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

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[redacted]

FILE: EAC 05 178 53840 Office: VERMONT SERVICE CENTER Date: JAN 28 2008

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 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 a software consulting company and seeks to employ the beneficiary as a programmer analyst. 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 proffered position did not qualify as a specialty occupation, and that the beneficiary was not qualified to perform the duties of a specialty occupation. Specifically, the director noted that the petitioner had not provided contracts with clients which detailed the work to be performed by the beneficiary during his period of intended stay in the United States. As such, it could not be determined that the petitioner had H-1B caliber work available for the beneficiary during beneficiary's intended period of stay in the United States. The petition was accordingly denied. On appeal, the petitioner states that the proffered position qualifies as a specialty occupation, and that the beneficiary is qualified to perform the duties of a specialty occupation.

The first issue to be determined is whether the proffered position qualifies as a specialty occupation.

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 petitioner seeks the beneficiary's services as a programmer analyst. Evidence of the beneficiary's duties includes the Form I-129 petition with attachment and the petitioner's response to the director's request for evidence. According to a summary of duties provided by the petitioner the beneficiary would:

- Analyze, design and develop software applications using C, VB, ORACLE, SQL, COBOL, FOXPRO, POWER BUILDER, SHELL PROGRAMMING and AUTOCAD on Windows, DOS and UNIX;

- Install and tune ORACLE on UNIX, and provide support and troubleshooting at the client end, incorporating new modules as per client requirements;

- Code, unit test, and prepare test data sheets using C, VB, POWERBUILDER, ORACLE AND SYBASE;

- Design and develop software applications in a client/server environment using Power Builder 4.0 and 5.0, and Oracle 7.0 on Windows/Unix;

- Interact with clients to understand business rules and develop functional specification of applications;

- Design and develop specialized Web based packages for project use; and

- Provide technical and analytical skills towards the design and development of Web based applications.

The petitioner requires a minimum of a bachelor's degree in science, computers, engineering or information systems, or a related field for entry into the proffered position.

The director determined that the petitioner had not provided contracts for the period of time requested on the petition. The petitioner did provide copies of sample contracts that it had entered into with some of its clients. The contracts did not, however, provide work orders establishing where the beneficiary would be working or otherwise provide a description of the work to be performed by the beneficiary from the ultimate user of the beneficiary's services (a description of the duties to be performed by the beneficiary as defined by the petitioner's client.) The AAO agrees that the petitioner has not provided an itinerary[1] for the beneficiary's work to be

[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).

performed from October 1, 2005 through September 30, 2008, the period of requested stay in the United States.

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/beneficiary and clients for whom the beneficiary would perform services and an itinerary for the beneficiary's employment. As recognized 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.[2] In response to the director's request for evidence, the petitioner provided sample contracts entered into with some of its clients. As noted above, however, the contracts did not include work orders indicating specifically where the beneficiary would be employed, or the specific duties to be performed by the beneficiary. 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. The documentation submitted by the petitioner does not provide that information. The record does not establish the locations of employment for the beneficiary during his entire requested period of stay in the United States. The documentation submitted does not satisfy the cited regulation requiring an itinerary of employment.

The evidence of record establishes that the petitioner is an employment contractor, in that the petitioner will place the beneficiary at multiple work locations to perform services established by contractual agreements for third-party companies. The petitioner, however, has 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 from the clients for whom the beneficiary would provide services that establishes the specific duties the beneficiary would perform, 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)*.

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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."

The petitioner's failure to provide contracts establishing the beneficiary's work locations during his entire period of intended stay in the United States precludes CIS from determining whether an LCA valid for all work locations was certified by the Department of Labor prior to the filing of the Form I-129 petition. For this additional reason, the petition must be denied.

The final issue to be determined is whether the beneficiary is qualified to perform the duties of a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
>
> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
>
> (C) (i) experience in the specialty equivalent to the completion of such degree, and
>
> (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the 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;
>
> *(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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(*4*) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be 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 petitioner seeks the beneficiary's services as a programmer analyst, and requires a minimum of a bachelor's degree in science, computers, engineering or information systems, or a related field for entry into the offered position. To establish the beneficiary's qualifications for the position, the petitioner submitted a credentials evaluation from a credentials evaluation service. That evaluation found the beneficiary's foreign education and past work experience to be equivalent to a bachelor's degree in computer information systems from an accredited college or university in the United States. That evaluation, however, does not establish that the beneficiary's past education and work experience is equivalent to a degree in information systems from an accredited college or university in the United States. Evaluations of work experience for degree equivalence purposes may only be made by 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. 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*). The record does not establish that the evaluator in this instance has authority to grant college-level credit for training and/or experience, nor does the record establish that the evaluator's employer has a program for granting such credit. As such, the evaluation is of little evidentiary value. CIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept, or may give less weight, to that evidence. *Matter of Caron International,* 19 I&N Dec. 791 (Comm. 1988).

CIS may itself determine whether the beneficiary is qualified to perform the duties of the specialty occupation. That determination may be made pursuant to 8 C.F.R. § 214.2 (h)(4)(iii)(D)(*5*), which provides:

> For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of

college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. . . . 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 occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

*(i)* Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

*(ii)* Membership in a recognized foreign or United States association or society in the specialty occupation;

*(iii)* Published material by or about the alien in professional publications, trade journals, books or major newspapers;

*(iv)* Licensure or registration to practice the specialty occupation in a foreign country; or

*(v)* Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The documentation referencing the beneficiary's work experience is insufficient in detail to determine that: the beneficiary's past work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; or that the beneficiary has recognition of expertise in the specialty. CIS cannot, therefore, determine that the beneficiary is qualified to perform the duties of the specialty occupation.

For reasons related in the preceding discussion, the petitioner has not established that the proffered position qualifies as a specialty occupation, or that the beneficiary is qualified to perform the duties of a specialty occupation requiring a bachelor's degree in a computer related field. Accordingly, the AAO shall not disturb the director's decision denial of the petition.

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.