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

U.S. Citizenship and Immigration Services

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FILE: WAC 04 154 53612 Office: CALIFORNIA SERVICE CENTER Date: APR 03 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:

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.

for Michael T. Kelly
Robert P. Wiemann, Director
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 computer consulting firm that seeks to employ the beneficiary as a programmer-analyst and to classify him 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 that the petitioner did not qualify as an employer under the applicable regulation, and that the petitioner failed to establish that it had a programmer analyst position available for the beneficiary at the time of the filing of the Form I-129 petition. On appeal, the petitioner submits a letter.

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

The petitioner seeks the beneficiary's services as a programmer-analyst. Evidence of the beneficiary's duties includes Form I-129 with attachments, the petitioner's response to the RFE, and the petitioner's appeal letter. According to this evidence, the beneficiary's duties would include: conferring with personnel of the organizational units involved to analyze current operational procedures; identifying problems and learning specific input and output requirements, such as how data input is to be summarized and formatted for reports; researching, designing, and developing computer software systems in conjunction with hardware choices for medical, industrial, communications scientific, engineering, commercial, and financial applications which require use of advanced computational and quantitative methodologies; applying principles and techniques of computer sciences and quantitative methodology and techniques to determine feasibility of design within time and cost constraints; planning, developing, testing, and documenting computer programs applying knowledge of programming techniques and computer systems; evaluating user requests for new or modified programs, compatibility with current system, and computer capabilities; consulting with users to identify current operating procedures and clarify program objectives; preparing flow charts and diagrams to illustrate sequence of steps programs must follow and to describe logical operations involved; analyzing, reviewing, and altering programs to increase operational efficiency or adapt to new requirements; reviewing, repairing, and modifying software programs to ensure technical accuracy and reliability of programs; writing manual for users to describe installation and operational procedures; and providing technical assistance to applications users. The petitioner stated that the position required the beneficiary to have a bachelor's degree in computer science. The petitioner states that the petitioner "will be solely responsible for the employer-employee relationship including but not limited to the salary, the employer tax contribution, etc., of the beneficiary," and that the beneficiary will be "rendering professional consulting services in Los Angeles County, California."

On July 27, 2004, the director issued an RFE specifically requesting that the petitioner submit, among other documents:

> an itinerary of definite employment, listing the location(s) and organization(s) where the beneficiary will be providing services. The itinerary should specify the date of each

> service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venue, or locations where the service will be performed by the beneficiary.

The director also asked the petitioner to submit contractual agreements it had with the beneficiary and with companies for whom the beneficiary would be performing services. The director emphasized that the documentation "should specify duties, dates of service requested, work schedule, and pay schedule."

In response, the petitioner submitted a contract entitled "General Computer Services Agreement" between the petitioner and one of its clients, [redacted] (KATSI); copies of contractual agreements and accompanying purchase orders with other clients; and a description of the proposed duties broken down by percentage of time to be spent on each duty. The contract between the petitioner and KATSI stipulated that a statement of work (SOW) would be drawn up for each project and the client would bill the petitioner for the hours actually worked by the consultant/beneficiary and that the consultant/beneficiary would perform programming and/or engineering services directly for the client. The contract was signed by the client and by the petitioner.

Upon review of the record, the AAO finds that the petitioner has not established that it will act as either an employer or an agent. Further, the AAO finds that the petitioner did not establish any of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first address whether or not the petitioner met its burden to establish that it is an employer and/or an agent. The AAO will then address whether or not the proposed position is a specialty occupation.

The regulations governing the H-1B classification state that a petitioner may be either a United States employer or an agent. 8 C.F.R. §§ 214.2(h)(2)(i)(A) and (F). The regulations do not mention employment contractors specifically, although employment contractors are increasingly petitioning for alien workers in the H-1B classification. CIS has traditionally categorized employment contractors as agents, and required employment contractors to comply with the evidentiary standards required of agents as outlined at 8 C.F.R. § 214.2(h)(2)(i)(F).[1] In reviewing certain provisions in Titles 8 and 20 of the Code of Federal Regulations, however, it is apparent that ambiguities exist among the terms "agent," "employment contractor" and "employer" as they apply to the H-1B classification.

For example, "United States employer" at 8 C.F.R. § 214.2(h)(4)(ii) is defined, in part, as a "contractor." In addition, according to 8 C.F.R. § 274a.1(g), which governs the control of employment of aliens:

> The term *employer* means a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. *In the case of an independent contractor or contract labor or services, the term employer shall mean the independent contractor or contractor and not the person or entity using the contract labor.*

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[1] Memorandum from Jacquelyn A. Bednarz, Chief, Nonimmigrant Branch, INS Office of Adjudications, *Petitions for H-1a, H-1b, O and P Temporary Workers Filed by Agents and Contractors*, CO 214h-C (May 5, 1993).

(Emphasis added.) In reviewing Title 20, Code of Federal Regulations at section 655.715, which governs LCAs in the H-1B petition adjudication process, the Department of Labor provides the following definitions:

> Employed, employed by the employer, or employment relationship means the employment relationship as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, "no shorthand formula or magic phrase . . . can be applied to find the answer . . . . [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." NLRB v. United Ins. Co. of America, 390 U.S. 254, 258 (1968).
>
> Employer means a person, firm, corporation, contractor, or other association or organization in the United States which has an employment relationship with H-1B nonimmigrants and/or U.S. worker(s). *The person, firm, contractor, or other association or organization in the United States which files a petition on behalf of an H-1B nonimmigrant is deemed to be the employer of that H-1B nonimmigrant.*

(Emphasis added.) An employment contractor does not need to meet the evidentiary standards required **of agents at 8 C.F.R § 214.2(h)(2)(i)(F). CIS will consider the employment contractor to be the** beneficiary's employer, because the employment contractor hires, fires, and pays the alien a salary, and ultimately controls the alien's work.[2]

However, as noted by the court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), a petitioner that is an employment contractor is merely a "token employer." The entity ultimately employing the alien or using the alien's services is the "more relevant employer." *Defensor v. Meissner, id.* at 4. The court in *Defensor* looked at the requirements of the ultimate work location rather than the contracting agent or "token" employer to determine whether the substantive requirements of the regulations had been met. In other words, the employment contractor's client is the "more relevant employment," if the alien will only work at the client's place of business. Pursuant to *Defensor*, if the alien will also work within the employment contractor's operations, CIS must review the requirements of both "relevant" employers - the employment contractor and the contractor's client.

Thus each entity that ultimately employs the alien or uses the alien's services must submit a detailed job description of the duties the alien will perform and the qualifications required to perform the job duties. 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.[3]

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[2] Memorandum from Michael L. Yates, 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] The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

A United States employer, as defined by 8 C.F.R. 214.2(h)(4)(ii), is:

> 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 petitioner asserts that the beneficiary will perform the duties of programmer-analyst for the petitioner's client, KATSI, but that the petitioner will act as the beneficiary's employer. To support this assertion, the petitioner submitted an agreement it signed with the client. This document does not establish that the petitioner would act as the beneficiary's employer. In response to the RFE and on appeal, the petitioner states that the beneficiary would "function directly under" Ms. [redacted] It is unclear from the evidence of record whether Ms. [redacted] works for the petitioner, the client, or another entity. The AAO is unable to determine whether the petitioner or the client will supervise or otherwise control the work of the beneficiary. Thus, the petitioner has not established that it would be an actual employer pursuant to the decision in *Defensor*.

The AAO now turns to the issue of whether or not the petitioner has satisfied the requirements to file this petition as the beneficiary's agent. The petitioner indicates that it would act as the beneficiary's agent. The petitioner would provide its client, KATSI, with a consultant, the beneficiary. The client would be the beneficiary's actual employer. Pursuant to 8 C.F.R. § 214.2(h)(2)(i)(F), agents may file petitions on behalf of workers if they meet the following requirements:

> A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent. A petition filed by a United States agent is subject to the following conditions:
>
> *(1)* An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested;
>
> *(2)* A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify 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. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.

Based on the petitioner's assertions, the petitioner is the agent in this process and the token employer but not the actual employer. As such, the AAO considers the requirements set forth in 8 C.F.R. § 214.2(h)(2)(i)(F)(*2*) and concludes that the petitioner has not met the requirements to file this petition on the beneficiary's behalf. The record does not contain a detailed itinerary with specific dates the beneficiary would work for the client or the names and addresses of the establishment, venues, or locations where the services will be performed. It is unclear from the evidence of record where exactly the beneficiary will perform services and whom he will perform services for. The agreement between the petitioner and the client lists the client as a Georgia corporation with its offices at 85 Cross Creek Drive, Lilburn, Georgia. On appeal, the petitioner states that the beneficiary will be working in San Ramon, California, but does not list the address where the beneficiary will perform the proposed services. The petitioner states that the beneficiary will work directly under Ms. [redacted]. It is unclear whether Ms. [redacted] works for the petitioner, the client, or another entity. The agreement between the petitioner and the client states that an SOW will be drawn for each contractor the petitioner assigns to the client and that the SOW shall:

> specify the start date, end date, invoice schedule, type of service ('time' basis – hourly, weekly or monthly OR 'work completed' basis – defined milestones, special deliverables, etc.), any approved expense reimbursement and any special conditions.

Despite the fact that director requested this type of detailed itinerary in the RFE and noted in his decision that he was denying the petition based on the lack of this itinerary, on appeal the petitioner did not submit an itinerary from the client or an SOW. Instead, the petitioner simply states that the beneficiary will work directly under [redacted] in San Ramon, California. 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)). Thus, the petitioner failed to establish that the petitioner satisfies the requirement to file a petition as the beneficiary's agent.

The AAO now reviews the statute and corresponding regulations to determine whether the proposed position is 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 bachelor's or higher degree, but one in a specific field of study that is directly related to the proposed position.

To determine whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge as required by the Act.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook* (*Handbook)* for its information about the duties and educational requirements of particular occupations. The petitioner has identified the proposed position as that of a programmer-analyst. Therefore, the AAO turns first to the *Handbook's* discussion of that occupational title:

> *programmer-analysts* design and update the software that runs a computer. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas . . . . As this dual proficiency becomes more commonplace, these analysts are increasingly working with databases, object-oriented programming languages, as well as client–server applications development and multimedia and Internet technology.

The AAO finds the above discussion to be reflected in the petitioner's description of the duties of the proposed position. It has been determined, however, that the petitioner is not the actual employer in the instant case. The petitioner described the proposed duties in its initial support letter, in response to the RFE, and on appeal, but did not provide a detailed itinerary or SOW from the client, the beneficiary's actual employer. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici.* The AAO requires information regarding the specific responsibilities of a proposed position to make its determination regarding the nature of that position and its degree requirements, if any. *See Defensor.* Without such information, the AAO is unable to determine the tasks to be performed by a beneficiary on a day-to-day basis and, therefore, whether a proposed position's duties are of sufficient complexity to require a degree or its equivalent. As the record in the instant case offers no meaningful description of the proposed position's

responsibilities, the petitioner is unable to establish either that the duties of the position are those of a programmer-analyst or that their performance would normally impose a degree requirement or its equivalent on the beneficiary. Without documentation of the day-to-day services the beneficiary is expected to provide the client, the AAO cannot analyze whether the beneficiary will be performing the duties of a programmer-analyst and precludes the AAO from reasonably concluding that the proposed position meets any of the specialty occupation criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Thus, the petitioner has failed to establish that the position is one that qualifies as a specialty occupation under the first criterion at 8 C.F.R. 214.2(h)(4)(iii)(A) - a bachelor's or higher degree or its equivalent, in a specific field of study is normally the minimum requirement for entry into the particular position. The petitioner asserts, without substantiating evidence, that a bachelor's degree or higher is the normal minimum requirement for entry into this position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*.

The AAO turns next to the first alternative prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a specific degree requirement is common to the industry in parallel positions among similar organizations. To determine if a position is a specialty occupation under this criterion, CIS generally considers whether or not letters or affidavits from companies or individuals in the industry attest that such companies "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 petitioner did not provide any evidence that the requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among companies of similar focus and size. Therefore, the proposed position does not qualify as a specialty occupation under the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The AAO now turns to 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) – the employer normally requires a bachelor's degree or its equivalent for the proposed position. To determine if a petitioner has established this criterion, the AAO generally reviews the petitioner's past employment practices, including the histories of those employees who previously held the position, as well as their names, dates of employment, and copies of their diplomas. To meet the criterion's requirements, a petitioner must not only establish that it normally imposes a degree requirement for a proposed position, but also that the position's duties require a degree (or its equivalent) in a specific field. In the instant case, the AAO has been unable to determine what the proposed position actually is. The petitioner asserts that it requires the individuals it hires for its programmer-analyst positions to hold bachelor's degrees in computer science. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*. Accordingly, petitioner has not established that the position qualifies as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

Finally, the AAO turns to the criteria related to the complexity, uniqueness, or specialized nature of the proposed position. A petitioner satisfies the second alternative prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*) if it establishes that a particular position is so complex or unique that it can be performed only by an individual with a bachelor's degree in a specific field of study. The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the

attainment of a bachelor's or higher degree in a specific field of study. Again, the petitioner has failed to provide concrete information about the specific day-to-day tasks that the beneficiary would perform and about the specific skills and competencies that he would need to apply. On appeal, the petitioner asserts that the nature of the specific duties of the proposed position is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree in computer science. The petitioner did not submit evidence to establish that the proposed position is a specialty occupation based on its complexity, uniqueness, or specialized nature. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*. The petitioner has not established that the proposed position is a specialty occupation based upon the complexity or uniqueness of its duties.

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

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