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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 04 800 48303 Office: CALIFORNIA SERVICE CENTER Date: OCT 19 2006

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.

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 consulting company. It seeks to employ the beneficiary as an information systems engineer 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 ground that the documentation submitted in response to the director's request for evidence failed to establish the petitioner's eligibility for the requested benefit at the time the petition was filed.

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 director's 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 the Form I-129 the petitioner describes itself as an information technology consulting business, established in 2000, with seven employees and gross annual income of $200,000. The petitioner proposes to hire the beneficiary as an information systems engineer for three years, at an annual salary of $45,000, and describes the duties of the position as "[p]rogramming of web based applications for the secure client website and corporate intranet using Visual Basic, HTML, SQL queries." The beneficiary is qualified for the proffered position, the petitioner declares, by virtue of her two degrees in Pakistan – which include a bachelor of science degree from the University of the Punjab in April 1999 and a master of computer science from Hamdard University Karachi in October 2003. The record contains the report from an educational credentials evaluation service in Sarasota, Florida, stating that the beneficiary's degrees are equivalent to a bachelor of science degree in computer science from an accredited U.S. college or university.

In the request for evidence (RFE) the director, after stating that the evidence did not show the petitioner had specialty occupation work for the beneficiary at its work site, requested the petitioner to submit copies of its contracts with clients to whom the beneficiary would be outsourced. The petitioner was advised to indicate where the beneficiary would perform computer consulting services, whether any of the computer consulting services would be performed at the petitioner's address, and to provide a complete itinerary of the beneficiary's employment – including the company names, work locations, and dates of service – for the entire three-year period of requested H-1B classification. The petitioner was also advised to submit copies of its contract(s) with the beneficiary.

In response to the RFE the petitioner submitted copies of a series of consulting contracts, including a one-year professional services agreement it executed with World Network Technologies, Inc. of Roselle, Illinois, dated December 3, 2004, which specifies that the beneficiary, as an employee of the petitioner, will provide services under the contract as an "Oracle Developer consultant" to Southern California Edison in Los Angeles, California, for at least 12 months starting on February 1, 2005. The petitioner also submitted a copy of its employment agreement with the beneficiary, signed by the parties on December 9, 2004, which states that the term of employment is four years and that the beneficiary will be assigned to projects for client companies.

In his decision the director found that the contracts submitted in response to the RFE were either expired, of unclear duration, or executed after the filing date of the petition, which was September 13, 2004. The director also found that the employment contract between the petitioner and the beneficiary postdated the filing of the petition, as did the one-year services contract between the petitioner and World Network Technologies, Inc. (WNT) identifying the beneficiary as the consultant. The director determined that the contract documents which postdated the filing of the petition constituted a material change to the petition that he was proscribed by regulation and case law from considering. Since the record did not establish that the petitioner had any client contracts in effect on the date of filing which covered the three-year time period of requested H-1B classification and identified the beneficiary as the services provider, the director concluded that the petitioner was not eligible to employ the beneficiary as an H-1B nonimmigrant worker.

On appeal counsel asserts that the petitioner hired the beneficiary as a "JAVA Developer engineer" and that "there has been no material change to the employment, employment terms and conditions after the date of the filing of the petition." Counsel describes the work of the proffered position as follows:

> Designs, develops, maintains and documents Java, JSP and J2EE-based programs. Analyzes existing software for adequacy to meet the intended task. Works mostly independently within task guidelines established by management.

The principal duties of the position are listed as follows:

Use Java, JSP and J2EE to bring superior core technology to commercial reality.

- Add to product lines in providing an automatic Web-based content classification and director system.
- Programs web based applications for the secure client website and corporate intranet using Visual Basic, HTML, SQL queries.
- Enhance core technology through further automation and functionality.
- Interact with a superb development staff.
- Continue to refine skills on the leading edge of development technologies and environments.

Counsel submits a copy of the petitioner's offer of employment to the beneficiary, dated July 12, 2004, which identifies the proffered position as "Oracle Developer for [the petitioner]," and resubmits a copy of the employment agreement signed on December 9, 2004. According to counsel, the petitioner will be the "actual employer" of the beneficiary and "be responsible for payroll, hiring, firing, and evaluating work product." Counsel explains that the petitioner is a provider of wireless telecom network consulting services and resubmits copies of the contract documents originally submitted in response to the RFE.

The infirmities of the contract documents of record, as discussed in the director's decision, have not been rectified by the petitioner on appeal. The petitioner's contract with WNT states that the beneficiary will provide "Oracle Developer" services to Southern California Edison for at least twelve months, beginning on February 1, 2005. That is the only contract document that identifies a specific client and time period of employment for the beneficiary. It accounts for only one of the three years of requested H-1B classification. The WNT contract's reference to "Oracle Developer" services accords with the petitioner's offer of employment to the beneficiary in July 2004, which identified the proffered position as an "Oracle Developer." This description of the beneficiary's services is at variance, however, with counsel's statement on appeal that the petitioner had hired the beneficiary as a "JAVA Developer engineer," as well as with the job duties described in the petition and on appeal, which refer to JAVA-related duties but make no mention of Oracle. 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 resolve the foregoing inconsistencies. Furthermore, doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *See id.* Thus, the record does not establish where, for whom, and in what capacity the beneficiary would work during the entire three years of requested H-1B classification.

Though counsel claims that the petitioner will be the beneficiary's "actual employer," the evidence of record appears to indicate that the petitioner is an employment contractor that will place the beneficiary at one or more work locations to perform services established by contractual agreements for one or more third-party companies. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides that if the beneficiary's duties will be performed in more than one location, the employer must submit an itinerary with the dates and locations of employment. The director's RFE included a request for the petitioner's contracts with the beneficiary and the client companies to whom the beneficiary would be assigned, as well as an itinerary of definite employment covering the requested three-year period of H-1B classification. The director has the discretion to request

such an itinerary from an employer who will employ a beneficiary in multiple locations. [1] The director properly exercised his discretion to request an itinerary and substantiating contract documentation from the petitioner. The only pertinent documentation submitted by the petitioner, however, is the WNT contract, which refers to the beneficiary's services as those of an Oracle developer and covers only one year. The petitioner has provided no other contracts, work orders, or statements of work that identify the clients to whom the beneficiary would be assigned and the time period(s) of his assignment(s) during the other two years of his requested period of H-1B classification. Since the petitioner has failed to comply with the requirements of 8 C.F.R. § 214.2(h)(2)(i)(B), the petition must be denied.

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 in this case fails to establish that the petitioner had an itinerary of definite employment for the beneficiary at the time the instant petition was filed.

Beyond the decision of the director, the petitioner has not established that it would employ the beneficiary in a specialty occupation. Aside from the WNT contract – which refers to the beneficiary's services as those of an Oracle developer and covers only one year of the requested three-year period of H-1B classification – the petitioner has provided no other contracts, work orders, or statements of work that describe the duties the beneficiary would perform for its client(s). 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 Immigration and Naturalization Service 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. In the instant petition the record contains no statement from WTN, or from any other clients of the petitioner's, as to what duties the beneficiary would perform for the client(s) and whether a baccalaureate degree in a specific specialty is required to perform them.

As the documentation of record does not establish the specific duties the beneficiary would perform during the requested period of H-1B classification, the AAO cannot analyze whether these duties require at least a baccalaureate degree or the equivalent in a specific specialty, as required for the proffered position 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), or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty

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[1] *See* 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).

occupation in accordance with 8 C.F.R. § 214.2(h)(1)(ii)(B)(*1*). For this additional reason the petition may not be approved.

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.