project acceptance agreements are required regardless of whether the project is for the petitioner or one of its clients. When work is to be performed for one of the petitioner's clients, the work location is to be set forth in the project acceptance agreements, in accordance with item I(a). The AAO notes that the record does not contain any project acceptance agreements.

Further, the employment agreement goes on to state, at item I(d), that the beneficiary will receive performance evaluations from clients of the petitioner for whom the beneficiary is performing work. At item I(f) the agreement states that, after joining the project at the "client site," the beneficiary is to submit

---

[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).

weekly time sheets to the petitioner, which are to be signed by the client's project manager or project leader. If the beneficiary were not going to be performing services established by contractual agreements for client (i.e., third-party) companies, as asserted by the petitioner, then there would be no reason for such third-party personnel to sign the beneficiary's weekly time sheets. The employment agreement also states, at item IV(e) that, when working at a client site, the hours of operation as prevalent at the client site shall prevail. Again, if the beneficiary were not going to be working at client sites, such clarification of the working hours would be unnecessary. Item VIII(i)(a) discusses vacation time after one year of work at the client site, and item VIII(ii)(b) discusses sick leave taken while working at a client site.

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 if the beneficiary's duties will be performed in more than one location.

While the Aytes memorandum cited at footnote 1 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 language of the employment agreement indicates that the beneficiary would be placed at various work locations to perform services established by contractual agreements for third-party companies, the director properly exercised his discretion to require an itinerary of employment for the three-year period of requested employment in his September 20, 2005 request for additional evidence.[2]

In its November 21, 2005 response to the director's request for additional evidence, the petitioner stated that the beneficiary would be working at its office premises in Campbell, California and submitted another copy of the employment agreement. The petitioner also stated that the beneficiary would be supervised by its manager of operations.

On appeal, the petitioner states that the beneficiary would not be used for the petitioner's computer consulting services but rather to "enhance and support" the petitioner's launch of the petitioner's e-commerce website.

The AAO does not find convincing the petitioner's assertions regarding the duties proposed for the beneficiary. First, it is unclear to the AAO why, if the beneficiary is to be supervised by the company's manager of operations, the beneficiary's weekly time sheets will be reviewed and signed by the project manager or project leader of a third-party company for whom the beneficiary is providing services, or why his work performance would be evaluated by such third-party companies. It is also unclear why, if he is to work on the petitioner's e-commerce website at the petitioner's office in Campbell, California, the employment agreement between the petitioner and the beneficiary references, on multiple occasions, duties to be performed for clients at client sites. The petitioner has repeatedly referred CIS to the employment agreement as evidence of the beneficiary's employment, but that document does not support the petitioner's assertions.

The weight of the evidence in this proceeding establishes that the petitioner is an employment contractor in the sense that the petitioner will place the beneficiary at work locations to perform services established by contractual agreements for third-party companies. However, the record contains no documentation regarding the dates and locations of the beneficiary's employment or copies of any project acceptance

---

[2] 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."

agreements as outlined in the employment agreement. Accordingly, the petitioner has failed to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition must be denied.

The record also does not establish that the proposed position is 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 proposed position is a specialty occupation, the 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 proposed 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, specifically copies of any project acceptance agreements, 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 for classification 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)*.

Based on the foregoing analysis, the AAO has determined that the record fails to establish that the beneficiary would be performing services in a specialty occupation, as defined in section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l) or that the employer has submitted an itinerary of employment. The petition, therefore, may not be approved.

Beyond the decision of the director, the AAO finds that the decision may not be approved for another reason, as the record does not establish that the beneficiary is qualified to perform the duties of a specialty occupation. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

> *(1)* Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> *(2)* Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> *(3)* Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
>
> *(4)* Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

To demonstrate that the petitioner qualifies to perform the duties of a specialty occupation, the petitioner has submitted a November 15, 2005 evaluation of education and experience, prepared by the Foundation for International Services, Inc. (FIS). The FIS evaluator found the beneficiary's combined education and experience equivalent to a bachelor's degree in computer information systems from an accredited college or university in the United States.

In making its determination as to whether the beneficiary qualifies to perform the duties of a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C)(*1*), as described above, which requires a demonstration that the beneficiary holds a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. The beneficiary received his education abroad, so he does not qualify under this criterion.

Nor does the beneficiary qualify under the second criterion, which requires a demonstration that the beneficiary's foreign degree has been determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. While the FIS evaluator did determine that the combination of the beneficiary's foreign education and experience are equivalent to a bachelor's degree in computer information systems, this evaluation does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(C)(*2*). In order to qualify under this criterion, the evaluation must be based solely upon the beneficiary's foreign degree; a credentials evaluation service may evaluate educational credentials only. 8 C.F.R. § 14.2(h)(4)(iii)(D)(3).

The record does not demonstrate, nor has the petitioner contended, that the beneficiary holds an unrestricted state license, registration or certification to perform the duties of the position, so he does not qualify under the third criterion, either.

The fourth criterion, set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*), requires a showing that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the field, and that the beneficiary also has recognition of that expertise in the specialty through progressively responsible positions directly related to the proposed position.

Thus, it is the fourth criterion under which the petitioner must classify the beneficiary's combination of education and work experience. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree is determined by one or more of the following:

> *(1)* An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
>
> *(2)* The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
>
> *(3)* An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The beneficiary does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*), as there has been no demonstration that the FIS evaluator possesses the authority to grant college-level credit for training and/or experience in a computer-related field at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience in a computer-related field.

No evidence has been submitted to establish, nor has counsel contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(*2*), which requires that the beneficiary submit the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI).

Nor does the beneficiary satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*). As was the case under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*2*), the beneficiary is unqualified under this criterion because the FIS evaluation was based upon both education and experience. In order to qualify under this criterion, the FIS evaluation would have to have been based upon foreign educational credentials alone.

No evidence has been submitted to establish, nor has counsel contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(*4*), which requires that the beneficiary submit evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

The AAO next turns to the fifth criterion. When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the proposed position; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the field; and that the alien has recognition of expertise in the field evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation[3];

---

[3] *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The evidence of record traces the beneficiary's work history from 2000 through 2005. As provided by regulation, the formula utilized by CIS is three years of specialized training and/or work experience for each year of college-level training that the alien lacks. A baccalaureate degree from a United States institution of higher education would require four years of study, and the FIS evaluator determined that the beneficiary's foreign degree is equivalent to three and one-half years of academic study toward a bachelor's degree. The AAO's next line of inquiry is therefore to determine whether at least six months of the beneficiary's work experience included the theoretical and practical application of specialized knowledge required by the proposed position, whether it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in a computer-related field, and whether the beneficiary achieved recognition of expertise in a computer-related field as evidenced by at least one of the five types of documentation delineated in sections (*i*), (*ii*), (*iii*), (*iv*), or (*v*) of 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*).

However, the evidence submitted by the petitioner regarding the beneficiary's previous work experience does not establish that it included the theoretical and practical application of specialized knowledge, that it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent, and that the beneficiary achieved recognition of expertise as evidenced by at least one of the five types of documentation delineated in sections (*i*), (*ii*), (*iii*), (*iv*), or (*v*) of 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*).

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(*1*)(*2*)(*3*)(*4*), or (*5*), and therefore by extension does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*). Therefore, the petitioner has not demonstrated that the beneficiary qualifies to perform the duties of a specialty occupation. For this additional reason, the petition may not be approved.

Accordingly, the record does not establish that the beneficiary is qualified to perform the duties of a specialty occupation. 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).

---

and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

For this additional reason, the petition may not be approved.

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 dismissed. The petition is denied.