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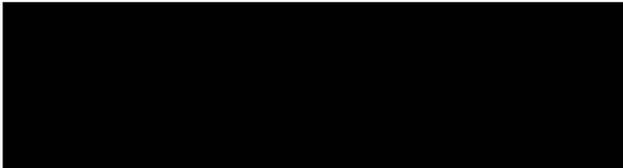
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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FILE: WAC 07 145 52519 Office: CALIFORNIA SERVICE CENTER Date: **AUG 15 2008**

IN RE: Petitioner: [Redacted]  
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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 software development and consulting services. It states that it has one employee and that it had gross annual revenue of \$750,000 when the petition was filed. It seeks to employ the beneficiary as a network administrator. 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).

The record includes: (1) the Form I-129 filed April 2, 2007 and supporting documents; (2) the director's May 22, 2007 request for further evidence (RFE); (3) the petitioner's August 10, 2007 response to the director's RFE; (4) the director's September 12, 2007 denial decision; and (5) the Form I-290B and counsel's brief and documents submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On September 12, 2007, the director denied the petition. The director found that the petitioner had not properly responded to the director's RFE; specifically finding that the petitioner had not submitted the Internal Revenue Service (IRS) Forms that had been requested, the beneficiary's proposed work itinerary, and clarification regarding discrepancies between the petitioner's listed gross income, the petitioner's 2005 IRS Form 1120, and state quarterly wage reports. The director also observed that the two addresses in the record listed as the petitioner's address are addresses for private residences and that the petitioner has not provided evidence that the residences are zoned for business or that the petitioner is authorized to conduct business at these locations. The director concluded that the record lacks a reliable evidentiary basis to determine that the petitioner's proffer of employment is authentic and that the petition should be denied pursuant to 8 C.F.R. § 103.2(b)(14) for failure to provide a complete response to the RFE.

On appeal, counsel for the petitioner submits a brief and additional documentation.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), 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 29, 2007 letter appended to the petition, the petitioner stated that it was requesting the beneficiary's classification to serve as a programmer analyst. In the same letter, the petitioner indicates that as a network administrator, the beneficiary would be responsible for:

The Install, configure and support Networks, Maintaining Software and Hardware and Monitor networks to ensure network availability to all system users and perform necessary maintenance. Further, [REDACTED] [not the beneficiary in this matter] will apply his knowledge of Networking and programming techniques to evaluate user requirements, procedures, and

problems to automate processing or to improve existing computer networks for our customers. He will confer with technical and management personnel of our customers to analyze current operational procedures, identify problems, and learn specific requirements.

The petitioner also provided a more elaborate position description and noted that the duties described are "some things, which are generally done by software professionals like [the beneficiary]." The Form I-129 and the Form 9035E, Labor Condition Application (LCA) identify the proffered position as a network administrator position. The LCA submitted with the petition certified the work location as Fremont, California.

On May 22, 2007, among other items, the director requested an itinerary of work locations where the beneficiary would be assigned. The petitioner did not provide the requested itinerary in its response to the director's RFE.

On appeal, counsel for the petitioner submits an employment agreement between the petitioner and the beneficiary stating that the beneficiary will commence work on October 1, 2007, and provides a general description of the beneficiary's proposed duties as a network administrator. The employment agreement indicates that the beneficiary's first project will be for WebAreas LLC, one of the petitioner's clients, and that the beneficiary will work at the client job site located in Ohio which will be both onsite and offsite. The petitioner also provides a March 5, 2007 subcontractor agreement between itself and SourceOne Technology Solutions, Inc. (SourceOne) with offices in Cincinnati, Ohio. A work order, dated March 12, 2007, attached to the SourceOne agreement identifies the beneficiary as the consultant, lists the start date as October 2007 for 24 months, and identifies the work location as WebAreas LLC, Wellington, Ohio. The petitioner also submits a March 2, 2007 subcontractor agreement between SourceOne and Web Areas LLC with a statement of work attached. The March 2, 2007 statement of work identifies the beneficiary as the consultant and indicates as the description of services: "Network Administrator." The statement of work notes: "the following personnel of Consultant [the beneficiary] who will work on this project have been informed and understand their obligations under the Statement of Work and the Master Agreement." Neither the master contract between the petitioner and SourceOne nor the contract between SourceOne and Web Areas LLC provide a detailed description of the proffered position's duties. Counsel asserts that the petitioner has offered an existing and *bona fide* position to the beneficiary as a network administrator as evidenced by the above described contracts and statements of work and work orders, that the petitioner is authorized to conduct business from the personal residence, and that the petitioner is a company incorporated in the State of California.

The AAO finds that the petitioner will be the beneficiary's employer. However, the petition may not be approved, as the petition does not establish that the beneficiary will be employed in a specialty occupation, that the LCA submitted is valid for all work locations, or that the employer has submitted an itinerary of employment.

The record shows that the beneficiary will perform duties in Wellington, Ohio. The petitioner has not clearly established that its headquarters location in Fremont, California is suitable or zoned to employ personnel in the private residence, thus there is no evidence the beneficiary would be allowed to work at the petitioner's personal residence headquarters. The AAO finds that placing the beneficiary at various work locations to

perform services established by contractual agreements for third-party companies requires the submission of an itinerary.<sup>1</sup> While the Aytes memorandum cited at footnote 1 below 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 regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) requires employers to submit an itinerary with the dates and locations of employment in situations where the employment will occur in more than one location.** As the evidence contained in the record at the time the petition was filed provided only a general description of the beneficiary's proposed duties and the nature of the petitioner's business suggested that the petitioner was an employment contractor, the director properly exercised her discretion to require an itinerary of employment.<sup>2</sup> The petitioner has failed to provide an itinerary. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not provided an LCA that is valid for all work locations. The LCA is valid for services performed in Fremont, California. The record does not include evidence that the beneficiary would be allowed to work in a personal residence, not zoned for commercial use. In addition, the petitioner provides information on appeal that the beneficiary will work in Wellington, Ohio. The LCA submitted is not valid for this employment. For this additional reason, the petition may not be approved.

Moreover, 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 (5<sup>th</sup> 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.

The petitioner in this matter presented a general description of the proposed duties the beneficiary would perform and noted that the description includes "some things, which are generally done by software professionals like [the beneficiary]." The descriptions provided, including the elaboration of duties, does not provide the details necessary to enable CIS to determine that the petitioner or the projects for the third party companies requires the theoretical and practical application of specialized knowledge attained through a four-year course of study in a specific discipline. The Department of Labor's *Occupational Outlook Handbook (Handbook)* indicates there are 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. Without a detailed job description from the entity that requires the alien's

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<sup>1</sup> 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).

<sup>2</sup> 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."

services, whether the entity is the petitioner or a third party client, the petitioner has not provided evidence sufficient to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Accordingly, the petitioner has not established that the proffered position qualifies for classification as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(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). 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. 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.