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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 07 143 50389 Office: CALIFORNIA SERVICE CENTER Date: DEC 0 8 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:

SELF-REPRESENTED

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).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The director of the service center 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 is a software development and consulting provider that seeks to employ the beneficiary as a systems analyst. The petitioner, therefore, 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 director denied the petition, determining that the petitioner had not established that it qualifies as a U.S. employer or agent, that its labor condition application (LCA) is valid, that the proffered position is a specialty occupation, that the petitioner has sufficient work for the requested period of intended employment, or that the petitioner would comply with the terms and conditions of employment.

Regarding the director's determination that the evidence of record is insufficient to show that the petitioner would comply with the terms and conditions of employment due to its filing of an extraordinarily high number of petitions in relation to the number of its employees claimed on the petition, the AAO finds that the director erred when referencing evidence not in the record of proceeding. The AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Furthermore, 8 C.F.R. § 103.2(b)(16)(i) requires the director to advise the petitioner "if a decision will be adverse to the . . . petitioner and is based on derogatory information considered by the Service and of which the . . . petitioner is unaware," and give the petitioner "an opportunity to rebut the information in his/her own behalf before the decision is rendered." The director's reference, although not a basis of denial in this matter, will be withdrawn.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with the petitioner's brief and documentation in support of the appeal. The AAO reviewed the record in its entirety before reaching 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;
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> *(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 April 5, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered systems analyst position as follows:

> The position of Computer Systems Analyst requires the incumbent to analyze a client's IT situation and hardware infrastructure. The employee will then develop a customized solution based on the client's needs, budget and time frame. The Computer Systems Analyst is expected to initiate, implement and troubleshoot applications in order to deliver efficient and effective

> technology based solution[s]. In this position, the Systems Analyst will employ a combination of techniques including structured analysis, data modeling, information engineering, mathematical model building, sampling and cost accounting to plan System Programming procedures to resolve IT problems. In order to successfully perform this array of tasks, the employee must have at least a Degree in a related field.

The record also includes a certified labor condition application (LCA) submitted at the time of filing, listing the beneficiary's work location in Sacramento, California as a systems analyst.

In an RFE, the director requested additional information from the petitioner, including an itinerary and copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or service agreements for the beneficiary. The director also requested the petitioner's 2006 federal income tax return.

In response to the RFE, the petitioner stated that the petitioner was the employing entity for the beneficiary, and that the beneficiary would be employed at the petitioner's location in Sacramento, California, assigned to the project "SAP Optimizer Reporting Tool (SORT)[:] Interface Tool for ERP." As supporting documentation, the petitioner submitted the following: a project description for SORT; a work itinerary for the beneficiary; an undated employment agreement between the petitioner and the beneficiary; copies of the petitioner's job postings; federal income tax returns for 2004, 2005, and 2006; a list of the petitioner's current employees; a list of the petitioner's "no-show" employees and revoked petitions; a list of the petitioner's candidates who had resigned and the corresponding withdrawals; and the petitioner's W-3 forms for 2005 and 2006.

The director denied the petition on the basis of her determination that the petitioner had not submitted any contracts with the petitioner's end-clients, as the petitioner indicated in its April 5, 2007 letter that the beneficiary would be analyzing its client's IT structures and hardware infrastructure and then developing a customized solution based on the client's needs, budget, and time frame. The director concluded that there was no evidence that the petitioner and beneficiary would have an employer-employee relationship, that the petitioner's LCA is valid, that the proffered position is a specialty occupation, or that the petitioner has sufficient work for the requested period of intended employment.

On appeal, the petitioner states that the petitioner meets the definition of a U.S. employer under 8 C.F.R. § 214.2(h)(4)(ii), as it maintains the responsibility of supervising, controlling, paying, and firing the beneficiary. The petitioner also states that the beneficiary will be employed in the petitioner's Sacramento office as a systems analyst, assigned as part of a team to work on the SORT project, and that the petitioner's LCA is valid, regardless of the employment location of the beneficiary. The petitioner also states that a systems analyst position qualifies as a specialty occupation, as it is similar to a computer programmer position, which has an *O*Net* Job Zone of 4 and an *Education and Training Code* of 5 – Bachelor's Degree.

Preliminarily, the petitioner's interpretation of the *O*Net* and the *Education & Training Code* are not persuasive that the proffered position is a specialty occupation. The *O*Net* does not indicate that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. The *O*Net* provides 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. Neither the SVP rating nor the *Education & Training Code* describes how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require. In particular, the AAO notes that the *O*Net* Job Zone 4 and the *Education and Training Code* of 5 designations do not specify a degree in a related specialty as a characteristic of occupations encompassed by this category. The *O*Net* OnLine Help site also states that an SVP rating indicates years of specific vocational training that may be attained in a variety of ways other than formal education.

The AAO finds that the evidence of record is sufficient to establish that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary as set out in the petitioner's undated employment agreement.[1] *See* 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the AAO withdraws the director's contrary finding.

The petition may not be approved, however, as the petition contains inconsistencies of the location of work, and the petition does not establish that the beneficiary will be employed in a specialty occupation. In an RFE, the director requested additional information from the petitioner, including an itinerary and copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or service agreements for the beneficiary. The Aytes memorandum cited at footnote 1, indicates that the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised her discretion to request additional information regarding the beneficiary's ultimate employment, as the nature of the petitioner's business is software development and consulting. In response to the RFE, the petitioner submitted an employee itinerary and project description and itinerary for its SORT project, describing its start date as April 2007, for a duration of 35 months, and its location as the petitioner's address in Sacramento, California. The petitioner describes the SORT project, in part, as follows:

> Configurable ERP SAP Legacy Connector that will work with the ERP QM, SD, FI/CO and MM Modules and the PS HRMS and Financial modules. The system will provide facility to configure the mapping of SAP and Legacy data as per the customer need. The configuration steps are generally one-time setup tasks. The configurability allows the connector to suit the Legacy/SAP implementation across different customer setups.

The petitioner, however, has submitted insufficient evidence in support of the petitioner's assertion that it has the project team, as described in the project description's "2.1 Resource Schedule," consisting of one project manager, two leads, 11 functional consultants, 24 technical consultants (programmers), and six developers, for a total of 44 team members, or that the beneficiary's specific duties related to the in-house SORT project require the theoretical and practical application of a body of highly specialized knowledge. It is noted that

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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).

information on the petition reflects that the petitioner has 21 employees. Moreover, the project description of the petitioner's in-house SORT project does not contain a breakdown of the duties assigned specifically to the beneficiary. 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)). It is also noted that the duties listed in the petitioner's April 5, 2007 letter are described only generically and differ from the duties described in the petitioner's response to the director's RFE, which pertain to a specific project. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather changed the generic duties to a specific project.

The record is also inconsistent regarding the job location. The petitioner's statement on appeal that "[t]here are no contracts with end clients, other software-consulting firms, etc. which pertain to the beneficiary because there are none and none are required" conflicts with the description of the proposed duties in the petitioner's April 5, 2007 letter, indicating that the beneficiary would "analyze a client's IT situation and hardware infrastructure" and "will then develop a customized solution based on the client's needs, budget and time frame." The record contains no explanation for this inconsistency. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

In the April 5, 2007 letter attached to the petition, the petitioner provided an overview of the types of duties the beneficiary might be required to provide as a systems analyst, which included, in part, "analyz[ing] a client's IT situation and hardware infrastructure" and "then develop[ing] a customized solution based on the client's needs, budget and time frame." It is noted that the evidence of record does not include any work orders or statements of work requesting the beneficiary's services. It is not possible to conclude from the brief description of the duties associated with the beneficiary's ultimate employment that the beneficiary's employment will include the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation. As discussed above, the record of proceeding lacks evidence that establishes the specific work that the beneficiary would perform in-house as part of the SORT project, and that such work would require the theoretical and practical application of at least a bachelor's degree level of knowledge in a specific specialty.

Each petitioner must detail its expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. In circumstances where the beneficiary will provide services to a third party, the third party must also provide details of its expectations of the position. Such descriptions must correspond to the needs of the petitioner and/or the third party and be substantiated by

documentary evidence. To allow otherwise would require acceptance of any petitioner's generic description to establish that its proffered position is a specialty occupation. CIS must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business, what the third party contractor expects from the beneficiary in relation to its business, and what the proffered position actually requires, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty.

In this matter without a comprehensive description of the beneficiary's actual duties from the entities utilizing the beneficiary's services, and without concrete information as to the specific duties that the beneficiary would perform with regard to the petitioner's in-house SORT project, the AAO is precluded from determining that the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. The petitioner does not provide substantive evidence that the duties of the proffered position incorporate the theoretical and practical application of a body of highly specialized knowledge that requires the 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. Only a detailed job description from the entity that requires the alien's services will suffice to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5th 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)).

The AAO observes that the Department of Labor's *Occupational Outlook Handbook* reports that there are many training paths available for programmers and that although bachelor's degrees are commonly required, certain jobs may require only a two-year degree or certificate; that most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of a variety of computer systems and technologies for positions of computer software engineer; and that there is no universally accepted way to prepare for a job as a systems analyst, although most employers place a premium on some formal college education. The general overview of the proposed duties in the petitioner's April 5, 2007 letter, and in association with the petitioner's in-house SORT project, is insufficient to determine whether the duties of the proffered position could be performed by an individual with a two-year degree or certificate or could only be performed by an individual with a four-year degree in a computer-related field. As the position's duties remain unclear, the record does not establish the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(*1*).

The record contains no evidence regarding parallel positions in the petitioner's industry or from firms, individuals, or professional associations regarding an industry standard. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment as a systems analyst. Moreover, the evidence of record about the particular position that is the subject of this petition does not establish how aspects of the position, alone or in combination, make it so unique or complex that it can be performed only by a person with a degree in a specific specialty. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) – the employer normally requires a degree or its equivalent for the position. The petitioner does not address this issue on appeal. The record does not establish this criterion. Further, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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 or 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. To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) based on its normal hiring practices.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*) – the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The AAO here incorporates its discussion regarding the lack of concrete evidence substantiating the actual duties of the proffered position. As indicated in the discussion above, the record of proceeding contains inconsistencies and lacks evidence of specific duties that would establish such specialization and complexity. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

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 or that the beneficiary is coming to the United States to perform services in a specialty occupation as required by the statute at section 101(a)(15)(H)(i)(b) of the Act; 8 U.S.C. § 1101(a)(15)(H)(i)(b). For this reason, the petition may not be approved.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,

2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,

3. Evidence that the alien qualifies to perform services in the specialty occupation. . . .

The director also found that, without contracts and work orders from the ultimate end-client for whom the beneficiary will provide his services, the name and location of the beneficiary's employment site is unclear, and thus the petitioner has not demonstrated compliance with the certified LCA. As discussed above, the petitioner did not submit the requested evidence in the director's RFE pertaining to contracts, statements of work, work orders, and/or service agreements between the petitioner and its clients for whom the beneficiary will be providing services, along with any statements of work, work orders, or service agreements for the beneficiary. 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. at 165. As the beneficiary's ultimate worksite is unclear, it has not been shown that the work would be covered by the location on the certified LCA. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of a specialty occupation. The record does not contain an evaluation of the beneficiary's credentials from a service that specializes in evaluating foreign educational credentials as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*). For this additional reason, the petition may 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. 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.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.