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U.S. Citizenship and Immigration Services

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FILE: WAC 07 145 52574 Office: CALIFORNIA SERVICE CENTER Date: NOV 24 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:

[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.

John F. Grissom, Acting 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 development and consulting services. It was established in 2005 and claims to employ 45 employees and to have had $1,500,000 in gross annual income when the petition was filed. It seeks to employ the beneficiary in the occupation of a computer 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).

On August 23, 2007, the director denied the petition determining that the petitioner had not submitted evidence establishing that a credible offer of employment existed. The director also found that the petitioner had failed to provide evidence in response to the director's request. The director concluded that the petitioner had failed to meet its burden of proof in establishing eligibility for the requested H-1B classification. On appeal, counsel for the petitioner submits a brief and documents in support of the appeal.

The record includes: (1) the Form I-129 filed April 2, 2007 and supporting documents; (2) the director's May 10, 2007 request for further evidence (RFE); (3) counsel for the petitioner's July 31, 2007 response to the director's RFE and supporting documentation; (4) the director's August 23, 2007 denial decision; and (5) the Form I-290B, counsel's brief, and supporting documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

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 a March 27, 2007 letter appended to the petition, the petitioner stated that it "is a full service development/management consulting firm, committed to providing efficient, cost-effective computer services and solutions to large commercial organizations." The petitioner noted: "[t]ypically, [it] is engaged by U.S. businesses to provide full services solutions for specific turnkey project development." The petitioner indicated that it had attached samples of master consulting agreements for software development which it had in place for many companies. Although referenced, the initial record did not include copies of agreements between the petitioner and third party companies. The petitioner stated further:

> Our company's contracts are generally to develop and implement a system or subsystem or to perform turnkey projects. [The petitioner's] consulting services involve the comprehensive review and analysis of selected aspects of our clients' businesses by a team of sophisticated systems experts on a project management basis. As a result, there is generally no agreement to supply a particular individual for a particular job.

> In deciding whether to assign an employee to an in-house project or a client project, priority is given to client projects. [The petitioner] hires their employees based upon the business projection and forecast. Given the nature of our services, many of [the petitioner's] clients prefer that the work be done on a consulting basis with the employees available on site to assist with a project. Therefore, some of the contracts take the form of what is routinely referred to as third-party contracts. Hence the Beneficiary will not always be working at our office. However, a valid employer-employee relationship exists. At all times, [the petitioner] assumes direct responsibility for the salary and benefits paid to the beneficiary while working for its clients.

The petitioner also offered the following job description for the proffered position:

> As a Programmer Analyst, the beneficiary will plan, develop, test, and document computer programs and apply broad knowledge of programming techniques and computer systems to evaluate user requests for new or modified programs. More specifically, the beneficiary will formulate plans outlining steps required to develop programs using structured analysis and design in addition to preparing flowcharts and diagrams to convert project specifications into detailed instructions and logical steps for coding into languages processed by computers. The beneficiary will also replace, delete, and modify codes to correct errors, analyze, review and alter programs to increase operating efficiency and adapt the system to new requirements; and, oversee the installation of software and provide technical assistance to clients. The beneficiary will also analyze and evaluate deployment of local area networks and wide area networks to providing [sic] internet connectivity and support of the computer infrastructure. Furthermore, the beneficiary will be assigned to various projects, which will require the maintenance of client's networks and software builds. The beneficiary will also coordinate with various locations during transitioning, oversee network administration and create test scripts and applications to manage and test the various functionalities of builds and network administration.

The petitioner listed processing steps that included: Project Plan – 10%; IT Requirements – 10%; Designs - 20%; Construction (Coding) – 20%; Test – 20%; User Support and Troubleshooting – 20% and then added:

> As a Programmer Analyst, the beneficiary will under general direction conceptualize, design, construct, test and implement portions of business and technical information technology solutions through application of appropriate software development life cycle methodology.
>
> The beneficiary will interact with business users, engineering, technical personnel and any other organizations to gather requirements. The beneficiary will then convert the requirements into symbolic formulations, using techniques such as flow-charting, block diagrams. The results of which are then encoded for processing as modules and subroutines, which require a thorough understanding of the limitations of the computer systems and associated languages. He will then test and analyze the results with the end users for further

tuning/modifications of the formulations, which might result in a repeat/expansion of the above process steps.

The record also includes a Form ETA 9035E. Labor Condition Application (LCA) listing the beneficiary's work location as Rosemont, Illinois and Schaumburg, Illinois in the position of a "programmer analyst."

On May 10, 2007, the director requested, among other items: signed copies of the petitioner's Federal Income Tax returns for 2005 and 2006; a notarized copy of the petitioner's lease agreement that indicates the total square footage and a floor plan; evidence to show that the petitioner has valid job offers and an ability to pay the 45 current employees and an additional 63 employees as requested in recently filed Forms I-129; clarification of the employer-employee relationship with the beneficiary; a description of conditions of employment, such as contracts or letters from authorized officials of the ultimate client companies; contractual agreements, statements of work, work orders, service agreements, letters from authorized officials of the ultimate client companies where the work will actually be performed, that provide a comprehensive description of the beneficiary's proposed duties; an itinerary that specifies the dates of each service or engagement, the names and addresses of the actual employers and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested; and any other evidence the petitioner believed would substantiate sufficient qualifying employment.

In a July 31, 2007 response, the petitioner stated: "[o]nce a contract has been signed, we staff the projects with our available programmer analysts and other software consultants. The programmer analyst will then work on the project either at the client site or at our headquarters." The petitioner also stated: "the programmer analyst will be the employee of Astron Consulting," and at present, it is the petitioner's plan that the beneficiary will be required to work at the petitioner's headquarters in Rosemont, Illinois. The petitioner also listed potential opportunities in in-house development projects. Contrary to the petitioner's initial statement in support of the petition, the petitioner stated: [i]n deciding on whether to assign an employee to an in-house project or a client project, priority is given to in-house projects." The petitioner provided a copy of its 2005 Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation, showing $258,083 in gross annual income, $4,500 paid in compensation of officers, $83,270 paid in salaries and wages, and $-76,047 in ordinary business income or loss. The petitioner also provided a copy of a June 30, 2006 amendment to a lease agreement for a total of 2,112 rentable square feet.

On August 23, 2007, the director denied the petition, determining that the record did not show whether the petitioner is the beneficiary's actual employer or is acting as an agent, and thus is insufficient to establish that a specialty occupation exists for the beneficiary and that there was a *bona fide* job offer at the time of filing the petition. The director noted, although referenced by counsel, that the record did not contain copies of contracts; that the petitioner had stated "the programmer analyst will be the employee of Astron Consulting"; and that the petitioner had not provided evidence to establish that it had adequate work space for its current 45 employees and 63 new workers. The director also found that the petitioner had failed to provide requested information regarding its number of employees and that such failure precluded a determination that the petitioner had shown that there existed a reasonable and credible offer of employment for the beneficiary's services.

On appeal, counsel for the petitioner asserts that the petitioner will be the beneficiary's actual employer and that contracted work is immediately available for the beneficiary's skills. Counsel repeats portions of the petitioner's general description of the duties of a programmer analyst and notes that the petitioner's ability to provide its clients the highest level of service requires the highly educated professional IT consultants with demonstrated expertise in such areas as computer, engineering, systems analysis, accounting, financial management and business systems. Counsel provides a copy of an agreement between the petitioner and Citigroup with a notice address in Warren, New Jersey that is dated April 11, 2007, but does not include a statement of work or purchase order appended to the contract. Counsel also submits a statement of work dated July 1, 2007 between the petitioner and Mosaic Crop Nutrition, Riverview, Florida for QA consulting services for an individual not the beneficiary. Counsel also provides a copy of an agreement between the petitioner and Hitachi High Technologies, located in Schaumburg, Illinois dated March 19, 2007. Counsel also submits a March 23, 2007 contract between the petitioner and Menasha Global and a statement of work signed on behalf of the petitioner and Menasha Global/Advantage for work to be performed by an individual not the beneficiary at the petitioner's offices in Rosemont, Illinois. Counsel further provides a copy of a December 18, 2006 agreement between the petitioner, labeled a staffing agency, and Cable Television Laboratories located in Louisville, Colorado. Counsel further submits the petitioner's 2006 IRS Form 1120, the petitioner's Quarterly Wage Report for the quarter ending June 30, 2007 listing 55 employees, and a copy of the same lease agreement previously submitted.

The AAO recognizes that the petitioner would act as the beneficiary's employer. The evidence of record establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.[1] *See* 8 C.F.R. § 214.2(h)(4)(ii). The petition may not be approved, however, as the petition does not establish: that the petitioner had employment available for the beneficiary when the petition was filed; that the beneficiary will be employed in a specialty occupation; and that the employer has submitted an itinerary of employment.

Although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor and that the petitioner will place the beneficiary at different work locations to perform services according to various agreements with 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 broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. The petitioner in this matter initially indicated that generally it does not enter into agreements to supply a particular individual for a particular job and that in deciding whether to assign an employee to an in-house project or a client project, priority is given to client projects. In response to the director's RFE, the petitioner again indicated that it did not assign individuals to particular tasks until a contract had been signed but changed the priority of assignment to indicate that priority is given to in-house projects. The petitioner also noted that the beneficiary would be the employee of Astron Consulting. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence.

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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).

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).

On appeal, counsel for the petitioner submits several contracts with third party companies that are located in New Jersey, Florida, Schaumburg, Illinois, Louisville, Colorado, as well as for a project to be completed in-house. In addition, some of the contracts submitted did not exist until after the petitioner had filed this petition. This information confirms that the petitioner did not have a specific position available for the beneficiary when the petition was filed but was considering the beneficiary's employment for speculative possible employment in a computer-related position.[2] The petitioner, however, 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 this matter, the director properly exercised her discretion to require an itinerary of employment in an effort to determine where the beneficiary would be employed. As the petitioner has not submitted an itinerary, the petition may not be approved.

In addition, although the petitioner is an employment contractor and will be the beneficiary's actual employer, the record does not contain a detailed description of the beneficiary's actual daily duties. The petitioner initially offered an overview of the occupation of a programmer analyst without detailing the actual duties the beneficiary would perform in the proffered position. 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, a 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. In this matter, the petitioner has not provided consistent evidence demonstrating that the beneficiary would work in-house or on a project for a particular client. The record does not contain evidence of the actual duties comprising the beneficiary's services for the petitioner or an end user client or clients. Thus CIS is unable to determine whether the proffered position incorporates 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 AAO notes that the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) lists 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. The AAO acknowledges that the *Handbook* reports: [t]raining requirements for computer systems analysts vary depending on the job, but many employers prefer applicants who have a bachelor's degree." However,

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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."

employer preference is not synonymous with the "normally required" language of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*). The petitioner in this matter has failed to provide a definitive description of the duties the beneficiary would perform for the ultimate end user of the beneficiary's services. The record does not provide sufficient information to determine whether the proposed position would include duties that required a bachelor's degree in a specific discipline or would require only a general degree, an associate's degree, or certification and experience. As the record does not contain documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner or the petitioner's clients or the petitioner's clients' clients for the duration of the H-1B classification, the AAO is unable to analyze whether the duties of the proposed position 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)(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*).

In that the record does not offer a comprehensive description of the duties the beneficiary would perform for the petitioner or 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 has not established the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguished the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a detailed listing of the duties the beneficiary would perform under a contract existing when the petition was filed, the petitioner has not established that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither has the petitioner satisfied 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. For this additional reason, the petition may not be approved.

The petitioner has also failed to establish that the submitted certified LCA is valid for all work locations. The AAO acknowledges that the petitioner has a contract with a company located in Schaumburg, Illinois, but the petitioner has not identified the beneficiary as the individual who would provide services to the client located in Schaumburg, Illinois. As the petitioner has contracts with multiple companies in various locations demonstrating that it is an employment contractor, the petitioner must provide an itinerary detailing the actual names and addresses of the actual end-users of the beneficiary's services and the time period the beneficiary would be working for various end-users. As the record does not contain an itinerary of employment, as required when the petitioner is an employment contractor, it cannot be determined that the LCA is valid for all the locations of employment. For this additional reason, the petition may not be approved.

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. As always, 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.