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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: WAC 07 147 50812 Office: CALIFORNIA SERVICE CENTER Date: SEP 30 200

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.

Michael T. Kelly

for 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). The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner provides information technology services. It seeks to employ the beneficiary as a systems analyst. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 13, 2007, the director denied the petition, determining that the petitioner failed to establish that it qualified as a United States employer or agent.

The record includes: (1) the Form I-129 filed April 2, 2007 and supporting documents; (2) the director's June 14, 2007 request for further evidence (RFE); (3) the petitioner's August 15, 2007 response to the director's RFE; (4) the director's September 13, 2007 denial decision; and (5) the Form I-290B, Notice of Appeal or Motion, counsel's brief, and documents in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

Upon review, the AAO finds that the director erred when determining 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 petition does not establish that the beneficiary would be employed in a specialty occupation.

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 work locations other than its home office to perform services according to various agreements with third-party companies.[2] 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. As the evidence contained in the record at the time the petition was filed did not establish where the beneficiary would perform the duties of the proffered position, the director properly exercised her discretion to require an itinerary of employment.[3] Although the petitioner provided an itinerary indicating that the beneficiary would perform work at a third party company for three years in a

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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).

[2] The record includes contracts between the petitioner and third party companies located in Illinois, California, and Ohio.

[3] 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."

specific location, the itinerary listed generic duties associated with an unidentified project.[4] As recognized by 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 the present petition, the business entity for which and at whose site the beneficiary would directly work has not provided evidence delineating the specific components of the work that the beneficiary would perform for it. Such evidence must be sufficiently detailed and explained as to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. In the absence of such substantive evidence from the end user entity, whose business needs directly determine what the beneficiary would actually do on a day-to-day basis, the AAO 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. Accordingly, the petitioner has not established that the proffered position is 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)(ii)(*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. As the director did not deny the petition for this reason, the petitioner has not had opportunity to address this deficiency on appeal. Thus, the petition will be remanded and the director shall render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's September 13, 2007 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.

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[4] The petitioner provided a broad overview of the beneficiary's duties as a systems analyst, both in its letter in support of the petition and in its letter in response to the director's RFE. However, broad descriptions that may or may not incorporate the theoretical and practical application of a body of highly specialized knowledge, associated with the attainment of a baccalaureate or higher degree are insufficient to establish the proffered position as a specialty occupation. Moreover, as determined above, the petitioner has not provided a description of the specific duties necessary to perform the services for the end user client.