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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: WAC 07 148 54288 Office: CALIFORNIA SERVICE CENTER Date: JUL 22 2008

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.

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 develops server information systems for its clients and employs approximately 85 consultants who are placed at various client sites throughout Michigan and the United States. It seeks to employ the beneficiary in the occupation of a computer software engineer. 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).

On September 5, 2007, the director denied the petition determining that the petitioner: had not provided a credible offer of employment; had not established that it was an employer or an agent; had not established the proffered position as a specialty occupation; and had not provided a Form ETA 9035E, Labor Condition Application (LCA) valid for all work locations. On appeal, the petitioner submits a brief and documents in support of the appeal.

The record includes: (1) the Form I-129 filed April 2, 2007 and supporting documents; (2) the director's May 30, 2007 request for further evidence (RFE); (3) the petitioner's undated response to the director's RFE and supporting documentation; (4) the director's September 5, 2007 denial decision; and (5) the Form I-290B, counsel's brief, and supporting documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

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)(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.

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.

In an undated letter appended to the petition, the petitioner stated that it sought "to employ [the beneficiary] in the position of "Computer Software Engineer," a position which requires specialized knowledge and skills to plan and direct activities concerned with development, application, and maintenance of computer software applications." The petitioner stated that the duties of the computer software engineer[1] will consist of:

1. Research, [d]esign, and develop computer software systems applying knowledge of computer theory and dynamic programming methods. (40% of work time).
2. Analyze software requirements to define need and feasibility of design within time and cost constraints. (40% of work time).

[1] The AAO observes that the petitioner provided this same job description in another matter (WAC 07 173 51620) for a different beneficiary when describing the duties and responsibilities of a computer systems analyst.

3. Expand, modify, and update existing programs to enhance their capability and functionality. (10% of work time).
4. Evaluate interface between hardware and software systems to enhance their capability and functionality and stimulation of future programs. (10% of work time).

The record also includes an LCA listing the beneficiary's work location as Sterling Heights, Michigan in the position of a "computer software engineer." The petitioner also provided: samples of its contracts with various clients in various locations and copies of advertisements for positions of staff engineer, computer/software engineering, and software engineer.

On May 30, 2007, the director requested, among other items: evidence establishing that a specialty occupation existed and that the beneficiary's work would be under the control of the petitioner; an itinerary that specified 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 for the period of time that the temporary employment is requested; and documentation of past employment practices showing H-1B employees routinely met conditions of employment and that the petitioner fully paid its workers throughout the time periods requested.

In an undated response, the petitioner submitted, among other items, a contract of employment for the beneficiary dated May 22, 2006 offering the beneficiary a position as a programmer analyst and noting that the beneficiary would be expected to perform at a location designated by the petitioner including customers' offices. The petitioner re-submitted its contracts with various clients located in Georgia and California.

On appeal, the petitioner asserts that it is the beneficiary's employer and that the beneficiary is employed in a specialty occupation. Counsel claims that the "Cendyn project" will require the following services:

a. Creating a development environment and a test environment to build the application, which has interfaces to all the other modules like eGalary, etc.?
b. Working on the .NET framework for the project.
c. Adding any required Flash Framework objects as non-Managed code to the .NET framework to have integrity between both .NET and Flash.
d. Working on a XML schema that is easy to edit for advance users and also easy to render by flash.
e. Perform a Pilot to verify the rendering of XML schema creating in .NET by flash.
f. Developing the admin interface.
g. Developing the Client interface.
h. Developing the End user interface.
i. Testing all the above interfaces.

The petitioner states that due to time constraints there was no end contract when it offered employment to the beneficiary but that it is now possible to provide an end contract for the beneficiary to perform software engineering and programming services for the petitioner's client, Cendyn, which has an office address in Boca Raton, Florida. The petitioner provides a copy of the contract dated August 2, 2007 which indicates that the

work will be accomplished by the consultant at designated client locations unless otherwise agreed to by the petitioner. The record also includes a one-page document identified as "Time lines for the project" that indicates "4 resources will be working from off shore and do the following mentioned things." The "mentioned things" are the various duties identified in counsel's brief on appeal. The one-page document does not identify the beneficiary as a consultant or resource. Although the placement of the document suggests that it is an attachment to the Cendyn contract, neither the title nor any reference within the document includes the name of Cendyn or the petitioner.

The AAO disagrees with the director's finding that the petitioner would not act as the beneficiary's employer. 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.[2] *See* 8 C.F.R. § 214.2(h)(4)(ii). In view of this evidence, the AAO finds that the petitioner will be the employer of the beneficiary and withdraws the director's decision to the contrary. The petition may not be approved, however, as the petition does not establish: that the petitioner had employment available for the beneficiary when the petition was filed; that the beneficiary will be employed in a specialty occupation; and that the employer has submitted an itinerary of employment.

To determine whether a particular job qualifies as a specialty occupation, CIS does not rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act. Although the title of a particular position is not the critical element in determining whether a position is a specialty occupation, the title of the proffered position provides some insight on the various duties that the petitioner expects the beneficiary to perform. In this matter, the petitioner has identified the proffered position as a computer software engineering position; but has offered the beneficiary the position of a programmer analyst. The AAO is aware that the duties of some computer positions overlap; however, the petitioner initially provided the same list of duties for a computer systems analyst as it has provided for the proffered position in this matter, a computer software engineer.[3] In addition, the petitioner in its offer of employment to the beneficiary identified the employment as that of a programmer analyst. The AAO notes that the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) lists a number of computer-related positions, some of which require a four-year course of college-level education, some of which require a two-year associate's degree, and some of which only require experience. The lack of detail offered by the petitioner in its initial description of the proffered position and the employment offer submitted in response to the director's RFE suggests that the petitioner did not have specific employment available for the beneficiary when the petition was filed but had

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[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).

[3] *See* WAC 07 173 51620.

speculative possible employment in an undefined computer-related position.[4] However, the petitioner 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). In addition, as stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), "[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition."

The AAO concludes that, although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor and that the petitioner will place the beneficiary at different work locations to perform services according to various agreements with third-party companies. 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 in such situations. 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 evidence contained in the record at the time the petition was filed did not establish that the petitioner had three years of work for the beneficiary to perform, the director properly exercised her discretion to require an itinerary of employment. As the petitioner has not submitted an itinerary, the petition may not be approved.

In addition, although the petitioner is an employment contractor and will be the beneficiary's actual employer, the record does not contain a detailed description of the beneficiary's actual daily duties. As noted above, the petitioner initially provided a broad statement of the beneficiary's potential duties. The AAO acknowledges the contract submitted on appeal; however, the contract is dated subsequent to the filing date of the petition and thus did not exist when the petition was filed. Again, the petitioner 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. Moreover, neither the contract nor the one-page document submitted with the contract identifies the beneficiary as the consultant or "resource" for the project. Furthermore, it is not readily apparent from the description of duties provided on appeal that the position on appeal corresponds to the duties of the position generally described in the undated letter appended to the petition.

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. In this matter, the petitioner has not provided consistent evidence of the actual duties comprising the beneficiary's services for the end user client

[4] 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."

or clients. Thus CIS is unable to determine whether the proffered position incorporates 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.

As the record does not contain documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients or the petitioner's clients' clients for the duration of the H-1B classification, the AAO is unable to analyze whether the duties of the proposed position 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)(iii)(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 that the record does not offer a comprehensive description of the duties the beneficiary would perform for the petitioner or the petitioner's client, or the petitioner's client's client, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, the petitioner has not established the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguished the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a detailed listing of the duties the beneficiary would perform under a contract existing when the petition was filed, the petitioner has not established that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither has the petitioner satisfied 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. For this additional reason, the petition may not be approved.

The petitioner has also failed to establish that the submitted certified LCA is valid for all work locations. The AAO acknowledges the petitioner's assertion on appeal that the beneficiary would be working in-house. However, this information is inconsistent with the contracts in the record. 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). Again, when a petitioner is an employment contractor, the petitioner must provide an itinerary detailing the actual names and addresses of the actual end-users of the beneficiary's services and the time period the beneficiary would be working for various end-users. As the record does not contain an itinerary of employment, as required when the petitioner is an employment contractor, it cannot be determined that the LCA is valid for all the locations of employment. 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. As always, 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.