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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 07 145 50649 Office: CALIFORNIA SERVICE CENTER Date: JUL 23 2008

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.

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 information technology solutions. It seeks to employ the beneficiary as a business 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 September 3, 2007, the director denied the petition. The director determined that the petitioner: had not established that it qualified as an employer or agent; had not established that a specialty occupation existed for the beneficiary; had not established that the proffered position met the statutory definition of a specialty occupation; and had not established that the beneficiary is qualified to perform services in a specialty occupation. On appeal, counsel for the petitioner submits a brief.

The record includes: (1) the Form I-129 filed April 2, 2007 and supporting documents; (2) the director's May 4, 2007 request for further evidence (RFE); (3) the petitioner's July 25, 2007 response to the director's RFE; (4) the director's September 3, 2007 denial decision; and (5) the Form I-290B and counsel's brief 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.

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 petitioner does not establish: that it had employment available for the beneficiary when the petition was filed; that the beneficiary would be employed in a specialty occupation; and that the Form ETA 9035E, Labor Condition Application (LCA) is valid for the beneficiary's proposed work locations. In addition, the record does not establish that the beneficiary is qualified to perform the duties of 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 different work locations to perform services according to various agreements with third-party companies. Pursuant to the

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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).

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. The Form ETA 9035E, Labor Condition Application (LCA) shows the beneficiary's work location as in Sioux Falls, South Dakota. As the evidence contained in the record at the time the petition was filed did not establish that the petitioner had three years of work for the beneficiary to perform, the director properly exercised her discretion to require an itinerary of employment.[2]

In response to the director's RFE, the petitioner submitted copies of contracts between the petitioner and different third parties in California, Pennsylvania, New Jersey, Ohio, New York, Georgia, and Connecticut. As the director observed, the contracts submitted do not include evidence that the contracts were in effect when the petition was filed. In addition, the contracts do not identify the beneficiary as the individual providing services in support of these contracts. The record does contain an undated "job itinerary" for the beneficiary identifying the petitioner's client as HCL Systems, Inc, (HCL) located in Jacksonville, Florida and the offsite work location as the petitioner's office in Sioux Falls, South Dakota. The "job itinerary" also provides a project description and a general description of the beneficiary's technical responsibilities and indicates that the start date of the services is October 1, 2007 and the end date is October 1, 2010. As the director observed, the "job itinerary" is not attached to a contract with HCL and is signed only by the petitioner. The AAO is unable to determine if a contract was in effect when the petition was filed on April 2, 2007. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Moreover, as stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), "[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition." The petitioner has not established that it had a job offer for the beneficiary's services when the petition was filed. For this reason, the petition may not be approved.

In addition, 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 petitioner has not provided a detailed description from the end user of the beneficiary's services, HCL, showing that the duties the beneficiary will perform incorporate 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.

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[2] 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."

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)(*1*). For this additional reason, the petition may not be approved.

Further, the petitioner has not provided sufficient consistent evidence establishing the job location for the beneficiary's services. The petitioner has provided an LCA identifying the job location as in Sioux Falls, South Dakota. In counsel's July 25, 2007 response to the director's RFE, counsel acknowledged that the petitioner's contracts with various third parties sometimes required the petitioner's employee(s) to work from the client's business location and sometimes the work is performed at the petitioner's central office. As the record does not contain the master contract with HCL, and the "job itinerary" is not signed by HCL, and the "job itinerary" lists HCL's location as in Jacksonville, Florida, the AAO is unable to conclude that the actual job location corresponds to the location identified on the LCA and that the LCA is valid for all the beneficiary's work locations. For this additional reason, the petition may not be approved.

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; that the petitioner had employment available for the beneficiary when the petition was filed, and that the LCA is valid for all work locations.

Regarding the beneficiary's eligibility to perform the duties of a specialty occupation, the AAO finds that the petitioner has not established that the beneficiary is eligible to perform the duties of a specialty occupation in the computer field. The petitioner initially stated that the beneficiary had obtained a Bachelor of Arts degree in Economics from the Delhi University in India in 1996 and a Master of Business Management from EMPI Business School in India in 1999. A review of the record shows that the beneficiary received a Bachelor of Arts degree from the University of Delhi with no specific specialty. AACRAO Electronic Database for Global Education (EDGE), a web-based resource for educational evaluations, indicates that an Indian Bachelor of Arts degree is awarded upon completion of two to three years of tertiary study beyond the "higher secondary certificate," a certificate comparable to completion of high school in the United States. The record also includes evidence that the beneficiary obtained a post graduate diploma in business management from Entrepreneurship & Management Processes International. EDGE indicates that a post graduate diploma is awarded upon completion of one year of study beyond the two- or three-year bachelor's degree. The record does not independently establish that Entrepreneurship & Management Processes International is an academic institution in India; neither is this institution listed or referenced in the EDGE database.

The petitioner submitted an evaluation of the beneficiary's credentials and work experience in response to the director's RFE. The evaluation is dated May 14, 2007 and is prepared by two individuals for World Academic Research Center, Inc. (WARC), a credentialing service, and concludes that the beneficiary's academic education and over five years of work experience is the equivalent of a U.S. Bachelor of Science degree in management information systems. The evaluators note that the beneficiary's academic education from the University of Delhi is the equivalent of three years of undergraduate study at a regionally accredited university in the United States. The evaluators do not comment on the beneficiary's post graduate diploma in business management. WARC claims that [redacted], Ph.D., one of the evaluators on the May 14, 2007 evaluation, is qualified as an official who has authority to grant college-level credit for training and/or work

experience in the specialty at an accredited college in the Untied States of America. Although the WARC letter claims that Dr. [redacted]s credentials are included in the WARC resume, the record does not contain this evidence. 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 record does not contain evidence that Dr. [redacted] has authority to grant college-level credit for training and/or experience in a specific specialty at an accredited college or university which has a program for granting such credit based on an individual's training or experience.

Although the record contains the beneficiary's resume, the record does not include a letter from the beneficiary's previous employer describing the beneficiary's prior employment duties in detail. The AAO has reviewed a March 16, 2007 letter signed by the director of human resources on behalf of Philips Electronics India Limited (Philips). The director confirms that the beneficiary was employed from January 2001 to September 2006 by Philips as a business analyst. The human resources director indicates that the beneficiary worked on different projects and made significant contribution in the product value chain: "re-engineering, realigning pricing as per company's objectives, newer way to the market, product quality (bringing down the failure rate), stock management and consumer service." The letter does not provide further detail of the beneficiary's duties, does not identify the beneficiary's supervisory or managerial responsibilities, if any, and does not include information regarding the credentials of the beneficiary's peers, supervisors, or subordinates. Thus, the AAO is unable to evaluate the beneficiary's work experience to determine whether the beneficiary's training and/or work experience has included the theoretical and practical application of the specialized knowledge required by a specialty occupation, and that the experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in a specialty occupation. The record also does not include evidence of recognition of the beneficiary's expertise in a specialty, as evidenced by one of the following: recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation; membership in a recognized foreign or U.S. association or society in the specialty occupation; published material by or about the alien in professional publications, trade journals, books or major newspapers; licensure or registration to practice the specialty in a foreign country; or achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation. The record as currently constituted does not establish that the beneficiary's foreign degree and work experience is the equivalent of a bachelor's degree issued by a regionally accredited college or university in the United States. For this additional reason, the petition will not be approved.

As always, 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.