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U.S. Citizenship
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FILE: WAC 06 233 52785 Office: CALIFORNIA SERVICE CENTER Date: **MAR 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:

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.

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 consulting and information technology services. It states that it employs 22 personnel and had gross annual revenue of approximately \$1,400,000 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).

The record includes: (1) the Form I-129 filed July 20, 2006 and supporting documents; (2) the director's November 7, 2006 request for further evidence (RFE); (3) the petitioner's November 13, 2006 response to the director's RFE; (4) the director's December 5, 2006 denial decision; and (5) the Form I-290B, the petitioner's statement, and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

On December 5, 2006, the director denied the petition. The director determined that the petitioner had not established that it qualified as a United States employer or agent and had not established that the duties of the proffered position incorporated the duties of a specialty occupation.

On appeal, the petitioner asserts that the beneficiary is its full-time employee; that the beneficiary will work at the client's locations when it is required; and that once the beneficiary finishes work at the client site, the beneficiary will work from the petitioner's offices. The petitioner states that it will pay the beneficiary for the three-year period of its contract with the beneficiary irrespective of clients' work. The petitioner submits documentation in support of the appeal.

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 July 17, 2006 letter appended to the petition, the petitioner provided a list of its clients in various locations; asserted that the proffered position is highly complex and professional in nature; and that the essential duties and responsibilities of the position include system analysis and design, writing code and developing programs and unit and system testing and attending meetings. The petitioner also listed the projected technical environment in which the beneficiary would be working. The Form I-129 indicated that the beneficiary would be working for Lucent Technologies in Lisle, Illinois. The petitioner submitted a Form ETA 9035E Labor Condition Application (LCA) certified July 17, 2006 for the Lisle, Illinois area.

On November 7, 2006, the director noted from the evidence provided that it appeared that the petitioner is engaged in the business of software development and consulting and is seeking the beneficiary's services to perform work for Lucent Technologies, a third party not at the petitioner's work site. The director noted that

the petitioner had not provided its contract with Lucent Technologies describing the beneficiary's ultimate employment duties. The director requested, among other things, that the petitioner submit: (1) an itinerary of definite employment, listing the location(s) and organization(s) where the beneficiary will be providing services and that the itinerary should specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venue, or locations where the service will be performed by the beneficiary; (2) contracts or letters from authorized officials of the ultimate client companies, a description of conditions of employment, and who will supervise the beneficiary; and (3) contractual agreements, statements of work, work orders, service agreements, and letters from the authorized officials of the ultimate client companies where the work will actually be performed, that provide a comprehensive description of the beneficiary's proposed work duties.

In a November 13, 2006 response, the petitioner noted that it had offices in Sebastian and Tampa, Florida. The petitioner stated that the beneficiary was a full-time employee; that the petitioner would control and pay the beneficiary; that the beneficiary would work at clients' locations as required; and that once the beneficiary finished work at a client's site, he would work at the petitioner's offices. The petitioner indicated it had a three-year contract with the beneficiary for the period of August 2, 2006 to August 1, 2009. In the November 13, 2006 response, the petitioner provided a more detailed description of the beneficiary's duties but did not disclose where the work would be performed or for what company the work would be performed. The petitioner submitted a new LCA for the Tampa, Florida area and a contract dated September 25, 2006 between the petitioner and Smart Outsource, Inc. listing the beneficiary as a consultant starting work October 1, 2006 for 24 months in Tampa, Florida as a programmer analyst. The petitioner also submitted a contract dated January 20, 2005 between the petitioner and Apollo Consulting Services Corporation with an attached work order naming the beneficiary and a client, CAP Gemini in Lisle, Illinois. The Apollo work order did not list the beneficiary's proposed duties but did indicate the work order was for a three month period beginning May 15, 2006.

As noted above, the director denied the petition on December 5, 2006, determining that the petitioner had not established that it qualified as a United States employer or agent and had not established that the duties of the proffered position incorporated the duties of a specialty occupation.

On appeal, the petitioner again asserts that the beneficiary is its full-time employee; that the beneficiary would work at the client's locations when it is required; and that once the beneficiary finished work at the client site, the beneficiary would work from the petitioner's offices. The petitioner states that it would pay the beneficiary for the three-year period of its contract with the beneficiary irrespective of clients' work. The petitioner repeated the description of duties, labeling the duties, a "Detailed Description where beneficiary will Involve in the job." The petitioner also resubmitted the Tampa, Florida LCA and the September 25, 2006 contract between the petitioner and Smart Outsource, Inc. identifying the beneficiary as a consultant. The petitioner provided a copy of its employment agreement with the beneficiary dated August 2, 2006 and payroll statements issued to the beneficiary by the petitioner for work starting August 2, 2006 through November 25, 2006.

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 (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.

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 or that the employer has submitted an itinerary of employment.

The record shows that the beneficiary has performed his duties at two locations and the petitioner indicates that the beneficiary will work in the petitioner's offices when not employed on a client site. The petitioner notes that it has two offices in Florida, in Tampa and in Sebastian, Florida. Although the petitioner indicates that the beneficiary would work from the petitioner's offices when the beneficiary finishes work at the client site, the petitioner does not provide evidence of ongoing projects at its office site. Upon review of the evidence of record, the AAO concludes that, although the petitioner will act as the beneficiary's employer, the petitioner will place the beneficiary at various work locations to perform services established by contractual agreements for third-party companies.¹ 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 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. 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

As noted above, in its November 13, 2006 response to the director's request for additional evidence, the petitioner stated: that it would be the beneficiary's actual employer, that the beneficiary would work at clients' locations whenever it is required, and that once the beneficiary finishes work at the client's site he would work at the petitioner's offices. The petitioner did not submit the requested itinerary. 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. Instead of submitting an itinerary, the petitioner submitted a contract with one company dated prior to the beneficiary's employment covering only a three-month period beginning prior to the beneficiary's employment with the petitioner and continuing two weeks after the beneficiary began its employment with the petitioner. Neither the contract nor the work order attached to the contract provided a description of the beneficiary's proposed duties for the company. 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."

AAO acknowledges the second contract the petitioner submitted in response to the director's RFE. The contract, however, is dated September 25, 2006 subsequent to the filing date of the petition. In addition, while listing the beneficiary as a consultant starting work October 1, 2006 as a programmer analyst, the contract does not include a description of the beneficiary's work duties for the third party company. Further, the record does not provide any information regarding the beneficiary's proposed work from August 15, 2006 to October 1, 2006. The petitioner has not provided evidence that it has on-site employment for a programmer analyst. Absent such information and contracts covering the entire period of the beneficiary's employment, the petitioner has not established that it has three years' worth of H-1B-level work for the beneficiary to perform. The evidence contained in the record does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of the beneficiary's employment by the petitioner. Thus, the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition was properly denied.

Furthermore, the Smart Outsource, Inc. contract is dated subsequent to the filing of the petition. A 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). 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 the requested the itinerary and has not substantiated that it has three years' worth of H-1B employment for the beneficiary. For this additional reason, the petitioner has not established that it had three years of H-1B employment for the beneficiary when the petition was filed.

The next issue to be discussed is the failure of the petitioner to establish that the proposed position is a specialty occupation. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proposed position is a specialty occupation, the 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 proposed position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. When a petitioner is acting as an employment contractor, the entity ultimately 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. From this evidence, Citizenship and Immigration Services (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.

The only contracts the petitioner submitted in this matter that identify the beneficiary as a consultant for a third party do not include a description of the duties the beneficiary will perform. Thus, the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's third party clients. In this matter, the AAO is unable to conclude that the requirements of third party employers will include duties that incorporate the theoretical and practical application of a body of

highly specialized knowledge that requires the attainment of a bachelor's degree or higher degree in the specific specialty or its equivalent as a minimum for entry into the occupation in the United States. 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 services, the petitioner has not provided evidence sufficient 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)). Accordingly, the petitioner has not established that the proposed position qualifies for classification 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).

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 will be denied.

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.