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FILE: WAC 04 201 53612 Office: CALIFORNIA SERVICE CENTER Date: **OCT 19 2006**

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 materials 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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a software products and services company. It seeks to employ the beneficiary as a software engineer and/or programmer analyst and to classify him 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 on the grounds that the record failed to establish that the petitioner qualifies as the employer of the beneficiary for immigration purposes or that the proffered position qualifies as a specialty occupation.

As defined in the regulation at 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.

Section 214(i)(1) of 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.

As provided in 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 criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director’s request for evidence (RFE); (3) the petitioner’s response to the RFE; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In its initial submission, including the Form I-129 and an accompanying letter, the petitioner described itself as a provider of software products and services to private companies and government agencies. The petitioner stated that its business was established in 1998, had 75 employees and a projected gross income of \$20 million in 2004, and sought to hire the beneficiary for three years, at an annual salary of \$53,000, as a software engineer. The proffered position was described as follows in the petitioner’s initial letter:

As a Software Engineer with [the petitioner, the beneficiary] will be responsible for system analysis and design and custom program development and implementation. Additionally, he will provide software support to our clients, which will include testing, debugging, and modifying software to meet customer specifications

[The beneficiary] will . . . liaise[] with business and engineering management to formulate and define system scope and objectives through research and fact-finding to develop and modify systems. He will also be constantly revising and revamping procedures as they are being created, not only to meet management concerns, but also to respond to unanticipated anomalies

[The beneficiary] will be exclusively engaged in developing and deploying [the petitioner]’s array of software products and services

The [beneficiary] will be responsible for developing one to several discreet modules/programs/codes for the [petitioner]’s range of products and services. He will be reporting to his team leader and will not . . . supervise other personnel.

According to the petitioner, the proffered position requires at least a baccalaureate degree and relevant work experience. The beneficiary is qualified for the job, the petitioner declares, by virtue of his bachelor of engineering degree from Mysore University in India, awarded in February 1999, along with more than five years of experience in the information technology (IT) industry.

In the RFE the director stated that it appeared the petitioner was seeking the beneficiary’s services as a “programmer analyst” to perform work for clients outside the petitioner’s work site. The director requested the petitioner to submit an itinerary of definite employment for the entire three-year period of requested H-1B classification – specifying the client companies, the beneficiary’s work locations and dates of service for each

such company, as well as the details of any services the beneficiary would perform at the petitioner's work site. The director requested copies of the contractual agreements between the petitioner and the beneficiary and between the petitioner and the client companies for which the beneficiary would provide consulting services. The director noted that the contracts should specify the duties to be performed by the consultant and include statements of work, work orders, and any other appendices detailing the duties, dates of service, and pay schedule of the beneficiary. In addition, the director requested that documentary evidence be submitted to show that the petitioner's clients are legitimate business operations.

In response to the RFE the petitioner submitted a copy of its offer of employment letter to the beneficiary and declared that the beneficiary would be working at the company's home office on the in-house development of software products and services as well as on remote software support services for various clients. The petitioner stated that "[a]s a Programmer Analyst . . . some of [the petitioner's] duties will include:

- Review and analysis of systems and integration of systems with other proprietary software.
- Preparation of technical design specifications, unit test plans, customizing and implementing third party and proprietary software.
- Planning, scheduling, progress monitoring and deployment of software products and services.
- Creating forms, reports, user interfaces, screens, templates, etc."

As explained by the petitioner, the beneficiary would be "a full-time employee of [the petitioner] at all times . . . and . . . even when he is not assigned to any particular project . . . he will work on our company's internal projects and assignments . . . for the entire [three-year] period of time requested." The petitioner indicated that the beneficiary's job title would be "programmer analyst," and submitted copies of several contracts which the petitioner claims are representative of its ongoing consulting agreements with clients and the types of projects to which the beneficiary would be assigned. With the exception of one change order for which the original contract was not submitted, none of the contract documents was accompanied by a statement of work or any other detailed description of the services that would be provided to the client companies. None of the contract documents stated specifically where the work was to be performed, none of them identified the beneficiary as the consultant who would perform the services, and collectively the contracts did not cover the entire time period of requested H-1B classification. The petitioner also submitted information from the internet about the subject client companies as evidence of their bona fides.

In his decision the director referred to CIS records showing that the petitioner had previously filed at least 361 H-1B petitions, most of which had been granted. The director cited the petitioner's statement in the Form I-129 that it has 75 employees and noted that the service center had not received written withdrawals for most of the employees who received H-1B status but do not appear to be working for the petitioner, or evidence that the petitioner paid for the return transportation of any such workers dismissed before the end of their authorized stay, as required under 8 C.F.R. § 214.2(h)(4)(iii)(E). The director found that the evidence of record was insufficient to establish which organization would supervise the beneficiary, control his work, and have the authority to terminate his employment. Accordingly, the petitioner failed to establish that it would be the beneficiary's U.S. employer, as defined in 8 C.F.R. § 214.2(h)(4)(ii). In the director's view, the petitioner's "misrepresentation" and "aberrant filing practices" undermined the credibility of all its supporting evidence that there was a position available for the beneficiary throughout the period of requested H-1B classification and that the petitioner would actually employ the beneficiary in a specialty occupation, as defined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Based on the evidence of record, the director concluded that the beneficiary is ineligible for H-1B classification.

On appeal the petitioner reiterates its contention that it meets the criteria of a United States employer, as defined in 8 C.F.R. § 214.2(h)(4)(ii). According to the petitioner, “[w]hether the employee is working on an assignment at a client site or at the offices of [the petitioner], all control over the day to day activities of the employee is retained by [the petitioner].” With respect to the 361 H-1B petitions previously filed, the petitioner stated that 26 H-1B employees had subsequently been dismissed, 91 had resigned, and 125 approved beneficiaries had not joined the company. Another 62 petitions are still pending. The petitioner submits a master list of all such individuals with their file numbers and, depending on their situations, information as to whether their approval is pending or they are awaiting visa stamping, whether they did not join the company or did not travel to the United States, and the dates of their dismissal, resignation, or return to their country of origin. While asserting that it previously submitted requests for withdrawal of H-1B status for the beneficiaries it no longer employed, the petitioner submits a separate list of all previously approved H-1B workers who are no longer employed by the company and requests that the subject petitions be withdrawn. The petitioner submits representative letters it sent to some of its previous H-1B employees advising them that their work with the company was ending on a date certain and that they would have to return home, as well as travel invoices showing that the petitioner paid for their return flights. As evidence that it has an actual position for the beneficiary, the petitioner submits a series of job advertisements for programmer analysts, software engineers, systems analysts, business development consultants, and business analysts, which it published in the three months prior to filing the instant petition. As evidence of the degree requirement for the proffered position, the petitioner refers to a sampling of advertisements for programmer analysts in various media publications and the career opportunities section on its own website, though it neglected to submit the referenced documentation. As further evidence of the proffered position’s degree requirement, the petitioner also refers to the information on programmer analysts in the Department of Labor (DOL)’s *Dictionary of Occupational Titles (DOT)*.

The evidence of record, including the petitioner’s offer of employment letter to the beneficiary, establishes 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.¹ See 8 C.F.R. § 214.2(h)(4)(ii). The record indicates that the petitioner is an employment contractor in that the petitioner will place the beneficiary at one or more work locations to perform services established by contractual agreements for one or more third-party companies. Though the petitioner claims that some of the beneficiary’s work would be on in-house projects at the petitioner’s worksite, it is clear that the bulk of the work would be performed for client companies and that much of it may be performed at their worksites. In *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000), a federal appeals court held that for the purpose of determining whether a proffered 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 court recognized that evidence of the client companies’ job requirements is critical when the work is to be performed for entities other than the petitioner, and held that the legacy Immigration and Naturalization Service reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the alien workers in a particular position require a bachelor’s degree for all employees in that position.

¹ See also Memorandum of 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).

As previously discussed, the director requested in the RFE an itinerary of definite employment for the beneficiary covering the requested period of H-1B classification, substantiated by contract documentation detailing the duties the beneficiary would perform, for whom, and at what locations. The contract documents submitted in response to the RFE include two “master consulting agreements” between the petitioner and E-Machines, dated April 10, 2001, and between the petitioner and Hyundai Translead, dated May 4, 2004. Both agreements state that the petitioner will “provide consultants . . . to [the client] to provide services on its in-house software projects.” Though the agreements refer to an attached SOW (statement of work), no SOW was submitted for either agreement, nor any other evidence of the tasks to be performed under the contracts. Neither agreement identified the individual(s) who would provide the consulting services, and neither specified the term of the agreement except to indicate that “this Agreement shall be ongoing, until terminated by either party.” The agreements state that the consulting services may be performed at the clients’ work locations, but that the petitioner is not obligated to perform the work there. Also submitted in response to the RFE was an “independent contractor agreement” between the petitioner and ConAgra Grocery Foods Group stating that the petitioner would provide consulting services related to its “BPCS Production Support” project. The agreement does not describe the specific tasks the consultant will perform, and indicates that the work can be performed at the petitioner’s premises, the client’s worksite, or a third location, at the petitioner’s discretion. The term of the agreement is specified as July 7 to 31, 2003, which was more than a year before the instant petition was filed. The record also contains a “consulting agreement” between the petitioner and Seminis Vegetable Seeds, Inc., dated January 12, 2004, stating that the petitioner will provide “software design and development” consulting services to the client. Though the agreement provides that the “[c]onsultant will perform such responsibilities as may from time to time be specified by [the client] on a SOW referencing this Agreement,” no SOW has been submitted, nor any other evidence of the tasks to be performed under the agreement. The agreement does not identify the individual who would provide the consulting services, does not state where the services are to be performed, and does not specify the term of the agreement except to indicate that it “will continue until terminated by either party.” Lastly, the record contains documentation relating to a contract alteration between the petitioner and Aera Energy LLC, dated October 23, 2001, which does not include the underlying contract and provides no information about the services to be provided thereunder, the individuals providing the services, the term of the contract, or the work location.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides that if the beneficiary’s duties will be performed in more than one location, the employer must submit an itinerary with the dates and locations of employment. The director’s RFE included a request for an itinerary of definite employment covering the requested period of H-1B classification along with contract documentation detailing the duties the beneficiary would perform. Under the Aytes Memorandum, cited at footnote 1, the director has the discretion to request an employer who will employ a beneficiary in multiple locations to submit an itinerary. The director properly exercised his discretion to request an itinerary and substantiating contract documentation from the petitioner. The documentation submitted by the petitioner, however, does not specify what duties are to be performed for the client companies, does not identify the beneficiary as a consultant on any of the agreements, does not specify any of the work locations, and does not provide an itinerary of definite employment for the three-year time period of requested H-1B classification for the beneficiary. Since the petitioner has failed to comply with the requirements of 8 C.F.R. § 214.2(h)(2)(i)(B), the petition must be denied.²

² As noted by Assistant Commissioner Aytes in his 1995 memorandum, “[t]he purpose of this particular regulation is to ensure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment.”

The director also found that the petitioner had failed to establish that it would employ the beneficiary in a specialty occupation. The record does not include a description of the beneficiary's job duties from any client company to whom the beneficiary would be assigned, as required to show that the beneficiary would be performing services that require a baccalaureate or higher degree in a specific specialty. The documentation submitted in response to the RFE has not been supplemented by any additional documentation on appeal.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform for client companies, the AAO cannot analyze whether the beneficiary's duties require at least a baccalaureate degree or the equivalent in a specific specialty, as required for the proffered position to be classified as a specialty occupation. Accordingly, the petitioner has not established that the proffered position qualifies as a specialty occupation under any of the criteria enumerated 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 in accordance with 8 C.F.R. § 214.2(h)(1)(ii)(B)(I).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

ORDER: The appeal is dismissed. The petition is denied.