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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 04 205 52721 Office: CALIFORNIA SERVICE CENTER Date: MAR 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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is software development and consulting company. It seeks to employ the beneficiary as a computer systems analyst and to classify her 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 grounds that the record failed to establish that the petitioner is the beneficiary's employer, as defined in 8 C.F.R. § 214.2(h)(4)(ii), or that the petitioner is in compliance with the terms of the labor condition application (LCA) filed with the Department of Labor (DOL). The director also questioned the legitimacy of the petitioner based on inconsistent evidence regarding H-1B petitions it filed for other employees.

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
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> (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.

As provided in 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;
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> *(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;
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> *(3)* The employer normally requires a degree or its equivalent for the position; or
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> *(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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In its initial documentation, including Form I-129 and an accompanying letter, the petitioner stated that it is a computer software consulting and development firm, established in October 2000, with 24 employees, six contractors, and gross annual income of $1.56 million in 2003. The company provides services in client/server Internet, Intranet, and e-commerce and ERP applications, the petitioner explained, including the installation of software, custom software development, and in-house, onsite, and offshore project development. The petitioner indicated that it needed a computer systems analyst to work on C, C++, Java, Corba, PASCAL, COBOL, SQL, PL/SGL, Oracle, Informix, Sybase, FoxPro, Dbase and Windows 98/NT Unix, MVS, OS/390 environment in-house project involving analysis, design development, testing, and documentation. The petitioner stated that it would be responsible for hiring, supervising, paying, controlling, and firing the beneficiary from its home office in Pleasanton, California. The minimum educational requirement, the petitioner stated, is a baccalaureate or master's degree in computer science or a related field. The beneficiary is qualified for the position, the petitioner declared, by virtue of her master of computer applications from Sri Padmavati University in India, granted in March 1999, and her subsequent professional experience in the computer field with employers in India.

In the RFE the director requested a more detailed description of the proffered position; an itinerary of the beneficiary's definite employment, including the names and addresses of the organizations where the beneficiary would be working during the three-year period requested for H-1B classification and copies of contractual agreements between the petitioner and the companies for which the beneficiary would be performing services; and other documentation establishing the petitioner's legitimacy.

In response to the RFE the petitioner provided additional details about the substantive tasks of the proffered position, listed the beneficiary's specific responsibilities, and indicated that the project on which she would work has two stages – the first of which involves 20% documentation, 30% design, and 50% coding, and the second of which involves 40% testing, 40% implementation, and 20% documentation. The petitioner identified the client as [redacted], indicated that the services would be performed at the petitioner's home office, and provided a three-year itinerary with a chronological listing of the project's seven phases. A copy of the petitioner's job offer to the beneficiary ("offer letter") was submitted, as well as a copy of the petitioner's service agreement with the client. The petitioner also submitted additional documentation including a company brochure, excerpts from its internet website, federal income tax returns, an organizational chart, an employee list indicating that all of its programmer analysts were in H-1B status, photographs of the petitioner's business premises, and the petitioner's articles of incorporation.

In his decision the director found that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge to perform the occupation and qualifies as a specialty occupation. The director also found, however, that the record failed to show an employer-employee relationship between the petitioner and the beneficiary, or where the beneficiary would be working. The director cited conflicting evidence as to whether the beneficiary would be working at the petitioner's worksite or at the client's worksite. Though the petitioner stated in its Form I-129 that the beneficiary would work at its home office, the petitioner's offer letter to the beneficiary stated that "[i]n

view of the nature of the company's business, you may be assigned to different locations/work places." The director interpreted an excerpt from the petitioner's service agreement with the client, stating that "[the petitioner] provides consulting and programming services to its clients, for which it locates, recruits and places individuals or other companies on full time and contract basis," as further evidence that the beneficiary would not be working at the petitioner's home office, but at the client's worksite. Noting that the service contract neglected to identify the client's locality, the director concluded that the beneficiary's worksite location was unknown. Though the petitioner's offer letter indicated that it would pay the employee's salary, the director found that the petitioner was acting as an agent and could not be considered the beneficiary's employer because the client company would exercise control over the beneficiary's work. In view of the conflicting evidence in the record, the director determined that it could not be determined whether the petitioner had complied with the terms of the LCA in regard to the work location and wage rate offered to the beneficiary. Lastly, the director declared that the petitioner's claimed employee total (24) was inconsistent with information in its 2002 federal income tax return on the amount of money paid that year in salaries ($70,373), and that the employer failed to advise the service center of the change of nonimmigrant status of some its previous employees who had moved on to different companies.

On appeal the petitioner reiterates that it has job openings for in-house development projects, as well as for projects to be performed at client worksites, and submits copies of eight contracts with current clients. The petitioner submits a copy of its 2003 federal income tax return, showing gross receipts of $1.57 million (compared to $415,000 in 2002) and expenditures for employee salaries of $644,071 (compared to $70,373 in 2002). According to the petitioner, its gross receipts for the first eight months of 2004 totaled $3 million. An updated organizational chart has been submitted, identifying 26 employees and five contractors, as well as an employee list with each individual's job title, educational degree, annual salary, immigration status, and job duties. The petitioner has also submitted quarterly wage and tax statements for its employees covering the last two quarters of 2003 and the first two quarters of 2004.

"United States employer" is defined in the regulation at 8 C.F.R. § 214.2(h)(4)(ii), as follows:

> *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:
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> *(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 has not established that it will have an employer-employee relationship with the beneficiary, as the service agreement between the petitioner and the client, [redacted], does not indicate that the petitioner will retain the authority to fire, supervise, or otherwise control the work of the beneficiary. While the petitioner stated in the petition and accompanying documents that it would be the beneficiary's employer, and that the beneficiary would be working on in-house projects, in its response to the RFE the petitioner indicated that the beneficiary would work exclusively for the client. The service agreement states that professionals placed at the client site are employees or sub-contractors of the vendor (*i.e.*, of the petitioner). The service agreement is

silent as to who will supervise and control the work of the beneficiary. But the client's control and supervision of the beneficiary is evident in the service agreement's provision directing the client to notify the petitioner "[s]hould the performance of the professionals provided by Vendor be determined to be less than satisfactory after careful and reasonable consideration by Client." Moreover, the service agreement gives the client the right to terminate the beneficiary's services with two-weeks notice. The AAO determines that the petitioner does not meet the definition of a U.S. employer under 8 C.F.R. § 214.2 (h)(4)(ii).

Based on the entire record, the AAO agrees with the director that the petitioner is acting as the beneficiary's agent. As described in the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F):

> 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 it[s] agent. A petition filed by a United States agent is subject to the following conditions:
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> *(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.

The record is inconsistent as to whether that the petitioner had a service agreement with the client at the time the instant petition was filed on July 19, 2004. The contract in the record contains multiple dates. The opening paragraph includes language reading: "This service agreement entered into by both parties on 01/22/2004." At the end of the document the signature of the petitioner's president is followed by the date "01/22/2004" and the signature of the client's executive vice president is followed by the date "09/08/2003." In the sentence just prior to the signatures, however, the service agreement reads as follows: "These provisions are accepted and agreed by both parties as of 22nd day of September 2004." This latter date indicates that the service agreement providing the beneficiary work in the United States was not executed until two months after the instant H-1B petition was filed. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92, (BIA 1988). No such competent evidence has been submitted by the petitioner to establish that the service agreement was in effect on the date the H-1B petition was filed.

CIS regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm.). Moreover, 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 record fails to establish that the petitioner, acting as the beneficiary's agent, had an itinerary of definite employment for the beneficiary at the time the instant petition was filed. The AAO determines that the petition is deniable on this ground as well.

The director found that the petitioner's compliance with the terms of the LCA could not be determined due to conflicting evidence as to the beneficiary's work location. As the director pointed out in his decision, the service agreement neglected to identify the client's exact locale, providing an address [redacted] and a zip code in California (95014), but failing to name the town. The AAO notes that the foregoing address is in Cupertino, a town located in Santa Clara County, California. While the service agreement and the petitioner's offer letter both seem to indicate that the beneficiary would work at the client's address, the petitioner stated on Form I-129 and in subsequent correspondence that the beneficiary would work at its home office in Pleasanton, California (which is located in Alameda County, adjacent to Santa Clara County). The petitioner's LCA allows work at both locations, since it identifies Pleasanton as the first work location and Santa Clara County (home of Cupertino) as the additional or subsequent work location. Thus, the LCA is valid for either work location.

Beyond the decision of the director, the record does not establish that the beneficiary will be employed in a specialty occupation. There is no description of the beneficiary's job duties from the client company, as required to show that the beneficiary would be performing services that require a baccalaureate or higher degree in a specific specialty. In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), a federal appeals court held that the Immigration and Naturalization Service (now Citizenship and Immigration Services) reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the alien workers in a particular position require a bachelor's degree for all employees in that position. The court determined that the degree requirement should not originate with the employment agency that brought the aliens to the United States for employment with the agency's clients. In the instant proceeding, the record includes a service agreement between the petitioner and its client, Information Security Systems & Services, Inc. The service agreement does not specify what duties are to be performed by the beneficiary, however, or that a particular degree is required for the position. (Two attachments are referenced in the service agreement, but they were not submitted with the document and their contents are not explained.) Nor does the record contain any other description of the beneficiary's proposed duties from an authorized representative of the client. Thus, the petitioner has not demonstrated that the work the beneficiary would perform for the client requires a bachelor's degree in a specific specialty, which would qualify the position as a specialty occupation.

Based on the foregoing analysis, the AAO determines that the record fails to establish that the beneficiary would be performing services in a specialty occupation, as defined in section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l). For this additional reason the petition must be denied.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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