U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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FILE: WAC 04 083 50062 Office: CALIFORNIA SERVICE CENTER Date: FEB 0 2 2007

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 documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is an IT development and consulting firm. Specifically, it is involved in network management, systems management, security management, mail management and facilities management making it a managed services provider. It seeks to employ the beneficiary in a position entitled "Engineer-Network." The petitioner endeavors to classify the beneficiary 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 determined that the petitioner had not established that it had available at the time of the filing of the petition, a specialty occupation in which the beneficiary would be employed. The director found that the petitioner failed to provide copies of contracts with third parties showing that work was available for the beneficiary with a description of the duties to be performed on behalf of third party clients, and that the petitioner failed to provide an itinerary for the beneficiary during the period of intended stay in the United States. As such, the director reasoned that the petitioner had failed to establish that a specialty occupation existed or that the petitioner would be the employer of the beneficiary.

The first issue to be determined is whether the petitioner qualifies as a United States employer.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

(1) Engages a person to work within the United States;

(2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and

(3) Has an Internal Revenue Service Tax identification number.

The record establishes that the petitioner will be the employer of the beneficiary, and the director's finding to the contrary shall be withdrawn. The petitioner's quarterly wage report establishes that it engages people to work in the United States, and the employment agreement signed by the petitioner and the beneficiary dated December 17, 2003 establishes an employee/employer relationship between the parties. The petitioner will hire the beneficiary, will pay the beneficiary, has the right to fire the beneficiary and will otherwise have control over the beneficiary's work. The fact that the beneficiary may perform services at a client facility and be subject to that client's work rules and regulations does not change the employer/employee relationship existing between the petitioner and the beneficiary. The petitioner will engage the beneficiary to work in the United States, has an employer-employee relationship with the beneficiary, and has an Internal Revenue Service Tax identification number. The petitioner qualifies as a United States employer in this instance, and the director's finding to the contrary is withdrawn.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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 above criteria 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) the Form I-129 and supporting documentation; (2) the director's requests for additional evidence; (3) the petitioner's response to the director's requests; (4) the director's denial letter; and (5) the Form I-290B with counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services in a position entitled "Engineer-Network." Evidence of the beneficiary's duties includes the Form I-129 petition with attachment and the petitioner's response to the director's requests for evidence. According to the evidence the beneficiary would be a member of the petitioner's network implementation and maintenance project team. His job responsibilities would include:

- Configuration of Cisco 7603, 7206 VXR routers and Cisco 3550 LAN switches;
- Configuration, analysis and trouble-shooting of OSPF and BGP routing protocols;

- Analyzing and troubleshooting network related issues;
- Ensuring a high network up time of Internet gateway links;
- Ensuring an optimal and efficient flow of traffic;
- Configuration, management and maintenance of OSPF and BGP routing protocols; and
- Ensuring that Network parameters such as latency and packet loss are controlled and maintained.

The petitioner finds the beneficiary to be qualified to perform the duties of the proffered position by virtue of his foreign education which has been determined by a credentials evaluation service to be equivalent to a bachelor of science degree in computer engineering from an accredited college or university in the United States.

The director determined that the petitioner had not provided contracts for the period of time requested on the petition. The AAO agrees that the petitioner has not provided an itinerary[1] for the beneficiary's work to be performed from February 2, 2004 through February 1, 2007.

Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.

In his request for evidence, the director asked for copies of contracts between the petitioner and its clients for whom the beneficiary would perform services and an itinerary for the beneficiary's employment. The petitioner states that the beneficiary would not be called on to work at a client's business location and that all services would be performed at the direction of the petitioner at the petitioner's business location in Santa Clara, CA. The petitioner states in its first response to the director's request for evidence (April 12, 2004), however, that as a necessary function of the service provided by the petitioner to its clients, the beneficiary would have a great deal of contact with customers. The petitioner also noted in its response to the director's request for evidence that it provides services to its clients relating to a specific project. The petitioner determines how many individuals are needed to perform the project and assigns employees to the project. When the project is completed, the petitioner would then reassign its employees to new client projects or return the employee to the parent company for new projects. Thus, the evidence is inconsistent as to whether or not the beneficiary would provide services off-site as well as on-site. In the Aytes memorandum cited at footnote 1, the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised his discretion to request the contracts described above as the petitioner has stated that the beneficiary would be assigned to work on

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[1] *See* Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification,* HQ 70/6.2.8 (December 29, 1995).

various customer projects, and that he may be reassigned at a future date to other company facilities.[2] The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states that the itinerary shall establish the dates and locations of employment. In this instance, the record does not contain documentation regarding the dates and locations of the beneficiary's employment or contracts of work to be performed. As 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.

The director also determined that as of the time of filing, the petitioner had not established that it would employ the beneficiary in a specialty occupation. The petitioner provided no contracts, work orders or statements of work describing the duties the beneficiary would perform for its clients and, therefore, has not established the proffered position as a specialty occupation. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)*(1)* For this additional reason, the petition must be denied..

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has failed to sustain that burden.

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

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[2] As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."