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U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Room 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 06 178 50648 Office: CALIFORNIA SERVICE CENTER Date: OCT 29 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:

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 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 provides software-consulting services. It seeks to employ the beneficiary as a software engineer. 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 record of proceeding before the AAO contains: (1) the Form I-129, filed May 5, 2006 and supporting documentation; (2) the director's July 26, 2006 request for additional evidence (RFE); (3) the petitioner's October 12, 2006 response to the director's request; (4) the director's November 20, 2006 denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition determining: (1) that the petitioner had failed to demonstrate that the proffered position is a specialty occupation; and (2) that the petitioner had not satisfied the requirements for the beneficiary's extension of stay under the "American Competitiveness in the Twenty-First Century Act," (AC21) and the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21).

On appeal, the petitioner submits a brief and additional documentation.

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 petitioner indicates on the Form I-129 that the beneficiary will work at locations throughout the United States to be determined. The petitioner also submitted a Form 9035E, Labor Condition Application, (LCA) indicating that the beneficiary's work location will be in Pittsburgh, Pennsylvania. The petitioner further provided a copy of an employment agreement with the beneficiary dated June 16, 2005.

Based on this information the AAO concludes, that although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor in 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 in such situations must submit an itinerary with the dates and locations of employment. As the evidence contained in the record at the time the petition was filed did not provide evidence that the petitioner had work for the beneficiary to perform, the director properly exercised his discretion to require an itinerary of employment.[1] 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.

In an October 12, 2006 response to the director's RFE, the petitioner indicated that the beneficiary had been assigned to work on a project at [redacted]Living Omnimedia, Inc. [redacted] since July 18, 2005. The petitioner described the beneficiary's duties at [redacted] and provided a copy of a contract with [redacted] for general technology services dated January 5, 2005. The contract does not contain a statement of work or a work order indicating [redacted] (the beneficiary's ultimate

[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."

employer) expectations or description of work for the beneficiary. The contract does not indicate where the beneficiary will perform the work for [redacted] and does not indicate the length of the beneficiary's work with [redacted]

As observed above, the director denied the petition determining that the petitioner had not provided evidence of the ultimate employer's job description; thus the petitioner had not established the proffered employment as a specialty occupation.

On appeal, the petitioner indicates that the beneficiary has been assigned to perform computer-programming services to [redacted] The petitioner provides a copy of a contract with [redacted] with a time and materials schedule dated June 7, 2006 and signed by both parties on July 18, 2006. The statement of work attached to the time and materials schedule indicates the work shall commence July 15, 2006 and that the anticipated completion of the work is December 29, 2006. The statement of work identifies the beneficiary as the onsite software developer and indicates that the onsite consultants will work from [redacted] premises in Hopewell, New Jersey. The petitioner does not provide an amended LCA.

The AAO concurs with the director's decision that the petitioner had not provided evidence that the proposed position is a specialty occupation. The AAO observes that the record before the director did not include a description of the beneficiary's proposed duties for [redacted] 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.

The AAO finds that the contract and statement of work provided on appeal also fails to establish that the proffered position incorporated the duties of a specialty occupation when the petition was filed. The [redacted] time and materials schedule is dated subsequent to the filing date of the petition. The 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* [redacted], 17 I&N Dec. 248 (Reg. Comm. 1978). In addition, as stated in *Matter of* [redacted], 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." Further, although the statement of work identifies the beneficiary as the software developer, the requirements of the software developer are only generally stated.[2] Furthermore, the [redacted] statement of work does not establish that the petitioner has employment available to the beneficiary for the full year of requested H-1B employment.

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[2] To determine whether a particular job qualifies as a specialty occupation, CIS does not simply 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 evidence of record does not establish the petitioner has complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) as the petitioner has not provided an itinerary of the beneficiary's work with dates and locations of employment. The record does not include detailed job descriptions of the beneficiary's proposed employment for the ultimate employer when the petition was filed or subsequent to the date of filing. Accordingly, the petitioner has not established that the proposed position of a software developer qualifies for classification as a specialty occupation under any of the criteria 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 occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)*(1)*. The petition was properly denied.

Turning to the issue of the beneficiary's eligibility for a seventh year extension pursuant to the requirements for an extension of stay under AC21 and DOJ21, the AAO finds the petitioner has not overcome the basis for the director's decision on appeal.

Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) provides that: "the period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years" and that an alien may not seek extension, change of status, or be readmitted to the United States under section 101(a)(15)(H) or (L), 8 U.S.C. § 1101(a)(15)(H) or (L), unless the alien has been physically present outside the United States - except for brief trips for business or pleasure - for the immediate prior year. AC21 (as amended by DOJ21) removed the six-year limitation on the authorized period of stay in H-1B visa status for aliens whose labor certifications or immigrant petitions remain pending due to lengthy adjudication delays and DOJ21 broadened the class of H-1B nonimmigrants able to avail themselves of this provision.

As amended by section 11030(A)(a) of DOJ21, section 106(a) of AC21 states the following:

> (a) EXEMPTION FROM LIMITATION. -- The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of such Act (8 U.S.C. § 1101(a)(15)(H)(i)(b)), if 365 days or more have elapsed since the filing of any of the following:
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> (1) Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).
>
> (2) A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.

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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.

Section 11030(A)(b) of DOJ21 amended section 106(a) of AC21 to state the following:

> (b) EXTENSION OF H-1B WORKER STATUS--The Attorney General shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made—
>
> (1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;
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> (2) to deny the petition described in subsection (a)(2); or
>
> (3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

The director determined in this matter that the underlying basis for the beneficiary's eligibility for a seventh year extension, an application for labor certification, had been closed. On appeal, the petitioner notes that when the petition was filed and when the response to the RFE was made, the application for labor certification was still pending. However, when a final decision is made on the labor certification application, the beneficiary is no longer entitled to an extension of stay in one-year increments under AC-21. The petitioner has not provided evidence sufficient to overcome the director's decision on this issue. For this additional reason, the petition must be denied.

Beyond the decision of the director, the AAO finds that the petitioner has not complied with the terms of the LCA filed with the Form I-129 as the beneficiary's proposed work location has changed. For this additional reason the petition may not be approved. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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. 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.