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

[redacted]

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FILE: SRC 05 170 52885 Office: TEXAS SERVICE CENTER Date: JAN 22 2007

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:

[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 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 consulting and development firm that seeks to employ the beneficiary as a programmer-analyst. The petitioner, therefore, 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 denied the petition on the basis of her determination that the petitioner had failed to demonstrate that the beneficiary would come to the United States to work in a specialty occupation or that the petitioner would employ the beneficiary in a specialty occupation as of the filing date of the petition.

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

Section 214(i)(1) of the Immigration and Nationality Act (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:

> [A]n 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 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 proposed position.

The term "employer" is defined at 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 director found that the petitioner had not established an employment relationship with the beneficiary as of the filing date of the petition. The record contains an undated employment agreement entered into between the petitioner and the beneficiary. The regulation at 8 C.F.R. § 214.2(h)(4)(iv)(B) provides that an employment contract between the petitioner and the beneficiary shall be provided, or a summary of the terms of the oral agreement under which the beneficiary will be employed if there is no written contract. The petition, letter of support, and employment agreement generally outline the terms of the proposed employment to pay the beneficiary the rate of $50,000 annually for a three-year period. Thus, as of the filing date, the petitioner has established a proposed employment agreement with the beneficiary. The evidence of record establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.[1] *See* 8 C.F.R. § 214.2(h)(4)(ii).

According to the petitioner's May 23, 2005 letter of support, it would be the beneficiary's employer. According to this letter, the petitioner would retain control over the beneficiary. According to the "Supplier Agreement" executed between the petitioner and [redacted] any contractors provided by the petitioner are not employees of Syslogic or its clients. According to the "Employment Agreement" between the petitioner and the beneficiary, the petitioner will pay the beneficiary's salary and provide benefits such as health insurance, sick leave, and vacation time. In view of this evidence, the AAO finds that the petitioner will be the employer of the beneficiary.

The director also found that the record did not establish that the beneficiary will be employed in a specialty occupation.

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[1] *See also* 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).

In its letter of support, the petitioner stated that "employees may perform part of their programming and software development at client sites." The record is clear that the beneficiary would not perform his duties at the petitioner's place of business. According to the evidence of record, the beneficiary would be performing his duties for the Verizon Corporation.

The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at work locations to perform services established by contractual agreements with third-party organizations. 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.

While the Aytes memorandum cited at footnote 1 broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. As the evidence contained in the record at the time the petition was field did not establish that the petitioner had three years of work for the beneficiary to perform, the director properly exercised her discretion to require an itinerary of employment.[2] In her June 20, 2005 request for evidence, the director stated the following:

> According to the petitioner's documentation, their company provides consultant services to client companies. You also indicate that the beneficiary will be providing services to such client [companies] on-site. Therefore, please provide a copy of the contract between the petitioner and the company which requests the services of the beneficiary. Such a contract must identify the place of employment, supervision, conditions of employment, and all duties to be performed, and the like.

The petitioner's July 21, 2005 response to the director's request included the aforementioned Supplier Agreement and Employment Agreement and a work order, dated May 3, 2005.

According to the Supplier Agreement between the petitioner and Syslogic (which is effective January 1, 2002 through December 31, 2002), the petitioner will supply personnel to provide technical services to the Verizon Corporation and its subsidiaries as specified in subsequent work orders. The corresponding work order states that the petitioner shall send one individual to a work location in Irving, Texas from October 15, 2005 through August 14, 2008. The work order indicates that all qualified resumes may be submitted for a period of 30 days. This documentation does not specifically request the services of the beneficiary, and does not indicate that the beneficiary was selected from the petitioner's qualified workers. The record contains no contracts, work orders or statements of work with the beneficiary's itinerary. Absent such information, the petitioner has not established that it has three years' worth of H-1B-level work for the beneficiary to perform. Thus, the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition was properly denied.

The record also does not establish that the proposed position is 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 proposed position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services (Verizon, in this case) are to be performed is the

[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."

"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 proposed 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 for classification 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)*.

Beyond the decision of the director, the AAO has determined that the beneficiary does not qualify to perform the duties of a specialty occupation. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

> (*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;
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> (*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 is unqualified under 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(*1*), (*2*), and (*3*), as he did not earn a degree in the United States, his degree has not been determined equivalent to a degree earned from an accredited college or university in the United States, and he does not possess an unrestricted state license, registration, or certification authorizing him to fully practice the occupation.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*), requires a demonstration that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree is determined by 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 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.

The beneficiary does not qualify under any of these criteria. First, the AAO notes that no evidence has been presented to establish that the beneficiary qualifies under 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(*2*) or (*4*).

The petitioner submitted an evaluation from Worldwide Education Evaluators, Inc. (WEE), which found the beneficiary's foreign education equivalent to three years of academic study. The WEE evaluator then found three years of the beneficiary's work experience equivalent to an additional year of academic study. The WEE evaluator found that the combination of the beneficiary's education and experience are equivalent to a bachelor's degree in computer science.

The WEE evaluation does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*), as there has been no demonstration that the evaluator possesses the 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.

Nor does the evaluation satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*), as a credentials evaluation service may evaluate educational credentials only. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*). Moreover, the evaluation only found the beneficiary's foreign education equivalent to three years of study.

When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. 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, whether it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the specialty, and whether the beneficiary achieved recognition of expertise in

the field as evidenced by at least one of the five types of documentation delineated in sections (*i*), (*ii*), (*iii*), (*iv*), or (*v*) of 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*).

However, the employment affidavits contained in the record do not establish that the beneficiary's previous work experiences included the theoretical and practical application of specialty knowledge required by the occupation, that it was gained while working with peers, supervisors, or subordinates who held degrees, or that he achieved recognition of expertise in a computer-related field as described at section (*v*) of 8 C.F.R. § 214.2(h)(iv)(D)(*5*).

Therefore, the petitioner has not demonstrated that the beneficiary qualifies to perform the duties of a specialty occupation. For this additional reason, the petition may not be approved.

Based on the foregoing analysis, the AAO has determined 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), that the employer has submitted an itinerary of employment, or that the beneficiary is qualified to perform the duties of a specialty occupation.

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 not sustained that burden.

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