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U.S. Citizenship and Immigration Services

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FILE: WAC 06 253 54358 Office: CALIFORNIA SERVICE CENTER Date: NOV 13 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:

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, California 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 software consulting and information technology services. It states that it employs 23 personnel and had gross annual revenue of approximately $1,400,000 when the petition was filed. It 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 Form I-129 filed August 14, 2006 and supporting documents; (2) the director's October 12, 2006 request for further evidence (RFE); (3) the petitioner's November 10, 2006 response to the director's RFE; (4) the director's December 18, 2006 denial decision; and (5) the Form I-290B, the petitioner's statement, and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

On December 18, 2006, the director denied the petition. The director determined that the petitioner is a consulting firm providing contract employees to other businesses and that the petitioner had offered insufficient evidence to establish that there was a *bona fide* job offer for the beneficiary to work in San Jose, California, the beneficiary's work location listed on the Form I-129 petition. The director further determined that even if the evidence submitted by the petitioner dated after the filing date of the Form I-129 was considered, the evidence did not establish that the proffered position qualified as a specialty occupation.

On appeal, the petitioner asserts that the beneficiary is its full-time employee; that the beneficiary will work at the client's locations when it is required; and that once the beneficiary finishes work at the client site, the beneficiary will work from the petitioner's offices. The petitioner states that it will pay the beneficiary for the three-year period of its contract with the beneficiary irrespective of clients' work.

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.

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.

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.

In an August 1, 2006 letter appended to the petition, the petitioner provided a list of its clients; asserted that the proffered position is highly complex and professional in nature; and that the essential duties and responsibilities of the position included system analysis and design, writing code and developing programs and unit and system testing and attending meetings. The petitioner also listed the projected technical environment on which the beneficiary would be working. The petitioner submitted a Form ETA 9035E Labor Condition Application (LCA) certified August 1, 2006 for the San Jose, California area.

On October 12, 2006, the director noted from the evidence provided that it appeared that the petitioner is engaged in the business of software development and consulting and is seeking the beneficiary's services for clients outside the petitioner's work site. The director requested that the petitioner submit an itinerary of definite employment, listing the location(s) and organization(s) where the beneficiary will be providing services and that the itinerary should specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venue, or locations where the service will be performed by the beneficiary. The director indicated that if the services would be performed on the petitioner's worksite that the petitioner provide evidence that it required personnel with the same skills for its projects on site. The director further requested copies of contractual agreements between the petitioner and the beneficiary and contractual agreements between the petitioner and the companies for which the beneficiary would be providing consulting services, including copies of statements of work, work orders or other documentation that specified the duties, dates of services requested, work schedule and pay schedule under which the beneficiary would perform.

In a November 10, 2006 response, the petitioner stated that the beneficiary was a full-time employee and that the petitioner would control and pay the beneficiary. The petitioner indicated further that the beneficiary would work at clients' locations whenever it is required and once the beneficiary finished work at the client's site she would work at the petitioner's offices. The petitioner provided: a copy of the employment agreement between the beneficiary and the petitioner dated August 18, 2006 covering a period of three years; an undated letter from Viker Technologies Group indicating the beneficiary had "been working as a consultant at eBay as a programmer analyst from 3/20/2006 thru till date;" an LCA certified on November 5, 2006 for the Tampa, Florida area; and a contractor agreement between the petitioner and Smart Outsource, Inc. dated October 30, 2006 identifying the beneficiary as a programmer/analyst for the Tampa, Florida area that listed the contract validity as a period of two years. The October 30, 2006 Smart Outsource contract did not provide a description of the beneficiary's duties.

As noted above, the director denied the petition, determining that the petitioner had not offered sufficient evidence to establish that there was a *bona fide* job offer for the beneficiary to work in San Jose, California, the beneficiary's work location listed on the Form I-129 petition. The director indicated that a petitioner must establish eligibility when the petition was filed. The director further determined that even if the evidence submitted by the petitioner dated after the filing date of the Form I-129 was considered, the evidence did not establish the proffered position qualified as a specialty occupation, as the record did not provide a description of the beneficiary's duties for the beneficiary's ultimate employer.

On appeal, the petitioner again asserts that the beneficiary is its full-time employee; that the beneficiary will work at the client's locations when it is required; and that once the beneficiary finishes work at the client site, the beneficiary will work from the petitioner's offices. The petitioner states that it will pay the beneficiary for the three-year period of its contract with the beneficiary irrespective of clients' work. The petitioner indicates that the beneficiary started work with its company on August 21, 2006 after notice that this Form I-129 had been accepted as filed. The petitioner also provides an LCA certified May 28, 2006 for the Tampa, Florida area and a contractor agreement between the petitioner and Smart Outsource, Inc. with a revised date of September 25, 2006. The second Smart Outsource contract is the same as the October 30, 2006 Smart Outsource contract submitted in response to the director's RFE in every respect except for the changed date.

The petitioner also submits a letter dated January 10, 2007 from the vice-president of Smart Outsource, Inc. indicating that the beneficiary is currently working at its location in Tampa, Florida and has been contracted through the petitioner since October 1, 2006 and that her services will be needed until October 1, 2008. The petitioner requests approval of the petition based on the information provided.

To determine whether a particular job qualifies as a specialty occupation, CIS does not rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO finds that the petitioner will be the beneficiary's employer. However, the petition may not be approved as the petition does not establish that the beneficiary will be employed in a specialty occupation or that the employer has submitted an itinerary of employment.

The record shows that the beneficiary has and will perform her duties at various locations. The petitioner has submitted three different LCAs, each certified on a different date and covering the San Jose, California area as well as the Tampa, Florida area. Further, the petitioner notes that it has two offices in Florida, in Tampa and in Sebastian, Florida. Accordingly, the AAO concludes that, although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner will place the beneficiary at various work locations to perform services established by contractual agreements for third-party companies.

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 in such situations. While the Aytes memorandum cited at footnote 1 below 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 filed 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.[1]

In its November 10, 2006 response to the director's request for additional evidence, the petitioner stated that it would be the beneficiary's actual employer and that the beneficiary would work at clients' locations whenever it is required and once the beneficiary finishes work at the client's site she would work at the petitioner's offices. The petitioner did not submit the requested itinerary. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) requires employers to submit an itinerary with the dates and locations of employment in situations where the employment will occur in more than one location. Instead of submitting an itinerary, the petitioner submitted a contract with one company dated subsequent to the date the petitioner filed the Form I-129. Further, the

[1] 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."

contract covered only two years of the three years of requested H-1B employment. The petitioner's statement that it would continue to employ the beneficiary once her work with third party contractors is insufficient. As the director observed, the petitioner has not provided evidence that it has on-site employment for a programmer analyst. Absent such information and contracts covering the entire period of the beneficiary's employment, the petitioner has not established that it has three years' worth of H-1B-level work for the beneficiary to perform. The evidence contained in the record does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of the beneficiary's employment by the petitioner. 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.

On appeal, the petitioner submits a revised contract with Smart Outsource, Inc, with a changed date. However, the revised contract still does not cover the three years of requested H-1B employment and is also dated subsequent to the date the petitioner filed the petition on August 14, 2006. Thus, the record does not include evidence that the petitioner had three years' work of H-1B level work when the petition was filed. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). In addition, 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 petitioner has not provided the requested the itinerary and has not substantiated that it has three years' worth of H-1B employment for the beneficiary. For this reason, the petition must be denied.

In addition, as the record does not contain an itinerary for the entire period of employment, it cannot be determined that any of the three LCAs are valid for particular work locations. For this additional reason, the petition may not be approved.

Further, 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 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 proposed position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. When a petitioner is acting as an employment contractor, the entity ultimately using the alien's services 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.

The only contracts the petitioner submitted in this matter that identified the beneficiary as a consultant for a third party do not include a description of the duties the beneficiary will perform. Likewise, the letter submitted by the third party contractor, does not include a description of the duties the beneficiary will perform.[2] Thus, the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's third party client. In this matter, the AAO is unable to conclude that the requirements of third party employers will include duties that incorporate the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a bachelor's degree or higher degree in the specific specialty or its equivalent as a minimum for entry into the occupation in the United States. The Department of Labor's *Occupational Outlook Handbook* (*Handbook*) indicates there are a number of computer-related positions, some of which require a four-year course of college-level education, some of which require a two-year associate's degree, and some of which only require experience. Without a detailed job description from the entity that requires the alien's services, the petitioner has not provided evidence sufficient 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)). 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*).

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. For this additional reason, the petition will be denied.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

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[2] The AAO also observes that the letter submitted by the third party contractor, the contracts between the petitioner and the third party, and the petitioner's statements regarding the beneficiary's past and proposed work contain inconsistent dates regarding the petitioner's proposed employment. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).