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U.S. Citizenship and Immigration Services

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FILE: WAC 07 146 51388 Office: CALIFORNIA SERVICE CENTER Date: NOV 10 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:

[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 an information technology consulting services provider that seeks to employ the beneficiary as a computer 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, determining that the petitioner had not established that it qualifies as a U.S. employer or that a specialty occupation is available for the beneficiary.

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 prior counsel's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching 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 a March 23, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered programmer analyst position as working for the petitioner's clients in the following:

> Analyze, design, test, and implement programs for client software applications. Determine the client organization's needs, the specifications of its current system, and the necessary modifications to the existing system or the necessary components for a new system. Design and develop the new system or the modifications to the existing system, create object-oriented designs, work with database technologies, and conduct performance tuning. Write program documentation describing the program development, and write the installation and operation procedures for the programmers to follow. Test and debug systems once installed, and oversee their complete implementation. Provide technical services to clients relating to the use, operation, and maintenance of equipment and systems.

The record also includes a certified labor condition application (LCA) submitted at the time of filing, listing the beneficiary's work location in Indianapolis, Indiana as a computer programmer analyst.

In an RFE, the director requested additional information from the petitioner, including an itinerary and copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or service agreements for the beneficiary.

In response to the RFE, the petitioner's prior counsel stated that a specialty occupation exists for the beneficiary, as evidenced by the employment contract between the petitioner and the beneficiary and the description of the

proposed duties. As supporting documentation, the petitioner submitted the following: a copy of the February 12, 2007 employment contract between the petitioner and the beneficiary; the petitioner's federal income tax returns for 2005 and 2006; a list of the current status of previously approved and pending H-1B petitions; the petitioner's business plan; and copies of previously submitted documentation.

The director denied the petition on the basis of her determination that the petitioner had not submitted any client contracts to show that it has work for the beneficiary. Therefore, there was no evidence that the petitioner and beneficiary would have an employer-employee relationship or that the proffered job is a specialty occupation.

On appeal, counsel states that the petitioner has an employer-employee relationship with its employees, as it maintains full control over them at all times, and that the petitioner will pay the beneficiary's salary and provide her with the standard company benefits. Counsel also states that the beneficiary will perform user acceptance testing as a consultant for the end-client, Seattle Times, which has a contract with iMatch. Counsel states further that the petitioner has established that the proffered position meets the requirements of a "specialty occupation" as defined by 8 C.F.R. § 214.2(h)(4)(ii). As supporting documentation, counsel submits: the petitioner's brochure and website information; a consulting agreement, dated August 6, 2007, between the petitioner and iMatch Technical Services, for the beneficiary to work as a consultant to perform the "User Acceptance Testing Project at client, Seattle Times, commencing on November 19, 2007"; an affidavit from the petitioner's account manager; contractual agreements between the petitioner and various entities, including work orders; an employment contract between the petitioner and the beneficiary; the petitioner's Employer Identification Number from the U.S. Internal Revenue Service; the petitioner's state and federal income tax returns for 2006; excerpts from the Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) pertaining to computer system analysts; related job advertisements and industry requirements; and information related to the beneficiary's qualifications.

The AAO observes that the documentation submitted on appeal does not comply with the requirement that 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 this matter, the consulting agreement between the petitioner and iMatch Technical Services, for the beneficiary to work as a consultant to perform the "User Acceptance Testing Project at client, Seattle Times, commencing on November 19, 2007" was dated August 6, 2007, after the April 2, 2007 filing date of the petition. 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."

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 March 23, 2007 employment offer and March 26, 2007 employment contract with the beneficiary.[1] *See* 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the AAO withdraws the director's contrary finding.

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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*

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 her discretion to request additional information regarding the beneficiary's ultimate employment, as, according to the information in the petitioner's March 23, 2007 letter, the beneficiary will work for the petitioner's clients as a computer programmer analyst. Moreover, 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.[2] 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.

In this matter, the petitioner did not submit the requested evidence in the director's RFE pertaining to contracts, statements of work, work orders, and/or service agreements between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work, work orders, or service agreements for the beneficiary. 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 does not contain a master contract between the petitioner and either iMatch or Seattle Times or any other agreement, statement of work, or work purchase order dated prior to filing the petition on April 2, 2007. Thus, the record does not contain evidence that a specialty occupation position existed when the petition was filed. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(*1*). Moreover, even if the AAO were to accept the consulting agreement between the petitioner and iMatch Technical Services as timely, the submission would still be deficient, as the record does not contain a comprehensive description of the beneficiary's proposed duties from Seattle Times, the end-client for whom it is asserted that the beneficiary will provide such services. As such, the AAO agrees with the director that the record does not support a finding that the petitioner has provided evidence of the conditions and scope of the proposed duties and the proffered position, and that the petitioner will employ the beneficiary in a specialty occupation for the requested period. Again, 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. at 165.

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

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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."

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, 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.

The AAO observes that the DOL's *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 general descriptions of the beneficiary's duties provided in the petitioner's March 23, 2007 letter and in the August 6, 2007 consulting agreement are insufficient to determine whether the duties of the proffered position could be performed by an individual with a two-year degree or certificate or could only be performed by an individual with a four-year degree in a computer-related field. As the position's duties remain unclear, the record does not establish the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(*1*).

In that the actual duties of the beneficiary remain unclear, the petitioner does not meet the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a job description detailing the specific duties from the entity for whom the beneficiary will perform services, 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 for the particular clients to which assigned, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties. Absent a detailed description of the substantive work that the beneficiary would perform for the particular clients to which assigned, the record fails to establish the level of specialization and complexity required by this criterion.

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 or that the beneficiary is coming to the United States to perform services in a specialty occupation as required by the statute at section 101(a)(15)(H)(i)(b) of the Act; 8 U.S.C. § 1101(a)(15)(H)(i)(b).

In view of the foregoing, the petitioner has not overcome the director's objection. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not demonstrated compliance with the terms and conditions of the LCA. The LCA submitted at the time of filing lists the work location as Indianapolis, Indiana, the address of the petitioner. As the beneficiary's actual duties and ultimate worksite are unclear, it has not been shown that the work would be covered by the location on the LCA. In addition, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of a specialty occupation that requires a bachelor's degree in a computer-related field. Although the record contains an evaluation indicating that the beneficiary possesses the equivalent of a U.S. master's degree in business administration, the record contains insufficient evidence to establish that the beneficiary's computer-related coursework and training are comparable to academic courses taken at a four-year university that are a realistic prerequisite to attaining a bachelor's degree in a specific specialty in computer science or a related field. For these additional reasons, the petition may not be approved.

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).

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.