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U.S. Citizenship and Immigration Services

[redacted]

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FILE: WAC 04 800 59605 Office: CALIFORNIA SERVICE CENTER Date: AUG 25 2006

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 service center 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 software development and consulting business that seeks to employ the beneficiary as an Axapta programmer/analyst. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 has not demonstrated that an employer-employee relationship exists or that it has a specialty occupation available for the beneficiary. On appeal, counsel submits a letter from the petitioner's president and additional documentation including website and financial information related to the petitioner.

The AAO will first address the director's conclusion that the petitioner has not demonstrated that an employer-employee relationship exists.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), a United States employer is defined as follows:

> 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 director found that a bona fide employer-employee relationship does not exist because the petitioner is not the actual employer having control over the beneficiary's work. On appeal, the petitioner states, in part, that the proposed duties will be performed internally on the petitioner's premises and will be "driven by our internal team."

The evidence of record reflects that the petitioner, which provides leading-edge IT consulting and software services to eBusiness and corporate clients, has filed a work petition on behalf of the beneficiary and has an IRS 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, supervise, or otherwise control the work of the beneficiary.[1] *See* 8 C.F.R. § 214.2(h)(4)(ii).

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.

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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).

In his request for evidence, the director asked for the beneficiary's employment itinerary and contracts of work to be performed. In the Aytes memorandum cited at footnote 1, 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 contracts reflecting the dates and locations of employment and an employment itinerary. However, the record contains no documentation regarding the dates and locations of the beneficiary's employment or contracts of work to be performed. 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.[2]

The director also found that the petitioner would not employ the beneficiary in a specialty occupation.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), defines the term "specialty occupation" as an occupation that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(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 proffered position.

The record of proceeding before the AAO contains: (1) 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

[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."

director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an Axapta programmer/analyst. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's September 24, 2004 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform the following duties:

> [The beneficiary] will be responsible for application analysis, designing, Axapta X++ development, Axapta Reports development, Axapta Modifications using the MorphX IDE, testing, implementing and maintaining Microsoft Business Solution – Axapta Version 3.0. In addition, he will be responsible for upgrading existing implementations of Axapta 2.50 to Axapta 3.0. [The beneficiary] will also help with integration of our eCommerce product with Axapta versions 2.50 and Axapta 3.0 and Axapta 4.[0](when available in December 2004). Axapta Version 4.0 is slated for release in December 2004 and [the beneficiary] will work towards upgrading existing customizations and enhancements to the products from the current version of Axapta 3.0 to 4.0 as well as enhancing our existing eCommerce product capabilities to integrate new features that become available in Axapta 4.[0].

The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in computer science, mathematics, engineering, or a related major.

The AAO also finds that, based upon the evidence in the record, the petitioner will not employ the beneficiary in a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) and (*2*): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. While a review of the *Handbook*, 2006-2007 edition, finds that a programmer/analyst may qualify as a specialty occupation, the AAO does not concur with counsel or the petitioner that the proffered position is a specialty occupation. The petitioner's assertion that proposed duties will be performed internally on the petitioner's premises and will be "driven by our internal team," is noted. The petitioner's 2003 federal tax return for the period from April 1, 2003 through March 31, 2004, reflects that the petitioner was incorporated in 1999 and paid only $31,672 in salaries and wages. As such, the nature of the petitioner's "internal team" with whom the beneficiary will work is unclear. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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)). As discussed above, the proposed duties indicate that the beneficiary will be performing duties for the petitioner's clients. The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at multiple work locations to perform services established by contractual agreements for third-party companies. The petitioner, however, has provided no contracts, work orders or statements of work describing the duties the beneficiary would perform for its clients and, therefore, has not established the proffered position as 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 proffered 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 proffered 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, 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 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)*.

The record contains an opinion letter from a university professor who states, in part, that the proffered position requires a bachelor's degree in engineering and 12 months of related, professional experience. The director did not state that the job of an "Axapta programmer/analyst" is not a specialty occupation. The director concluded correctly that, due to deficiencies in the record, the petitioner has not demonstrated that the proffered position is a specialty occupation, or that the petitioner would employ the beneficiary in a specialty occupation.

Regarding parallel positions in the petitioner's industry, the petitioner submitted Internet job postings for positions related to programmer analysts. This information is not convincing evidence that the proffered position is a specialty occupation in this case, as the petitioner has not established the duties that the beneficiary would perform. In view of the foregoing, the petitioner has not demonstrated that a baccalaureate or higher degree in a specific specialty is the industry standard for the proffered position.

The record also does not include any evidence from firms, individuals, or professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position.

The petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(1)* or *(2)*.

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(3)* – the employer normally requires a degree or its equivalent for the position. As neither counsel nor the petitioner addresses this issue on appeal, it will not be discussed further. The evidence of record does not establish this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.