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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship
and Immigration
Services

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[redacted]

FILE: WAC 07 214 50751 Office: CALIFORNIA SERVICE CENTER Date: SEP 03 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:

[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 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 business that seeks to employ the beneficiary as a systems/programmer analyst to work at the following address: [redacted]., Deerfield, IL 60015.[1] 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, or that the proffered position is a specialty occupation.

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 the petitioner's letter 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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[1] A Google search of this address finds that it is the location of a Walgreens business.

(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 June 24, 2006 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered systems/programmer analyst position as follows:

- Collect requirements and analyze the business process and data flow;
- Prioritize, schedule and manage multiple tasks;
- Conduct meetings and prepare demos for middle management;
- Write pseudo code programs and algorithms;
- Develop documents using ADEX;
- Develop applications using technologies such as C, C++, SQL, HTML and Unix;

- Write complex SQL queries and store procedures in PL/SQL to access the data from the database;
- Conduct causal analysis on the defects that are raised using the Causal Analysis Tool;
- Conduct code reviews using the Assent Tool;
- Participate in reviews and system testing;
- Perform unit testing and integration testing;
- Prepare system/integration test plans;
- Evaluate user requirements, procedures, and problems to automate processing or to improve existing computer systems for the petitioner's customers; and
- Confer with the petitioner's customers' technical and management personnel to analyze current operational procedures, identify problems, and learn specific requirements.

The record also includes: a General Consulting Agreement, dated June 11, 2007, between the petitioner and Quadratic Systems, Inc., located at [redacted], Elk Grove Village, IL 6007, for the beneficiary to provide information technology consulting services for Walgreens Inc.; and a certified LCA submitted at the time of filing, listing the beneficiary's work locations in Wilmington, Delaware and Deerfield, Illinois as a systems analyst/programmer.

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.

In response to the RFE, counsel submitted the following supporting documentation: a copy of the petitioner's previously submitted offer of employment to the beneficiary, dated June 24, 2007; a copy of the contract of employment, signed by the petitioner and the beneficiary on June 24, 2007; an August 2, 2007 letter from the director of Trinity Tech Labs LLC, located at [redacted], Palatine, IL 60074, stating that, in accordance with its agreement with the petitioner, the beneficiary would be assisting their business in the implementation of "TYAN – Marketing Requirements Specifications" for a two-year period upon the approval of her H-1B petition; the petitioner's job description for the beneficiary, dated June 24, 2007; and copies of the petitioner's previously submitted business plan and website information.

The director denied the petition on the basis that, although the petitioner had submitted a copy of a confirmation of the agreement between itself and Trinity Tech Labs LLC, and a copy of the contract between itself and the beneficiary, the petitioner had not provided a contract between itself and the ultimate end-client for whom the beneficiary would provide computer-related services. The director also found that, as the petitioner had contracted

with another computer consulting/staffing agency but had not identified the name or location of the end-client business for whom the beneficiary would provide computer-related services, the petitioner had not demonstrated compliance with the terms and conditions of the LCA, which reflects the beneficiary's work location as Deerfield, Illinois. The director also found that, without valid contracts between the petitioner and the actual end-client for whom the beneficiary would provide computer-related duties, the petitioner had not demonstrated that the proffered position is a specialty occupation.

On appeal, the petitioner states, in part, that, in accordance with the August 1, 2007 "Service Level Agreement" between the petitioner and Trinity Tech Labs, the petitioner will provide computer programming and analysis services to Trinity Tech Labs for the implementation of "TYAN – Marketing Requirements Specifications," which includes business analysis, requirements definitions, QA testing, user documentation, training, and the implementation of project management support. The petitioner also states that it will control and supervise the beneficiary on a day-to-day basis, and will be solely responsible for payment of her salary and other benefits, thus qualifying the relationship between the petitioner and the beneficiary as that of employer and employee. The petitioner states further that it intends to employ the beneficiary at the premises of Trinity Tech Labs at Palatine, Illinois for the time period reflected on the LCA, which was filed for Cook County, Illinois. As supporting documentation, the petitioner submits: a printout from the Department of Labor's (DOL) *Foreign Labor Certification Online Wage Library & Data Center*; a Service Level Agreement, dated and signed on August 1, 2007, between the petitioner and Trinity Tech Labs, for the petitioner to provide computer programming and analysis services to Trinity Tech Labs for the implementation of "TYAN – Marketing Requirements Specifications," on the premises of Trinity Tech Labs at [redacted] Palatine, IL 60074, from August 1, 2007 through December 31, 2010; an August 2, 2007 letter from the director of Trinity Tech Labs LLC, confirming its agreement with the petitioner for the beneficiary's services for the "Design/Development/Maintenance/Implementation of TYAN – Marketing Requirements Specification"; copies of the petitioner's previously submitted June 24, 2007 offer of employment to the beneficiary and the contract of employment; and Trinity Tech Labs LLC's "Tyan Software Architecture Document" and related documentation.

The AAO disagrees with the director's finding that the petitioner would not act as the beneficiary's employer. 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 June 24, 2007 offer of employment to the beneficiary and the contract of employment."[2] *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 documentation submitted on appeal does not comply with the requirement that the petitioner must establish eligibility at the time of filing the nonimmigrant visa

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[2] *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).

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 this matter, the Service Level Agreement between the petitioner and Trinity Tech Labs, for the petitioner to provide computer programming and analysis services to Trinity Tech Labs for the implementation of "TYAN – Marketing Requirements Specifications," is dated and signed on August 1, 2007, after the July 11, 2007 filing date of the petition. 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."

Moreover, the petition contains inconsistencies regarding the location of work, and the petition does not establish that the beneficiary will be employed in a specialty occupation. At the time of filing, the petitioner submitted a General Consulting Agreement, dated June 11, 2007, between the petitioner and Quadratic Systems, Inc., located at [redacted], Elk Grove Village, IL 6007, for the beneficiary to provide information technology consulting services for Walgreens Inc., and the petitioner indicated in Part 5 of the petition that the beneficiary would work at: [redacted], Deerfield, IL 60015, which, as noted in footnote 1, is the location of a Walgreens business. 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 August 2, 2007 letter from the director of Trinity Tech Labs LLC, located at [redacted] Palatine, IL 60074, stating that, in accordance with its agreement with the petitioner, the beneficiary would be assisting their business in the implementation of "TYAN – Marketing Requirements Specifications" for a two-year period upon the approval of her H-1B petition. The information concerning the location of the beneficiary's employment submitted in response to the RFE is inconsistent with the information submitted at the time of filing. 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 addition, 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 RFE did not clarify or provide more specificity to the original duties of the position, but rather changed the end-client for whom the beneficiary would provide computer-related services and added the "TYAN – Marketing Requirements Specifications" project. Of further note, although information on the petition that was signed by the petitioner's director on June 27, 2007 reflects that the petitioner was

established in 2006, has one employee and a gross annual income of $150,000, the record contains insufficient evidence in support of these claims. It is noted that the petitioner's 2006 Schedule C (Form 1040), Profit or Loss From Business, reflects $32,944.00 in gross receipts or sales, and $31,260.00 in costs of labor. 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)).

As discussed above, the record of proceeding contains inconsistent evidence pertaining to the specific work that the beneficiary would perform, and thus the petitioner has not established that the proffered position 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.[3]

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)).

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[3] 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. Thus, without a detailed job description regarding the work to be performed on a specific project, the AAO is unable to determine whether the project requires the theoretical and practical application of a body of highly specialized knowledge.

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, 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. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(*1*).

In that the record contains conflicting information regarding 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 specific information pertaining to the beneficiary's actual work location and job 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 consistent information pertaining to the beneficiary's actual work location and job duties, 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,

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 from the ultimate end-client, the petitioner has not demonstrated compliance with the certified LCA. As discussed above, the beneficiary's specific duties and ultimate worksite are unclear, and thus it has not been shown that the work would be covered by the locations on the certified 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.