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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[redacted]

FILE: WAC 07 148 50931 Office: CALIFORNIA SERVICE CENTER Date: SEP 2 9 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.

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 information technology solutions. It claims to employ 151 personnel and to have $7,144,000 in gross annual income when the petition was filed.[1] It seeks to employ the beneficiary as a hardware engineer. 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 September 6, 2007, the director denied the petition. On appeal, the petitioner submits the Form I-290B, Notice of Appeal or Motion and indicates a brief and/or additional evidence will be submitted to the AAO in 30 days.

The record includes: (1) the Form I-129 filed April 2, 2007 and supporting documents; (2) the director's May 24, 2007 request for further evidence (RFE); (3) counsel for the petitioner's August 16, 2007 response to the director's RFE and supporting documentation; (4) the director's September 6, 2007 denial decision; and (5) the Form I-290B, and counsel's statement on the Form I-290B 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

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[1] Also on April 2, 2007, the petitioner submitted a separate petition (WAC 07 148 51154) for a different beneficiary and used as its office address, an address in Santa Clara, California. In the separate petition, the petitioner claimed to employ over 125 personnel and to have $13.1 million in gross annual income when the petition was filed. Counsel's assertion on appeal that the petitioner has properly filed all income, payroll and withholding tax returns in all states, does not address the inherent misrepresentations to Citizenship and Immigration Services regarding the petitioner's number of employees and gross annual income as both petitions were filed on the same day.

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 26, 2007 letter appended to the petition, the petitioner stated that the petitioner sought to employ the beneficiary in the position of "Hardware Engineer." The petitioner provided a lengthy description of a project or projects and stated that the beneficiary would perform duties 60 percent of the time at the corporate headquarters located in Urbandale, Iowa and would perform duties 40 percent of the time at the petitioner's operational research and development center located in Santa Clara, California. The petitioner provided the following job description for the position of hardware engineer:

To do Hardware and Verification Engineering in PC installation and troubleshooting issues, debug, and verify, VHDL based RTL design methodology and FPGA design. Good

> understanding of the principles of IC design, microprocessor based design and high-speed serial I/O interfaces.
>
> Responsible for developing verification environment for block level and chip level verification using Verilog, writing the test plan and implement the test cases, debugging Verilog RTL design using the simulator model ModelSIM.
>
> Should be able to automate the verification process by writing scripts using perl and C language. Must be familiar with the FPGA/ASIC methodology and digital design techniques.

The record also includes two Forms ETA 9035E, Labor Condition Application, (LCA). The first LCA lists a work location for a hardware engineer in Santa Clara, California and the second LCA submitted in response to the director's RFE lists a work location for a hardware engineer in Urbandale, Iowa.

On May 24, 2007, the director requested, among other items: evidence establishing that a specialty occupation existed for the beneficiary; clarification of the petitioner's employer-employee relationship with the beneficiary; a complete itinerary that specified 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 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 detailed description of the duties the beneficiary would perform, and a brief description of who will supervise the beneficiary.

In an August 16, 2007 response, counsel for the petitioner provided a description of "in-house product development" projects for an unrelated company identified as "ESI." Counsel also stated: "[a]s Software Engineer with [the petitioner], the beneficiary will be responsible for custom program development and implementation, system analysis, design, testing and coding. Additionally, he will provide software as per the needs of the client." Counsel also noted the itinerary for the work to be done by the Beneficiary is as follows:

> The present beneficiary has been working on a project for Sprint at Santa Clara, CA. He will be working there by virtue of the contract between [the petitioner] and Jaust Consulting Partners LLC. The current PO is valid from November 5th, 2007 for a period of 30 months and is extendable beyond that after review of the project. Based on current work at the client site, the Beneficiary is likely to work there till the end of his H-1B tenure.

Counsel noted further: "Even though the Beneficiary is working at the client site, the beneficiary will work on project [sic] that are assigned to him and approved by [the petitioner]. Counsel added a detailed description of the beneficiary's proposed job duties and noted that the beneficiary would work at the petitioner's office site for the end user client, and if the beneficiary's services were not required for the "said project," before the termination of the H-1B classification, the petitioner would absorb the beneficiary's services in other "ongoing software application development projects as stated above." Counsel does not explain or clarify the change in position title from hardware engineer to that of software engineer and does not explain the statement "[t]he

beneficiary has been working on a project for Sprint at Santa Clara, CA."[2] Counsel also cited a December 29, 1995 memorandum signed by Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, that clarified legacy Immigration and Naturalization Service's regulations regarding the requirement of itineraries, and an unpublished decision from the AAO.

Although counsel referenced previous job vacancy announcements for the petitioner included as an exhibit to the response, the record does not contain any job vacancy announcements.

The petitioner also submitted the first and last page of a service provider agreement between the petitioner and JAUST Consulting Partners, LLC, a company located in San Jose, California, dated July 12, 2006. The contract noted that JAUST Consulting Partners, LLC was engaged in the business of providing computer consulting services to its customers. Attached to the agreement is a copy of a purchase order dated July 12, 2006 identifying the contractor as the beneficiary, the client name as Sprint, the start date as November 5, 2007, the duration as 30 months, to be extended upon client's request, and the scope of services as: "[c]onsultant will perform work as a Seibel Consultant and will perform all duties assigned to him by client." The purchase order does not include a further description of the beneficiary's proposed duties.

On September 6, 2007, the director denied the petition. The director noted that the petitioner, Pacific West Corporation, is actually Reddy & Reddy Inc. doing business as Pacific West Corporation. The director questioned the credibility of the petitioner's Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation that included a handwritten note adding the petitioner's "consulting svcs" to the petitioner's stated business of "rental." The director also noted inconsistencies in the petitioner's and Reddy & Reddy's payroll journals, the employees reported on the California Form EDD DE-6, Employer's Quarterly Wage and Withholding Report for the first quarter of 2007, and the IRS Form 941, Employer's Quarterly Federal Tax Return for the same quarter.[3] The director found that the petitioner had not clarified these discrepancies. The director also determined that the petitioner had not submitted a valid LCA, as the first LCA covered work only at Santa Clara, California. The director did not note the second LCA submitted in response to the director's RFE for a work location in Urbandale, Iowa. The director also found that the petitioner's service provider agreement with JAUST Consulting Partners, LLC indicated that JAUST Consulting Partners, LLC provided computer consulting services to clients and that the beneficiary would work directly for Sprint, according to the purchase order. The director noted that Sprint headquarters is located in Dallas, Texas and that the LCA did not include this work location.

On appeal, counsel for the petitioner asserts that the petitioner has properly filed all income, payroll and withholding tax returns in all states. Counsel also acknowledges that Reddy & Reddy has business interests that are not computer consulting related. Counsel avers that the RFE response clearly stated that the present beneficiary will be working on a project for end client Sprint by virtue of the contract between the petitioner

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[2] The petition is for new employment and the petitioner does not indicate or otherwise substantiate that the beneficiary is currently in valid nonimmigrant status and eligible to work in the United States.

[3] The AAO observes that the claims made to CIS on the different petitions submitted regarding the petitioner's number of employees and gross annual income when the petition was filed adds to the confusion regarding the petitioner and its actual business.

and "Stratitude Inc." and that the beneficiary would work at the "client site." Counsel contends that the petitioner did not indicate that the beneficiary would work at the end client offices in Dallas, Texas. Counsel notes that a brief and new supporting documents would be sent within the time requested. The record does not contain a brief or additional documentation. The AAO considers the record complete and makes its decision on the record of proceeding currently before it.

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.[4] *See* 8 C.F.R. § 214.2(h)(4)(ii). The AAO finds that 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. Based on the inconsistencies in the record of proceeding regarding the proposed position, the disparate duties described for the proposed position, and the general references to different projects, the AAO is unable to determine the scope of the proposed position or the project or projects underway at the petitioner's offices or at other locations to which the beneficiary would be assigned. The petitioner initially provided an overview of the duties of a "hardware engineer" but did not directly tie the performance of those duties to any specific project. In addition, the petitioner, through its counsel's response to the RFE, provided a description of "in-house product development" projects for an unrelated company identified as "ESI." The petitioner's counsel also revised the title of the proffered position to that of a "Software Engineer" and provided a general statement regarding the beneficiary's duties as a software engineer. Counsel further indicated that the beneficiary was currently working on an undefined project for Sprint in Santa Clara, California "by virtue of the contract between [the petitioner] and Jaust Consulting Partners LLC." As footnoted above, the record does not contain evidence that the beneficiary was in valid nonimmigrant status when the petition was filed. On appeal, counsel indicates that the beneficiary will be working on a project for end client Sprint by virtue of the contract between the petitioner and "Stratitude Inc." and that the beneficiary would work at the "client site." The petitioner does not identify the client site. It is not possible to conclude from the variety of information in the record regarding the proposed position where the beneficiary will work and what duties the beneficiary will actually perform. The petitioner has not established that it had a definite and credible position to offer the beneficiary when the petition was filed.

The indefinite nature of the proffered position and the reference to different work locations, including locations at client sites, does not establish that the two submitted certified LCAs are valid for all work locations. The petitioner, through counsel, has indicated that the beneficiary will work in the two locations specified on the LCA, but in response to the RFE and on appeal indicates that the beneficiary would work for JAUST Solutions Inc. and Stratitude Inc., as end user clients but without adequately and consistently defining the work location. The record does not include evidence of these client sites. The possible locations of the beneficiary's employment and the projects for different companies to which the beneficiary would be assigned confirm that the petitioner seeks to hire the beneficiary for speculative possible employment in an undefined computer-related position.[5] The record does not present consistent information regarding the beneficiary's

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[4] *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).

[5] As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this

actual work location, job title, or the nature of the work or projects. 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). As the record does not contain an itinerary of employment, as required in this instance it cannot be determined that the LCA is valid for all the locations of actual employment. For this reason, the director's decision will be affirmed.

Beyond the decision of the director, the AAO finds that although the petitioner would be the beneficiary's employer, the record establishes that the petitioner is an employment contractor. When a petitioner 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. In such an instance, 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. While the Aytes memorandum cited at footnote 4 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. The petitioner in this matter, through counsel, alluded to possible work locations at the petitioner's offices, at the offices of a third party client, and on appeal at a different third party client's client. The speculative and indefinite employment for the beneficiary not only fails as an itinerary, it reinforces the need for one. As the petitioner has not submitted an itinerary, the petition may not be approved.

In addition, although the petitioner will be the beneficiary's actual employer, it is also an employment contractor and the record does not contain a detailed description of the beneficiary's actual daily duties for the ultimate end user of the beneficiary's services. As noted above, the petitioner provided a broad statement of the beneficiary's potential duties. Moreover, the record does not include a detailed description of the services the beneficiary would perform for Sprint or for JAUST Consulting Partners LLC or Stratitude Inc. 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 of the actual duties comprising the beneficiary's services for the 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.

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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."

As the record does not contain documentation that establishes the specific duties the beneficiary would perform under contract for 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*). 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 AAO observes that the beneficiary's start date for employment, even if considering the purchase order for services between the petitioner and JAUST Consulting Partners LLC, is November 5, 2007, more than six months after the petition was filed on April 2, 2007. The regulation at 8 C.F.R. § 214.2(h)(9)(i)(B) indicates that a petition may not be filed or approved earlier than six months before the date of actual need for the beneficiary's services or training. The petitioner failed to comply with this regulation. For this additional reason, the petition will 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. 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.