U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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FILE: WAC 04 800 58244 Office: CALIFORNIA SERVICE CENTER Date:

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 materials 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, Chief
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 an information technology service center. It 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 grounds that the record failed to establish whether the petitioner would be the beneficiary's employer or agent, whether the proffered position qualifies as a specialty occupation, or whether the petitioner is in compliance with the terms of the Labor Condition Application (LCA) certified by the Department of Labor.

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.

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;

*(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 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 submission, including Form I-129 and an accompanying letter, the petitioner described itself as a global software systems integrator and IT strategy firm specializing in enterprise information management, portals, outsourced engineering services, and strategic IT/business alignment consulting. The petitioner stated that it was established in 1999, has 30 employees, and earns a gross annual income of $6 million. The petitioner indicated that it wished to employ the beneficiary as a programmer analyst for three years, at an annual salary of $43,800, working as a member of a team and supervised by a team leader/project manager. The duties of the position were described as follows:

> [The beneficiary] will be responsible for business process analysis, process flow mapping, discussing with module leaders and core team members and decid[ing] on organization structure, organizing testing of configuration, setting up base configuration, coordinating migration and upload of data, interacting with software engineers/programmers to develop data migration tools, creating processes for new [ ], attending ad hoc issues related to day-to-day activities, provid[ing] necessary end user training, scooping of rollout, periodical review of implementation status and report[ing] weekly task plan to the project management team for implementation of custom software.

According to the petitioner, the position requires a degree in computer science, physics, engineering, mathematics, or a related field. The beneficiary is qualified for the position, the petitioner declares, by virtue of his three-year bachelor of science degree, with a concentration in physics, mathematics, and electronics, from Bangalore University, India, in April 1991, together with more than five years of work experience in the computer industry.

In his RFE the director stated that the evidence of record appeared to indicate that the petitioner would utilize the beneficiary to perform services for clients outside the petitioner's work site. The petitioner was advised to submit an itinerary of definite employment, listing the organization(s) and location(s) where the beneficiary would provide services, as well as the dates of service, for the three-year period of requested H-1B status. The petitioner was also advised to submit copies of its contractual agreements with the beneficiary and with client companies for which the beneficiary would be providing consulting services, including statements of work, work orders, or other appendices to the contracts specifying the duties the beneficiary would perform, his dates of service, as well as his work and pay schedules.

In response to the RFE counsel stated that the beneficiary would be working at the petitioner's office on in-house projects – identified as "Usability and Portal Implementation" and "Online Billing" – that the petitioner is completing for a client company, WellPoint, Inc. (WellPoint). Highlights of the "Usability and Portal Implementation Project," counsel explained, include enhancing usability across external and internal web sites through the development of enterprise-wide usability standards; implementation of the portal architecture developed by the petitioner to core web sites (member, employer, and provider); implementation of common web sites for systems being consolidated under core system integration initiatives; development of a national accounts web site for national account business; implementation of enterprise web site metrics and tools to measure success; and development of a sales demonstration of the WellPoint eCommerce capabilities. As for the "Online Billing" project, counsel explained, the petitioner is currently providing developmental support for various healthcare brands with the objective of implementing such features as online billing as a stand alone application with two technology stacks, enterprise wide usability standards, advanced features identified during the requirements phase, and a new functionality like individual billing, ASO, Complex Life for Anthem Life, and Combined Billing for Greater Georgia Life. Counsel submitted

copies of pages 1 and 28 of the 28-page Statement of Work (SOW) between the petitioner and WellPoint, dated March 3, 2005, which identifies the document as an appendage of the "Master Agreement" between the parties, dated July 2, 2004. No copy of the Master Agreement was provided. Counsel submitted a copy of a pre-contract work authorization (PCWA) for the "Usability and Portal Implementation" project which states that the petitioner will work on requirements documentation, portal framework creation, and setup development environments during the period of October 13-29, 2004. Also submitted were copies of invoices for work performed under the Master Agreement and the PCWA between July and December 2004, some of which was performed in India.

Counsel indicated that the beneficiary would be responsible for business process analysis, process flow mapping, discussing with module leaders, testing, setting up base configuration, custom program development, implementation, systems analysis and design. The duties of the proffered position, and the percentage of time required by each duty, were described by counsel as follows:

30% Analysis of the user needs. This involves the review and analysis of the existing systems and data for the client. The beneficiary will be involved in analyzing user requirements, procedures and problems to automate processing and improve existing computer systems. This will require the beneficiary to study and analyze the existing system on which the development work will be carried out. This will require the beneficiary to understand the functionality of the system, the specifications, and the requirements of the users.

40% Planning and coordinating design and development of the modification of applications to meet client needs. Based on the analysis and understanding of the needs of the potential users and aim of the product developed, the beneficiary is responsible for design of the new systems and modifications needed to be implemented. The beneficiary will design and develop the modifications for the new tool; formulate/define systems scope and objectives and write a detailed description of the user needs, program functions and steps required to develop or tailor computer programs; and utilize his knowledge and experience in the field for designing, enhancing, integrating, creating and implementing new applications and systems as well as customizing.

20% Testing and implementation of the proposed modification and providing support if necessary. The beneficiary will configure and customize various modules based on user requirements and will be involved in the systems integration, systems configuration, program specifications, coding testing and unit integration. The beneficiary will extensively interact with user groups with regard to various functionalities and provide application support during the advanced stages of implementation.

10% Miscellaneous. The balance of the beneficiary's time will be spent on miscellaneous activities, including coordinating with other members of the team.

There is no contract between the petitioner and the beneficiary, counsel indicated, but the petitioner would be the beneficiary's employer, would pay him, and would utilize his services at its work site for the duration of the beneficiary's period in H-1B status. In the event that the petitioner would not need the beneficiary's services on the Well-Point projects for the entire three years, counsel indicated that the petitioner would utilize the beneficiary' services for its ongoing in-house development and design projects.

In his decision the director stated that the contract documentation submitted in response to the RFE – which did not include the master agreement between the petitioner and Well-Point dated July 2 2004, contained only one PCWA of short duration in October 2004 and the first and last pages of the SOW dated March 3, 2005, and included a series of invoices for a six-month time period ending in December 2004 – failed to establish that the projects being conducted on behalf of the client company, WellPoint, are ongoing in nature and that the petitioner would be the beneficiary's employer for the entire three-year period of requested H-1B employment – *i.e.*, from October 1, 2004 through October 1, 2007. Without evidence of ongoing contracts, the director stated, the petitioner had not shown that there was a programmer analyst position available for the beneficiary upon his arrival in the United States or that the beneficiary would be working in a specialty occupation. Furthermore, the absence of contract documentation made it unclear whether the petitioner would be acting as the beneficiary's employer or as his agent. Lastly, the director ruled that the lack of contract documentation made it impossible to determine whether the petitioner was in compliance with the wage and work location conditions for the three-year period certified in the LCA.

On appeal counsel emphasized that the petitioner would be the beneficiary's employer, not his agent, that the beneficiary would work at the petitioner's work site during the entire three-year period of requested H-1B status, that the beneficiary would work on projects assigned by the petitioner and under the supervision of the petitioner's project manager, that the petitioner would pay the beneficiary and retain the right to fire him, and that the petitioner would provide all the tools, software, and hardware needed by the beneficiary to work on the projects. Counsel asserts that the petitioner has an employer-employee relationship with the beneficiary and meets the definition of a U.S. employer at 8 C.F.R. § 214.2(h)(4)(ii). [1] According to counsel the description of the proffered position in the response to the RFE as well as the contract documentation and invoices in the record show that there is a bona fide position for the beneficiary, where he will be working, and the details of the job. Counsel references an internal memorandum of the legacy Immigration and Naturalization Service (INS) in December 1995 ("*Aytes Memorandum*") interpreting the term "itinerary" in the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) as it relates to the H-1B nonimmigrant classification. [2] The subject regulation, which deals with the "filing of petitions," provides that "[a] petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training." The purpose of the regulation, the *Aytes Memorandum*

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[1] "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:
>
> *(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.

[2] Memorandum of 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).

states, is to ensure that H-1B beneficiaries have actual job offers in the United States. The itinerary requirement may be met in a number of ways, the memorandum states, and

> in the case of an H-1B petition filed by an employment contractor, a general statement of the alien's proposed or possible employment is acceptable since the regulation does not require that the employer provide the Service with the exact dates and places of employment. As long as the officer is convinced of the bona fides of the petitioner's intentions with respect to the alien's employment, the itinerary requirement has been met. The itinerary does not have to be so specific as to list each and every day of the alien's employment in the United States.

The *Aytes Memorandum* encourages service officers "to use discretion in determining whether the petitioner has met the burden of establishing that it has an actual employment opportunity for the alien."

The AAO determines that the director exercised proper discretion, consistent with the *Aytes Memorandum*, in requesting the submission of contract documentation between the petitioner and its client(s) to establish the nature of its employment relationship with the beneficiary – *i.e.*, whether it is acting as an employer or as an agent – and whether it has a bona fide job for the beneficiary as a programmer analyst for the entire three years of requested H-1B status. As counsel acknowledged in response to the RFE that there is no contract between the petitioner and the beneficiary, it was reasonable for the director to request other documentary evidence of the beneficiary's employment relationship vis-a-vis the petitioner and the client company, WellPoint. The AAO agrees with the director that the materials submitted by the petitioner fail to resolve the nature of the employment relationship or the existence of a bona fide position for the beneficiary. Despite the director's notation that the record contains no copy of the "Master Agreement" between the petitioner and WellPoint, that evidentiary defect has not been remedied on appeal. As for the Statement of Work, counsel's only explanation on appeal for failing to submit pages 2-27 of the 28-page document is that the matter is "confidential." The Pre-Contract Work Authorization, as previously discussed, is limited to a short period in October 2004, and the invoices for work completed on the two projects being performed for WellPoint cover only a six-month period from July through December 2004. None of the foregoing documentation identifies the beneficiary as an individual who would perform services for WellPoint, or the work location where the services would be performed. Only the PCWA and the invoices during the second half of 2004 refer to specific types of work performed by the petitioner for WellPoint. There is no evidence in the record of any work to be performed from the beginning of 2005 onward. While the SOW of March 2005 could shed light on the issue, the petitioner has chosen to submit only the first and last pages which do not describe the work to be performed. Thus, the record does not contain any documentary evidence of the work to be performed under the Master Contract and the SOW, or the work location, or the identity of the individual(s) who would perform the work. Moreover, the documentation of record does not establish that the petitioner has an employer-employee relationship with the beneficiary, as defined in 8 C.F.R. § 214.2(h)(4)(ii), or whether the petitioner is an employment contractor that would place the beneficiary at multiple work locations to perform services under contractual agreements for third-party companies. Simply going on record without supporting documentation does not satisfy the petitioner's burden of proof. *See 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)).

In *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000), a federal appeals court 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 court recognized that evidence of the client companies' job requirements is

critical when the work is to be performed for entities other than the petitioner, and held that the legacy INS 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. As the documentation of record does not establish the specific duties the beneficiary would perform under the petitioner's contract with WellPoint (or other clients) during the three-year period of requested H-1B status, or the client's degree requirements, the AAO cannot analyze whether the duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for the job to be classified as a specialty occupation. Accordingly, the petitioner has not established that the proffered position qualifies as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The director also found that the petitioner failed to show that it was in compliance with the terms of the LCA. On appeal the petitioner has still not submitted an itinerary of services or engagements demonstrating that the beneficiary would be employed in its home office in San Jose for the three-year period of requested H-1B classification. Accordingly, the record does not establish that the petitioner will be in compliance with the provisions of the LCA certified by DOL for the proffered position.

For the reasons discussed above, the petitioner has not overcome the bases for denial discussed in the director's decision.

Beyond the decision of the director, the present record does not establish that the beneficiary is qualified to perform services in a specialty occupation. An alien must meet one of the following criteria set forth in 8 C.F.R. § 214.2(h)(4)(iii)(C) to qualify to perform the services of a specialty occupation:

> (*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 beneficiary does not qualify to perform the services of the specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*1*) because he does not have a U.S. baccalaureate or higher degree, or under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*2*) because he does not hold a foreign degree determined to be equivalent to a U.S. baccalaureate or higher degree, or under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*3*) because he does not have an unrestricted state license to practice the specialty occupation. For the purpose of deciding whether the beneficiary is qualified under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*), the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D) provides that the determination shall be based on one or more of the following:

(*1*) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(*2*) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(*3*) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(*4*) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(*5*) A determination by the Service [CIS] that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty .... It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as: (i) Recognition of expertise in the specialty occupation by at least two recognized authorities [3] in the same specialty occupation; (ii) Membership in a recognized foreign or United States association or society in the specialty occupation; (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers; (iv) Licensure or registration to practice the specialty occupation in a foreign country;

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[3] *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used.
8 C.F.R. § 214.2(h)(4)(ii).

> or (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The record includes an evaluation of the beneficiary's academics and experience from Morningside Evaluations and Consulting, which concludes that the beneficiary's three-year bachelor of science degree in India, concentrating in physics, mathematics, and electronics, together with more than five years of training and work experience in computer information systems and related areas, is equivalent to a bachelor of science in computer information systems from an accredited U.S. college or university. The evaluation is not authored by an official with authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university with a program for granting such credit. Accordingly, it cannot be considered as evidence of the beneficiary's U.S. degree equivalency under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*). Furthermore, the evaluation is not restricted to the beneficiary's foreign education, as required to be considered as evidence of the beneficiary's U.S. degree equivalency under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*), and it specifically states that the beneficiary's education is equivalent to three years of academic coursework in the United States, which is not equivalent to a four-year baccalaureate degree from a U.S. college or university.

Nor does the record establish that the beneficiary has the equivalent of a U.S. baccalaureate degree in computer information systems, or a related specialty, through a combination of education, specialized training, and/or work experience in the specialty occupation or related areas, and recognition of expertise therein, as required to meet the alternative qualifying criteria at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*). As previously discussed, the beneficiary earned a three-year bachelor of science degree in physics, mathematics, and electonics from Bangalore University in India. According to the credentials evaluation report the beneficiary's degree in India is equivalent to three years of academic coursework in the United States. To account for a fourth year of credit in the specialty, therefore, the beneficiary must demonstrate three years of progressively responsible experience in computer information systems or a related specialty. The record includes copies of the beneficiary's certification by Sun Microsystems as a Java programmer in 2000, as well as three letters from Indian companies confirming that the beneficiary worked for them in various computer positions from February 1999 through September 2004. There is no evidence in the record, however, that any of the beneficiary's training and experience in the computer industry was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation, or that the beneficiary has documented recognition of expertise in the specialty, as required under the regulation. Accordingly, the beneficiary's work experience cannot be counted for the purpose of determining degree equivalency under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*). The AAO concludes, therefore, that the beneficiary's education and work experience combined is not equivalent to a U.S. baccalaureate degree in computer information systems or any other related specialty.

For the reasons discussed above, the petitioner has failed to establish that the beneficiary is qualified to perform services in a specialty occupation. For this reason as well the instant 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.