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U.S. Citizenship
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Services

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[redacted]

FILE: WAC 07 145 51512 Office: CALIFORNIA SERVICE CENTER Date: SEP 30 2008

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:

[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.

for Michael T. Kelly
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 designs and develops software products, provides consulting services and information technology solutions. It employs two personnel and claims to have had $1.2 million in gross annual income when the petition was filed. It seeks to employ the beneficiary as a systems 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 24, 2007, the director denied the petition. 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 7, 2007 request for further evidence (RFE); (3) counsel for the petitioner's July 25, 2007 response to the director's RFE and supporting documentation; (4) the director's August 24, 2007 denial decision; and (5) the Form I-290B, counsel's brief, and 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 an undated letter appended to the petition, the petitioner stated that it required "the services of a System Analyst who at least has a bachelor's degree in science or equivalency and can satisfactorily perform the following duties:"

> Gather detail user and system requirements; Provide consultation and guidance to on-site client team; Provide ownership and support of plug-ins, Wizards, Menus code generators and Development Environment tools to the on-site Development teams. Requires on-site consultation with the client team for some period of time to gather detail requirements.

The record also includes a Form ETA 9035E, Labor Condition Application, (LCA) listing a work location for a "system analyst" in Bloomington, Illinois. The record further includes copies of contracts between the petitioner and third parties located in Chicago, Illinois and Houston, Texas.

On May 7, 2007, the director requested, among other items: clarification of the petitioner's employer-employee relationship with the beneficiary; evidence establishing that a specialty occupation existed and that the beneficiary's work would be under the control of the petitioner; if the petitioner is an agent, an itinerary of definite employment; contractual agreements, statements of work, work orders, service

agreements, or 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; and 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 that the temporary employment is requested.

In a July 25, 2007 response, counsel for the petitioner noted that the petitioner is the beneficiary's employer and is not acting as an agent. Counsel indicated that the petitioner has different projects with different vendors and needs a systems analyst to do "significant job" at our client sites and at the petitioner's office. Counsel stated that the beneficiary would be working for the petitioner at a client's site in Bloomington, Illinois and that once the project was over would work at the petitioner's office in Naperville, Illinois. Counsel submitted a letter agreement between the petitioner and Global Source IT dated January 1, 2007 and a Global Source IT's statement of work identifying the beneficiary as the consultant; the client as State Farm Insurance, indicating the site address had been sent separately; the start date as January 2, in an indecipherable year; and the duration of the work as one year. Counsel also submitted an affidavit signed by the petitioner's chief operating officer on July, 18, 2007, which provided the same position description as initially provided. Counsel noted that the petitioner currently employed another individual in H-1B status to show that the petitioner had met the requirements and conditions of employment imposed by CIS.

On August 24, 2007, the director denied the petition. The director determined: that the petitioner had not provided evidence establishing that it was an employer or agent; that the petitioner had not provided contracts or other evidence from the end-user of the beneficiary's services and thus had not established the proffered position as a specialty occupation; and that without contracts and statements of work, CIS was unable to determine that the Form ETA 9035E, Labor Condition Application (LCA) was valid for all work locations.

On appeal, counsel for the petitioner asserts that the petitioner is the beneficiary's employer. Counsel indicated that the petitioner was unable to provide a contract between its client, Global Source IT and the ultimate end-user of the beneficiary's services, State Farm Insurance, due to confidentiality and proprietary reasons. Counsel submitted a September 20, 2007 letter signed by a representative of Global Source IT confirming that it had entered into a contract with State Farm Insurance on January 29, 2007 for the services of a systems analyst and had entered into a contract on January 7, 2007 with the petitioner for the petitioner to provide their employee to perform the systems analyst work at State Farm Insurance in Bloomington, Illinois.

Counsel contends that the proffered position is a specialty occupation position and that the petitioner had described the position and the job duties consistent with the definition of a systems analyst found in the Department of Labor's *Occupational Outlook Handbook* (*Handbook*), the Department of Labor's *Dictionary of Occupational Titles* (*DOT*), and the Department of Labor's *Online Service O*NET* (*O*NET*). Counsel also cites *Young China Daily v. Chappell*, 742 F. Supp 552 (N.D. Cal. 1989), for the proposition that CIS is not allowed to solicit "irrelevant factors" such as contracts and other items and to do so renders the decision arbitrary. Counsel further asserts that the LCA submitted shows the beneficiary's actual place of work, Bloomington, Illinois and thus is valid.

The AAO disagrees with the director's finding that the petitioner would not 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). In view of this evidence, the AAO finds that the petitioner will be the employer of the beneficiary and withdraws the director's decision to the contrary. The petition may not be approved, however, as the record does not establish: that the beneficiary will be employed in a specialty occupation; that the employer has submitted an itinerary of employment; and that the LCA is valid for all work locations.

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.

In this matter, the petitioner has identified the proffered position as a systems analyst and has provided a broad overview of the duties of the position; however, it is the description of the specific duties as those duties relate to the petitioner's interests or those of the petitioner's client or client's client that enable CIS to analyze whether the position is a specialty occupation. The AAO notes that the Department of Labor's *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 general nature of the petitioner's description of the proffered position and the lack of a description of the particular duties associated with the petitioner's client's client project precludes the AAO from determining that the duties of the actual position comprise the duties of a systems analyst or any computer-related position that would require a bachelor's or higher degree in a specific discipline.

In response to the RFE, counsel confirmed that the petitioner had different projects with different vendors and that the petitioner's "systems analyst" would work at client sites as well as at the petitioner's office. This statement and the contracts in the record with third parties demonstrate that the petitioner in this matter is an employment contractor. 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 only description of the beneficiary's duties is the generic description provided by the petitioner. CIS is unable to determine from this general description whether the proffered position actually incorporates

[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).

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.

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*).

The AAO acknowledges counsel's reference to the *Handbook*, the *DOT* and *O*NET*[2] and the fact that the petitioner's description of its systems analyst is consistent with these sources. However, the petitioner cannot repeat portions of the generalized descriptions found in the *Handbook* to establish that a position is a specialized occupation. Such a generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. When establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests or the business interests of its client or client's client. In the instant matter, the petitioner has offered no description of the duties of its proffered position beyond the generalized outline it provided at the time of filing. It has not detailed the actual work to be performed for this position rather than describing the occupation. It cannot, therefore, establish that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the proffered 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 proffered position is a specialty occupation within the meaning of the regulations. For this reason, the petition may not be approved.

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[2] The AAO notes counsel's reference to *DOT* and the *O*NET* and the information contained therein regarding a systems analyst. However, the AAO does not consider either the *DOT* or the *O*NET* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. These source materials provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP rating, for example, is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Again, the petitioner has not provided a detailed description of the actual work the beneficiary would perform for the petitioner's client's client and thus has not established that the proffered position is a specialty occupation.

The AAO acknowledges counsel's citation to *Young China Daily v. Chappell*; however, the AAO finds that when the petitioner is an employment contractor, the petitioner must provide a description of the beneficiary's duties for the ultimate end-user, as discussed by the court in *Defensor v. Meissner*. Thus, the request for and failure to provide contracts and statements of work for the duration of the beneficiary's requested H-1B classification are not irrelevant factors in a decision that concludes that the actual position of the beneficiary as determined by the actual work requirements of the ultimate end-user has not been defined.

In addition, although the petitioner will be the beneficiary's actual employer, it is an employment contractor and as such 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. The AAO observes that the statement of work identifying the beneficiary as the consultant is for one year. As the record does not contain an itinerary of employment, as required in this instance, it cannot be determined that the submitted LCA is valid for all the locations of employment. For this additional reason, the petition may not be approved.

Beyond the decision of the director and as referenced above, the petitioner is an employment contractor that places the beneficiary at different work locations to perform services according to various agreements with third-party companies. In such an instance, as referenced above and 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 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. As the petitioner has not submitted an itinerary, the petition may not be approved.

Also beyond the decision of the director, the petitioner has submitted an evaluation of the beneficiary's foreign degree as equivalent to a bachelor's degree in economics from a regionally accredited university in the United States. The petitioner has also submitted an evaluation of the beneficiary's work experience in computer-related positions to establish that the beneficiary has sufficient education and experience in a discipline that is directly related to the duties of the proffered position. However, when attempting to establish that a beneficiary has the equivalent of a degree based on his or her combined education and employment experience under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*), a petitioner may not rely on a credentials evaluation service to evaluate a beneficiary's work experience. A credentials evaluation service may evaluate only a beneficiary's educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*). To establish an academic equivalency for a beneficiary's work experience, a petitioner must submit an evaluation of such experience from an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*). The evaluator in this matter does not substantiate by independent evidence that he has authority to grant college-level credit, such as a letter from a dean or provost verifying the evaluator's authority. Moreover, the record does not contain evidence that the university that employs the evaluator has a program for granting college-level credit based on an individual's training or work experience in the specialty. Further, the record does not contain the foreign employers' descriptions of the duties the beneficiary performed or the educational level of the beneficiary's peers, supervisors, or subordinates. Thus, the record is insufficient to demonstrate that the beneficiary holds the equivalent of a baccalaureate degree in a field directly related to the proffered position. For this additional reason, the petition will be denied.

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.