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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MAY 03 2007

FILE: SRC 05 192 50619 Office: TEXAS 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:

SELF-REPRESENTED

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, Texas Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner provides information technology services and support to other companies. The petitioner seeks to employ the beneficiary as a programmer analyst. Accordingly, 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 record includes: (1) the June 27, 2005 Form I-129 and supporting documents; (2) the director's July 18, 2005 request for further evidence (RFE); (3) the petitioner's September 22, 2005 response to the director's RFE; (4) the director's September 29, 2005 denial decision; and (5) the Form I-290B and documents in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On September 29, 2005, the director denied the petition determining that the petitioner had failed to establish that the beneficiary would be coming to the United States to work in a specialty occupation or that the petitioner would be engaging the beneficiary to work in a specialty occupation.

On appeal, the petitioner submits a statement and a revised statement of work (work order).

Section 214(i)(l) of the Immigration and Nationality Act (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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

> *Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

When filing the Form I-129 petition, the petitioner avers that it employed 13 persons, is a computer consulting firm and not an employment agency, and that it retains complete control over all its employees. In a June 20, 2005 letter submitted in support of the petition, the petitioner indicated:

> It is estimated that a minimum of 60% of the Beneficiary's time will be spent in performing user requirement analysis and the remainder of the Beneficiary's time will be spent in

> programming. Analytically, the Beneficiary will consult with management[,] evaluate problems and needs for future expansion and hardware/software interface and machine operation optimization.
>
> The position offered is that of a Programmer Analyst. [The petitioner's] Programmer Analysts perform the functions of user requirements and design analysis. The Programmer Analysts also render the actual programming of systems. The Programmer Analyst will analyze the users' data, provide record keeping and general modes of operation, and devise methods and approaches to solve the users' needs based upon his knowledge of data processing techniques and management information, statistical, audit, and control systems, also plans, develops, tests, and documents computer programs, applying knowledge of programming techniques and computer systems[.] Consults with user to identify current operating procedures and clarify program objectives[.] Reads manuals, periodicals, and technical reports to learn ways to develop programs that meet user requirements[.] Designs computer terminal screen displays to accomplish goals of user request[.] Converts project specifications, using flowcharts and diagrams, into sequence of detailed instructions and logical steps for coding into language process able [sic] by computer, applying knowledge of computer programming techniques and computer languages.

The LCA that the petitioner filed with the Department of Labor (DOL) listed the beneficiary's place of work as North Wilkesboro, North Carolina as a programmer analyst.

On July 18, 2005, the director requested additional evidence from the petitioner. The director requested that the petitioner provide the employment contract between the petitioner and the beneficiary; a copy of the contract between the petitioner and the company which requested the services of the beneficiary; and that the contract between the petitioner and the third party company must identify the place of employment, supervision, conditions of employment, duration, remuneration, and all duties to be performed.

In a September 22, 2005 response, the petitioner indicated that it would be the beneficiary's actual employer and that the beneficiary would provide services through the petitioner at the client site in Wilkesboro, North Carolina. The petitioner also repeated the description of duties initially provided. In addition, the petitioner provided a copy of a September 16, 2004 contract between the petitioner and Pyramid Consulting, Inc and a work order dated July 16, 2005, referencing a contract dated July 16, 2005. The work order identified the beneficiary as the employee working under the purchase order and indicated that the beneficiary would be working at Lowe's in North Wilkesboro, North Carolina. The work order did not include a description of the beneficiary's duties at the client site. The petitioner also included the June 7, 2005 employment contract between itself and the beneficiary indicating that the beneficiary would perform employment duties as assigned from time to time.

The director denied the petition on September 29, 2005. The director noted that the work order provided was dated July 16, 2005, almost three weeks after the filing of the Form I-129 petition. The director then determined that the record did not demonstrate that when the petition was filed, the beneficiary would be

coming to the United States to work in a specialty occupation or that the petitioner would be engaging the beneficiary to work in a specialty occupation.

On appeal, the petitioner asserts that the work order submitted in response to the director's RFE contained a typographical error and should have been dated June 16, 2005. The petitioner provides an October 7, 2005 letter from the contracts administrator for Pyramid Consulting Inc. indicating that the work order identifying the beneficiary as the consultant should have been dated June 16, 2005 and appends a revised copy of the work order with this date to the letter. The petitioner requests that the petition be approved.

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.

Preliminarily, the AAO finds that the evidence of record is sufficient to establish 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). However, in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the 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.

In this matter, the petitioner is a consulting company that contracts with third parties for the use of its consultants at client sites. The entity ultimately using the beneficiary's services is Lowe's in North Wilkesboro, North Carolina. As such that entity must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, Citizenship and Immigration Services (CIS) will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

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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).

The petitioner in this matter has provided a generic description of the types of duties the beneficiary would perform upon his employment with the petitioner, but no evidence that establishes the specific duties. A petitioner cannot establish employment as a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title, e.g., a programmer writes programs; a computer system analyst designs and updates software; a computer software engineer designs, constructs, tests, and maintains computer applications software. Although the petitioner asserts that the beneficiary's duties would involve design analysis and actual programming of systems, the petitioner has not provided any evidence substantiating the actual requirements of the ultimate user of the beneficiary's services. Only a detailed job description from the entity that requires the alien's services will suffice to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

The petitioner's revised work order submitted on appeal does not include a description of the beneficiary's actual duties for the third party client. Without a description of the beneficiary's actual duties from the entity utilizing the beneficiary's services, the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(*1*).[2]

In that the record offers no description of the duties the beneficiary would perform for the petitioner's client, or the petitioner's client's client, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a listing of the duties the beneficiary would perform under contract, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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[2] The AAO observes that the *Handbook* reports that there are many training paths available for programmers and that although bachelor's degrees are commonly requires, certain jobs may require only a two-year degree or certificate; that most employer's prefer to hire persons who have at least a bachelor's degree and broad knowledge of a variety of computer systems and technologies for positions of computer software engineer; and that there is no universally accepted way to prepare for a job as a systems analyst, although most employers place a premium on some formal college education.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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