

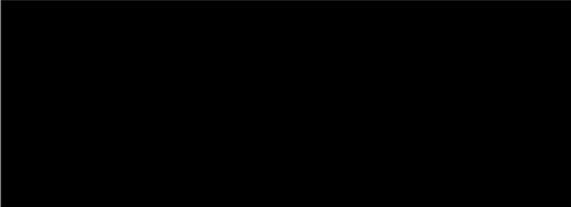
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FILE: WAC 06 169 51516 Office: CALIFORNIA SERVICE CENTER Date: **JUN 02 2008**

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:
[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.

for Michael T. Kelly
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, established in 2001, provides software development services. It claims to employ 250 personnel and to have approximately \$23 million in gross annual income when the petition was filed. It seeks to employ the beneficiary as a programmer/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 July 26, 2007, the director denied the petition. The director determined: (1) that the petitioner had not established that it was an employer or an agent; (2) that the petitioner had not provided an itinerary or contracts detailing the beneficiary's proposed work so that a determination could be made regarding the validity of the labor condition application (LCA); (3) that the petitioner had not established the proffered position as a specialty occupation; and (4) that a review of the petitioner's other H-1B employees, its LCAs, and the petitioner's state employment records revealed discrepancies in the petitioner's compliance with the elements of regulatory eligibility. On appeal, counsel for the petitioner submits a brief and documentation, including many documents that were previously submitted, all in support of the appeal.

The record includes: (1) the Form I-129 filed April 21, 2006 and supporting documents; (2) the director's June 18, 2007 request for evidence (RFE); (3) documents submitted in response to the RFE; (4) the director's July 26, 2007 denial decision; and (5) the Form I-290B, counsel's brief, and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

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 an April 20, 2006 letter appended to the petition, the petitioner indicated it wished to employ the beneficiary in the position of a programmer/analyst to "analyze, design, develop, test and integrate software programs." The petitioner indicated that the proffered position is a "hybrid of [a] Systems analyst and Programmer." The petitioner referenced the 2006-2007 *Career Guide to Industries*, which is a companion guide to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, and noted the *Handbook's* report on the educational requirements for the two occupations. The petitioner further indicated that its clients expected its computer professionals to be the best in the field, highly educated and well trained, and therefore the petitioner required its programmer/analysts to possess a bachelor's degree in one of a variety of industry-recognized areas including computer science, electronics and communication, engineering, statistics, mathematics, or a related field.

The record also includes an ETA Form 9035E, Labor Condition Application (LCA) listing the beneficiary's work location as Dallas, Texas and Burlington, Vermont in the position of a programmer/analyst.

On June 18, 2007, the director requested, among other items: current status of the petitioner's H-1B and L-1 employees; a complete itinerary of services or engagements that specifies the date of each service or engagement and the names and addresses of each of the employers; and copies of signed contracts, statements of work, work orders, service agreements, and letters between the petitioner and authorized officials of the ultimate end-user of the beneficiary's services that list the beneficiary's name and a detailed description of the duties the beneficiary will perform.

In response, the petitioner submitted, among other items, a July 11, 2007 letter signed by a human resources employee on behalf of Infinite Computer Solutions, Inc. indicating that it currently was engaging the beneficiary as a sub-contractor with its client, Verizon Information Services, since April 27, 2006. The letter-writer indicated that the beneficiary was working on .Net technologies and is responsible for creating CMS applications using ASP.Net, C#, SQL Server 2000, JavaScript, SML, XSLT and MCMS. The petitioner also included a copy of a purchase order showing the petitioner as the vendor and referencing a subcontractor master services agreement dated June 1, 2004 signed by Infinite Computer Solutions. The purchase order dated July 24, 2006 also shows the beneficiary as the consultant; the client as Verizon; the start date as April 24, 2006; "TM" as the project; and the work location as Irving, Texas. The record includes printouts from an internal Verizon website confirming the beneficiary's presence at the Verizon location in Irving, Texas.

On appeal, counsel for the petitioner asserts that the petitioner is the beneficiary's employer. Counsel cites an unpublished case for the proposition that a request for a contract between a petitioner and the alien's work site does not fall within service guidelines and that future and unknown work locations that are not listed for an H-1B employee does not restrict a transfer to other locations in the future in accordance with approved LCAs. Counsel also referenced a private USCIS letter issued to an attorney acknowledging that CIS regulations do not prohibit a professional employer organization from petitioning for an H-1B alien as long as it meets the definition of "employer." Counsel provides a copy of both the unpublished decision and the private letter. Counsel asserts that as the petitioner is an employer and has provided the address where the employment of the beneficiary is controlled, the director's determination that the petitioner failed to provide a valid LCA fails. Counsel claims that as the petitioner controls the beneficiary's employment and the petitioner does so in accordance with the needs of its clients, the job position has been established as a specialty occupation. Counsel also contends that the director erred when analyzing the petitioner's data regarding the number of its H-1B employees and finding that the petitioner had not complied with CIS regulations regarding the H-1B employment.

Preliminarily, the AAO concurs with counsel's contention that the director erred when denying the petition on the basis of evidence not in this record of proceeding. The director may, however, address the alleged deficiencies in petitions for other of the petitioner's H-1B employees by issuing a Notice of Intent to Revoke approval of the related petitions, as a matter for the director's discretion. However, those matters may not be used as a basis to deny the instant petition. With regard to the other matters noted by the director, 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).

The AAO also disagrees with the director's finding 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 it does not establish that the beneficiary will be employed in a specialty occupation or that the employer has submitted an itinerary of employment. The petitioner clearly indicates on appeal and in the documentation submitted that the beneficiary would not perform her duties at the petitioner's place of business. Rather, as noted in the petitioner's April 20, 2006 letter in support of the petition, she may "provide onsite professional services to [the petitioner's] clients at additional locations, always in accordance with the Department of Labor certified Labor Condition Application."

The AAO concludes that, 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 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 that the petitioner had three years of work for the beneficiary to perform at one location, the director properly exercised her discretion to require an itinerary of employment.² As the petitioner has not submitted an itinerary, the petition may not be approved.

The AAO acknowledges counsel's submission of an unpublished decision and a personal letter issued to an attorney. Neither of these documents is probative in this instance. Counsel has not furnished evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, the proposition cited by counsel in reference to the unpublished decision does not preclude a request for an itinerary when the petitioner is an employment contractor. Similarly, private correspondence generated to answer hypothetical situations does not provide a basis for this adjudication. Further, the AAO has found in this matter that the petitioner has met the definition of an employer.

The petitioner has also failed to establish that the proffered position is a specialty occupation. To determine whether a particular job qualifies as a specialty occupation, CIS does not rely on a position's title. The

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 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 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 (5th 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.

In this matter, although the petitioner is an employment contractor and will be the beneficiary's employer, the record does not contain a detailed description of the beneficiary's actual daily duties. The petitioner initially provided a broad statement of the beneficiary's potential duties and in response to the director's RFE, a similarly general statement regarding the beneficiary's current duties in a project for Verizon. 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 ultimate end user of the beneficiary's services had not provided a description of the beneficiary's duties; thus CIS is precluded from determining 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.

The AAO observes that the Department of Labor's *Occupational Outlook Handbook (Handbook)*, as cited by counsel, indicates that 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. As the record does not contain documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients for the duration of the H-1B classification, the AAO is unable to analyze whether the duties of the proposed position would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation or whether the position could be performed by individuals proficient in computer languages learned through certification courses and at the associate degree level. Accordingly, the petitioner has not established that the proposed position qualifies as 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)(I).

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 and 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. Neither the petitioner nor the third-party contractor describes the project(s) the beneficiary will work on in detail.

In that the record does not offer a comprehensive description of the duties the beneficiary would perform for the petitioner or the petitioner's client, or the petitioner's client's client, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, the petitioner has not established the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguished the position as more complex or unique than similar, but non-degreed, employment, as required by the alternate prongs of the second criterion. Absent a detailed listing of the duties the beneficiary would perform under contract, the petitioner has not established that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither has the petitioner satisfied the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

The AAO acknowledges the petitioner's claim that it requires its programmer/analysts to possess at least a minimum of a bachelor's degree in a specific field; however, as the beneficiary will be placed with a third party, with unknown expectations and requirements, the AAO is unable to ascertain whether the petitioner's bachelor's degree requirement is required of the third party's position. 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. For this additional reason, the petition may not be approved.

The petitioner has also failed to establish that the Labor Condition Application (LCA) is valid for all work locations. As the record does not contain an itinerary of employment, it cannot be determined that the LCA is valid for all the locations of employment. Although the AAO notes that the petitioner could file an amended LCA if the petitioner placed the beneficiary in a different location, the failure of the petitioner to provide an itinerary indicating the amount of time the beneficiary would be employed at the Irving, Texas location and the Burlington, Vermont location, prohibits a determination that the LCA is valid for all work locations. For this additional reason, the petition may not be approved.

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. As always, 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.