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FILE: WAC 07 131 51791 Office: CALIFORNIA SERVICE CENTER Date: JUN 03 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.

  
Robert P. Wiemann, 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 an information technology development business that seeks to employ the beneficiary as a programmer 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 the proffered position is a specialty occupation, or that its labor condition application (LCA) is valid.

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) counsel's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching 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 a March 25, 2007 letter submitted in support of the petition, the petitioner described the proposed responsibilities and time allocations of the proffered programmer analyst position as follows:

- Analysis of system requirements, (25%);
- Evaluation of interface feasibility between hardware and software, (10%);
- Software system design (using scientific analysis and mathematical models to predict and measure design consequences and outcome, (35%);
- Unit and integration testing, (20%);
- System installation, (5%); and
- Systems maintenance, (5%).

The record also includes an LCA submitted at the time of filing listing the beneficiary's work locations in

Hoffman Estates, Illinois and San Diego, California as a programmer analyst.

In an RFE, the director requested additional information from the petitioner, including 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.

In response to the RFE, counsel for the petitioner submitted the following: an employment agreement dated March 19, 2007, between the petitioner and the beneficiary; a June 18, 2007 letter from the president of Metmox, Inc. (Metmox), stating that the beneficiary was contracted to work at its facility in Schaumburg, Illinois, and his compensation would be paid by the petitioner; a statement of work, signed by the petitioner and Metmox, assigning the beneficiary to perform consulting services at Metmox; and a new LCA reflecting the beneficiary's work location as Schaumburg, Illinois. Counsel also submitted evidence pertaining to the petitioner, including job vacancy announcements, examples of the petitioner's products/services, lists of all nonimmigrant petitions filed by the petitioner from 2003-2007, tax documentation, quarterly wage reports, business licenses, and a company profile.

The director denied the petition on the basis that, although the petitioner submitted a letter indicating that the beneficiary was contracted to work at Metmox, the website for Metmox reveals that Metmox subcontracts computer workers to other companies in need of computer programming services. The director concluded that without an end contract between Metmox and the business that will utilize the beneficiary's services, it has not been shown who has actual control over the beneficiary's work. The director also found that, without such a contract, the petitioner had not demonstrated that the proffered position qualifies as a specialty occupation, or that the petitioner had complied with the terms and conditions of the LCA.

On appeal, counsel states, in part, that the client letter job description submitted to the director in response to the RFE stipulates that the petitioner is the beneficiary's actual employer, that the petitioner will pay the beneficiary's compensation, and that it will control all activities such as managerial supervision, hiring, firing, and performance evaluations. Counsel also states that the director misinterpreted the website for Metmox, which will retain the beneficiary to work on a project at their site in Schaumburg, Illinois, as reflected on the LCA.

Preliminarily, 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 employment agreement between the petitioner and the beneficiary, and the letter from the president of Metmox, Inc.<sup>1</sup> See 8 C.F.R. § 214.2(h)(4)(ii).

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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).

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 petitioner indicated that the beneficiary would be working at the petitioner's site in Hoffman Estates, Illinois and at its client's site in San Diego, California. Although the AAO declines to find that the petitioner is acting as the beneficiary's agent, the petitioner in this matter is employing the beneficiary to work for its clients or its clients' clients, and thus can be described as an employment contractor.

When a petitioner is an employment contractor, the entity ultimately employing the alien or using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). From this evidence, CIS will determine whether the duties require 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.

In this matter, 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 (5<sup>th</sup> Cir. 2000). Although counsel states on appeal that the director misinterpreted the website for Metmox, which will retain the beneficiary to work on a project at their site in Schaumburg, Illinois, as reflected on the LCA, the record does not contain a comprehensive description of that project. In his June 18, 2007 letter,<sup>2</sup> the president of Metmox provides a generic description of the beneficiary's duties and states: "[The beneficiary] must constantly interact with management, explaining to it each phase of the system development process, responding to its questions, comments and criticisms, and modify the system so that the concerns raised by clients are adequately addressed." The president of Metmox, however, does not specify to what specific project the beneficiary will be assigned or provide a detailed description of that project. Moreover, as the president of Metmox states that the beneficiary would be interacting with the clients of Metmox, it appears, as stated by the director, that the beneficiary would be performing services for the end clients of Metmox. The statements on appeal by counsel and the president of Metmox that Metmox will retain the beneficiary to work on a project at its site in Schaumburg, Illinois, is noted. However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's

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<sup>2</sup> The AAO observes that the letter from Metmox is signed June 18, 2007, more than two months after the petition was filed. However, a petitioner must establish eligibility at the time of filing the nonimmigrant 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). In addition, 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 provided a master contract with Metmox or any other evidence that indicates it had a position available for the beneficiary when the petition was filed.

burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)). Thus, as the nature of the proposed duties is unclear, the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).<sup>3</sup>

In that the record does not provide a sufficient job description from the end user of the beneficiary's services, 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 job description detailing the specific duties, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a descriptive listing of the programmer analyst duties the beneficiary would perform under contract, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

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.

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,

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<sup>3</sup> 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 record 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 specific discipline.

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 where the beneficiary will perform his services, the name and location of the beneficiary's employment site is unclear, and thus the petitioner has not demonstrated compliance with the LCA. As discussed above, the record does not contain specific details of the project to which the beneficiary will be assigned. As the beneficiary's specific duties and ultimate worksite are unclear, it has not been shown that the work would be covered by the locations on the LCA. For this additional reason, the petition may not be approved.

In view of the foregoing, the petitioner has not overcome the director's objections. For these reasons, the petition may not be approved. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.