U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 01 2010

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The acting 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 describes itself as an information technology consulting and services firm. To employ the beneficiary as a programmer analyst, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation 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).

The acting director denied the petition because he determined (1) that the petitioner had not provided evidence sufficient to satisfy a Request for Evidence (RFE) pertinent to whether the petitioner is or is not an H-1B dependent firm within the meaning of 20 C.F.R. § 655.736, and had not, therefore, demonstrated that the certified Labor Condition Application (LCA) in the record, in which the petitioner stated that it is not H-1B dependent, was properly filed and is valid; and (2) that the petitioner failed to demonstrate that the certified LCA corresponds to the job offered to the beneficiary. More specifically, as to the applicability of the LCA, the acting director found that the petitioner had not demonstrated that the location for which the LCA was certified is the location at which the beneficiary would be employed. On appeal, counsel contended that the acting director's decision to deny the petition does not accord with the evidence of record and, therefore, should be overturned.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's RFE; (3) the response to the RFE; (4) the acting director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

The AAO will first address the issue of whether the petitioner is an H-1B dependent employer. The regulation at 20 C.F.R. § 655.736 provides, in pertinent part, "H-1B-dependent employer," . . . means an employer that has 25 or fewer . . . employees . . and [e]mploys more than seven H-1B nonimmigrants . . . ."

On the LCA the petitioner stated that it was not H-1B dependent. On the Form I-129 petition, which the petitioner submitted on April 1, 2008, the petitioner stated that it then had four employees. The LCA states that the work will be performed in Irving, Texas.

In a request for evidence (RFE) dated May 30, 2008, the service center requested that the petitioner provide a list of all its employees, with their names, a social security number or Alien Number, and their current immigration statuses along with proof of their statuses. The service center also requested copies of the petitioner's quarterly returns.

The petitioner submitted an organizational chart showing four employees identified by name and position. It also lists six programmer analyst positions and three senior software engineer positions with no associated names or other identifying information. The identified employees and positions

are [redacted] project lead, [redacted] consultant-programmer analyst.

The petitioner also submitted what purports to be a list of its employees, with birth dates, job titles, employment commencement dates, the states in which they are employed, and their social security numbers. The six employees identified on that list are [redacted] project lead; [redacted] programmer analyst; [redacted] senior software engineer; Senthil Balasubramanian, programmer analyst; [redacted] design engineer; and [redacted] programmer analyst. The list also notes that all six of those employees are in H-1B status.

The AAO observes that the petitioner's list of employees is not readily reconcilable with the petitioner's organizational chart. The AAO further observes that the petitioner did not provide the current immigration statuses of [redacted] notwithstanding that the RFE required it to reveal the status of each of its employees. Further, whether, as the evidence suggests, the petitioner employs two additional senior software engineers and three additional programmer analysts, all of whom are unidentified and whose immigration statuses are unknown to the AAO, is unclear.

In the decision of denial, the acting director noted that the immigration status of some of the petitioner's employees was not provided, as required by the May 30, 2008 RFE, and found that the petitioner had not, therefore, provided evidence sufficient to show that it is not H-1B dependent. The acting director further found, therefore, that the certified LCA in this case was not properly filed.

On appeal, counsel stated that the petitioner has eleven employees and that only six are in H-1B status. Counsel noted that, pursuant to 20 C.F.R. § 655.736, an employer that employs 25 or fewer employees is not deemed to be H-1B dependent unless it employs eight or more people in H-1B status. Counsel did not, however, provide any evidence of the immigration status of the petitioner's remaining employees.

The petitioner has not provided evidence sufficient to show that it is not H-1B dependent. It has not, therefore, demonstrated that the LCA with which it is attempting to support the visa petition was properly filed and is valid. The acting director correctly denied the petition on that basis. As that ground has not been overcome on appeal, the appeal will be dismissed and the petition will remain denied on that same basis.

The remaining issue identified by the director is whether the LCA is invalid for having incorrectly identified the location where the beneficiary would work.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) states:

> Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a

> labor condition application in the occupational specialty in which the alien(s) will be employed.

While the Department of Labor (DOL) is the agency that certifies LCAs before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of a LCA filed for a particular Form I-129 visa petition actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification. . . .

[Italics added]

With the Form I-129 petition the petitioner provided various contracts and work orders, purporting to show that the petitioner provides computer personnel to end-users, often through intermediaries. An appendix to one of the contracts specifies that one of the petitioner's employees would work in New Jersey. Further, a work order states, "[The petitioner] and the client will discuss the hours and location where the work is to be performed . . . ." Further still, although the employee list the petitioner provided indicates that three of the petitioner's employees work in unidentified locations in Texas, it also indicates that the other three work in California, Indiana, and Pennsylvania. Those documents demonstrate that the petitioner has in the past provided employees for projects outside of the area for which the instant LCA is valid.

A subcontract agreement indicates that the petitioner agreed to provide software engineers to TechStar Consulting, Inc., of Irving Texas, so that those software engineers could be employed "at TSCI or its client's facilities." The agreement further specifies that TSCI would specify the place of employment in a purchase order.

The petitioner also provided a letter from Technocepts of Irving, Texas stating that it would engage the beneficiary's services as a programmer analyst for 24 months in Irving, Texas.

However, the petitioner provided a work order that states that Apertus, Inc. of San Mateo, California, a client of the petitioner to whom it provides its employees, specifically agreed to provide the beneficiary to Vendor Technospects LLC, of Irving, Texas. That work order further states:

> **Location at which the services to be performed:**
> Dallas, TX
> San Mateo, CA

On appeal, counsel stated, "The work order from Apertus, Inc. does not shows that the work locations to be in Dallas, Texas and San Mateo, California." [Errors in the original.] Counsel further stated, "The work order shows the work location to be in Dallas, Texas."

The AAO is unable, absent competent objective evidence, to interpret the work order's specification of the work location as does counsel. The petitioner must resolve 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).

That work order appears to the AAO to clearly state that the beneficiary would be employed at both Dallas, Texas and San Mateo, California. The instant LCA is not valid for employment in California, and cannot be used to support the instant visa petition because of the location of the proposed employment. Consequently, the acting director's dismissal of the petition on that basis is correct. That basis for denial has not been overcome on appeal and the appeal will also be dismissed on this additional, independent basis.

Finally, beyond the decision of the director, the petitioner has failed to establish that the proffered position of programmer analyst is a specialty occupation. To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the Department of Labor's *Occupational Outlook Handbook* (*Handbook*). Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the alien will likely perform for the entity or entities ultimately determining the work's content.

As discussed above, the evidence of record indicates that the beneficiary will perform work at other locations for another entity or possibly for multiple other entities. In this respect, the AAO notes that as recognized by the court in *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000), where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. 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. *Id.* 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. The record of proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any

criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. For this additional reason, the petition must be denied.

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.