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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 06 163 52515 Office: VERMONT SERVICE CENTER Date: MAY 02 2008

IN RE: Petitioner:
Beneficiary: [redacted]

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 consulting business that seeks to employ the beneficiary as a programmer analyst. The petitioner, therefore, 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 because the petitioner had not established that the proffered position is a specialty occupation or that the beneficiary is qualified to perform the duties of a specialty occupation. The director also found that the record contains insufficient documentary evidence to demonstrate that, at the time of filing, the petitioner had sufficient H-1B level work for the beneficiary at the location listed on the labor condition application (LCA).

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's brief, and documentation in support of the appeal. The AAO reviewed the record in its entirety before reaching its decision.

The first issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of 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:

> An 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.

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.

Citizenship and Immigration Services (CIS) consistently 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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply 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.

The petitioner seeks the beneficiary's services as a programmer analyst. Evidence of the beneficiary's duties includes: the petitioner's undated letter and addendum in support of the petition and the petitioner's November 11, 2006 response to the director's RFE. As stated by the petitioner, the proposed duties and time allocations are as follows:

- Requirement Analysis, 10%;
- Function Design, 10%;
- Software Development, 20%;
- Software Testing, 20%;
- Software Implementation, 5%;
- Software Maintenance, 15%; and
- Software Performance, 10%.

The record also includes an LCA submitted at the time of filing listing the beneficiary's work locations in Katy, Texas and Houston, Texas as a programmer analyst.

In an RFE, the director requested additional information from the petitioner, including copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, a letter signed by an authorized representative of the actual end-user client describing the specific duties to be performed in the proffered position, copies of purchase or work orders, contract addendums, memorandums, and/or schedules for the beneficiary.

In response to the RFE, the petitioner submitted additional documentation including the following:

- A letter from the president of Linx/AS, dated August 21, 2006, addressed to the petitioner, summarizing the account status of the petitioner as a vendor to Linx/AS;

- An agreement between Quantum Consulting & Placement, Inc., (Quantum) and the petitioner, signed by both parties on November 6, 2006 and November 10, 2006, respectively, in which Quantum agrees to market the petitioner's employees to Quantum's clients;

- A contractor services agreement between Perficient Inc. and the petitioner, dated May 31, 2005, in which the petitioner agrees to perform services as set forth in Exhibit A; and

- A purchase order, dated September 26, 2006, signed by the petitioner and a representative of Database Resources, Inc. on November 13, 2006, naming the beneficiary as a consultant to perform services as a "ABAP Developer" at the client work site: "CCBCC, Charlotte, NC", with a project start date of May 15, 2006 and a project end date of November 30, 2006 (with possible extension).

The petitioner also stated, in part, as follows:

> At present [the beneficiary] is on a temporary assignment gathering requirements for Coca Cola, Customer Care Center in Charlotte, NC. As with any software project understanding the scope of the project is the most important phase of the project and consultants need to travel to the customer site for a brief period. Once the design and blue print has [sic] been accepted [the beneficiary] will return to the Katy office for the realization phase of the project.

The director denied the petition determining that the petitioner had not established that it had sufficient work to immediately employ the beneficiary at the work location identified on the LCA. The director specifically noted that the writer of the Linx/AS letter did not identify the beneficiary as the consultant for any of the listed projects nor specify the location of such projects. The director also found that the purchase order from Database Resources, Inc., which names the beneficiary as a consultant, did not correspond to either of the submitted contracts, and the work site location reflected on this purchase order did not correspond to the location listed on the petitioner's LCA.

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 as set out in the petitioner's November 11, 2006 letter.[1] *See* 8 C.F.R. § 214.2(h)(4)(ii). The petition may not be approved, however, as the petition does not establish that the beneficiary will be employed in a specialty occupation or that the petitioner has submitted an itinerary of employment.

The Aytes memorandum cited at footnote 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 indicated that the beneficiary would be working at the petitioner's site in Katy, Texas and at its client's site in Charlotte, North Carolina. The petitioner in this matter is employing the beneficiary to work for its clients or its clients' clients and will place the beneficiary at work locations to perform services established by contractual agreements for third-party companies. 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.

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 his discretion to require an itinerary of employment.[2]

Although the petitioner submitted several contracts in response to the director's RFE, the petitioner did not identify the beneficiary's multiple work locations or the expected services of the petitioner's clients regarding the beneficiary's duties. The petitioner's letter indicating the beneficiary was on a temporary assignment in

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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).

[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."

Charlotte, North Carolina and the purchase order from Database Resources, Inc. naming the beneficiary as a consultant for a six month project in Charlotte, North Carolina is insufficient to establish that the petitioner has sufficient work at the specialty occupation level to employ the beneficiary in H-1B status.

The AAO acknowledges the letters on appeal: (1) a January 3, 2007 letter signed by the president of Linx/AS requesting that the petitioner have resources allocated according to certain projects and that the necessary resources should be able to work from the petitioner's offices in Katy, Texas, listing three projects in the $250,000 to $300,000 range; and (2) a January 25, 2007 letter, also from the president of Linx/AS indicating that the beneficiary had been working as a contractor for approximately four months in the role of an analyst programmer. However, these letters, similarly, do not provide sufficient information identifying the beneficiary's actual work location, the detailed duties to be performed by the beneficiary, and the length of time the beneficiary would be working at Linx/AS. Moreover, the record does not provide the master contract, if any, between the petitioner and Linx/AS and the date it was entered into. Thus, the AAO is unable to determine if the Linx/AS contract was in existence when the petition was filed. 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." Absent such information, the petitioner has not established that it has three years' worth of H-1B level work for the beneficiary to perform. The petitioner has not complied with the requirements at 8 C.F.R. §214.2(h)(2)(i)(B) and the petition was properly denied.

Moreover, when a petitioner is an employment contractor, the entity ultimately employing the alien or using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). 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 this matter, 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 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). The writer of the Linx/AS letters does not provide a detailed description of the actual daily duties the beneficiary will be or is performing. The purchase order from Database Resources, Inc., which names the beneficiary as a consultant, does not correspond to either of the submitted contracts, and the work site location reflected on this purchase order does not correspond to the location listed on the petitioner's LCA. 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)). The record also does not contain a detailed description of the work to be performed by the beneficiary for "CCBCC, Charlotte, NC." Thus, as the nature of the actual proposed

duties is unclear, the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(*1*).[3]

In that the record does not provide a sufficient job description from the end user of the beneficiary's services, 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 job description entailing programmer analyst duties, 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 descriptive listing of the programmer analyst duties the beneficiary would perform under contract, the petitioner has not established that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

The second issue in this proceeding is whether the record contains insufficient documentary evidence to demonstrate that, at the time of filing, the petitioner had sufficient H-1B level work for the beneficiary at the location listed on the labor condition application (LCA).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,

2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,

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[3] 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. Thus, without a detailed job description regarding the work to be performed on a specific project, the AAO is unable to determine whether the project requires the theoretical and practical application of a body of highly specialized knowledge.

3. Evidence that the alien qualifies to perform services in the specialty occupation. . . .

The director also found that the record did not establish that the LCA was valid for all work locations. As the record does not contain an itinerary for the period of employment, it cannot be determined that the submitted LCA is valid for the work locations. For this additional reason, the petition may not be approved.

The final issue in this proceeding is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of a specialty occupation. Specifically, the director found that the petitioner had not established that the beneficiary's education, training, and work experience qualifies the beneficiary for the proffered position.

On appeal, counsel states, in part, that the beneficiary is qualified for the proffered position based on the following: a foreign bachelor's degree in chemical engineering; a U.S. master's degree in chemical engineering; comprehensive training in SAP Advanced Business Application Programming; and related employment experience.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The record contains the following documentation pertaining to the beneficiary's qualifications:

- A U.S. Master of Science in Chemical Engineering degree issued to the beneficiary on December 19, 2005, and corresponding transcript;

- A letter dated October 17, 2006, from the Associate Vice President Academic Affairs, of the University of South Alabama, stating, in part, that he was the beneficiary's "mentor for two directed studies research projects concerning further technical development of the ASTM computer program CHETAH," which "is a software product that makes predictions of possible reactive chemical hazards";

- A foreign Bachelor of Engineering degree in chemical engineering issued to the beneficiary, with September 2000 listed as the "Year of Examination," and corresponding transcripts;

- A certificate dated June 1, 1996, reflecting that the beneficiary passed the "Second Year Pre-University Examination;

- A letter dated May 1, 2001, from the human resources manager of the Indian business, Miracle Solutions, Pvt., Ltd., certifying that the beneficiary underwent comprehensive training for "SAP-Advanced Business Application Programming" from January 22 - April 30, 2001;

- A letter dated June 18, 2001, from a manager of Miracle Solutions, Pvt., Ltd., confirming the beneficiary's appointment as "SAP-developer (ABAP); and

- A letter dated February 28, 2002, from a manager of Miracle Solutions, Pvt., Ltd., accepting the beneficiary's February 24, 2002 resignation letter.

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.

The AAO acknowledges counsel's assertion that the beneficiary's degree in chemical engineering is related to computer science. The AAO also acknowledges the beneficiary's training as a SAP-developer and the beneficiary's work on a computer program while studying at the University of South Alabama. However, a certificate for training as a SAP-developer is not equivalent to study at a bachelor's level in the specific discipline and the petitioner has not submitted documentary evidence and a detailed description of the beneficiary's work on a computer program sufficient to establish its equivalency to a bachelor's degree in a specific discipline. Regarding counsel's assertion that the beneficiary's master's degree in chemical engineering it sufficiently related to a bachelor's degree in computer science, the AAO finds that the record lacks documentary evidence to substantiate this assertion. 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). Moreover, as the petitioner has not provided an adequate description of the proposed projects and work that

will be performed by the beneficiary for the petitioner's clients, the AAO is unable to determine whether the beneficiary's master's degree in chemical engineering would be sufficiently related to the work to be performed. As determined above, the petitioner has not provided sufficient evidence establishing that the proffered position is a specialty occupation; thus, the AAO is unable to relate the beneficiary's qualifications in the discipline of chemical engineering to the actual work proposed.

In view of the foregoing, the petitioner has not submitted argument or documentation on appeal sufficient to overcome the director's decision on this issue. The petitioner has not established that the beneficiary has the requisite qualifications to perform the duties of a programmer analyst performing at the specialty occupation level. For this additional reason, the petition will 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.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.