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FILE: WAC 07 145 54559 Office: CALIFORNIA SERVICE CENTER Date: **AUG 15 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.

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, established in 2003, provides information technology and business consulting services. It employs six personnel and claims approximately \$800,000 in gross annual income when the petition was filed. It seeks to employ the beneficiary as a computer programmer. 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 August 21, 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 contracts from the end-client firm precluding a determination that the Form 9035E, Labor Condition Application (LCA) was valid for all work locations; and (3) that the petitioner had not established the proffered position as a specialty occupation. On appeal, counsel for the petitioner submits a brief and documentation.

The record includes: (1) the Form I-129 filed April 3, 2007 and supporting documents; (2) the director's May 7, 2007 request for evidence (RFE); (3) counsel for the petitioner's July 27, 2007 response to the RFE and supporting documents; (4) the director's August 21, 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 a March 30, 2007 letter appended to the petition, the petitioner indicated it was offering the beneficiary employment as a computer programmer and offered the following information regarding the duties of the position:

[A]nalysis, design, development of systems software applications, software testing, business system analysis by utilizing his expertise in system administration and Microsoft, Java, Unix, Oracle and Informix technologies. The beneficiary will analyze the data processing requirements to determine the computer software which will best serve a Company's needs. Thereafter, he will design a computer system which will process the data in the most timely and cost effective manner.

Subsequently, he will implement that design by overseeing the installation of the necessary software, security application and its customization to the company's unique requirements. The actual computer programming may be performed with the assistance of the programmer.

Throughout this process, the beneficiary will constantly interact with the management team, explaining each phase of the development process, responding to their questions, comments and criticisms, and modifying the system to accommodate their concerns.

The petitioner added that the development of a system included several phases and that the beneficiary's day-to-day responsibilities included:

- Analysis of software requirements and programming – 25% of time
- Evaluation of interface feasibility between hardware and software – 10% of time
- Software system design (using scientific analysis and mathematical models to predict and measure design consequences and outcome) – 30% of time
- Unit and integration testing – 25% of time
- System installation – 5% of time
- System maintenance – 5% of time

The record also includes an ETA Form 9035E, Labor Condition Application (LCA) listing the beneficiary's work location as Streamwood, Illinois in the position of programmer.

On June 18, 2007, the director requested, among other items: clarification of the petitioner's employer/employee relationship with the beneficiary; an 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 a July 27, 2007 response, counsel for the petitioner stated that the petitioner is the employing entity; that the beneficiary will work mainly at the petitioner's business location; and that the beneficiary will travel to the petitioner's client sites to work on particular assignments. Counsel attached a copy of a July 1, 2007 contract with Hollister, Inc. amending a statement of work also dated July 1, 2007. Counsel indicated that the contract would commence August 1, 2007, end on or about April 1, 2008; and that the beneficiary would work on this project at the petitioner's offices. The contract identified two of the petitioner's personnel to work on this contract as "engagement leader" and "engagement manager" and listed two technical consultants that would be determined later. The beneficiary is not identified by name on the contract. The record also includes Hollister's request for proposal outlining the project and its scope. Counsel also submitted contracts with other third party companies.

As observed above, based on this information, 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 contracts from the end-client firm precluding a determination that the Form 9035E, Labor Condition Application (LCA) was valid for all work locations; and (3) that the petitioner had not established the proffered position as a specialty occupation.

On appeal, counsel for the petitioner asserts that the petitioner is the beneficiary's employer. Counsel observes that the statements of work attached to the service contracts the petitioner enters into include the schedule, the time frame and the applicable rate and charges. Counsel contends that the agreement the petitioner has entered into with Hollister, Inc. will be performed at the petitioner's offices; that the petitioner has undertaken this project to design and implement a new Virsa toll for the R/3 production client; that only in the system testing and end user training stages would the petitioner's team travel to the client's site; and that the beneficiary will be entrusted to perform the day-to-day responsibilities previously described in the petitioner's response to the director's RFE. Counsel also submits a copy of its employment contract with the beneficiary indicating that the petitioner will employ the beneficiary as a computer programmer and a copy of a December 1, 2006 contract with Hollister, Inc. outlining the design phase of the Virsa project and identifying one of the petitioner's employees as project manager and listing two other security technical consultants to be determined later.

The AAO concurs with counsel's assertion that the petitioner will be 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 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 on different projects for third party companies throughout the beneficiary's requested three-year tenure in H-1B classification. Thus, 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 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 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

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."

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 has provided a broad statement of the beneficiary's potential duties as a "computer programmer." The petitioner indicates that the beneficiary will work on the Hollister/Virsa project. The two Hollister agreements submitted for two of the phases of the Virsa project do not identify the beneficiary as a consultant. Even if accepting that the beneficiary will be placed in the position of one of the "security technical consultant" positions to be determined later, the record does not include a detailed description of the duties the beneficiary would perform in this position. In addition, when describing the beneficiary's general duties, the petitioner indicated that the "actual computer programming may be performed with the assistance of the programmer."

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, neither the petitioner nor the ultimate end user of the beneficiary's services has provided a detailed 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)*, reports 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 or 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.

When establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests or its clients' interests. General references to the responsibilities of a computer programmer or a security technical

consultant without providing evidence of how the beneficiary will perform the tasks in relation to the petitioner's specific business or its clients' specific business or project are insufficient. Upon close review of the description provided, the petitioner has opted to describe aspects of an occupation without providing a description of the specific duties that are directly related to the petitioner's business or its clients' projects. Stated a different way, the generic description provided by the petitioner can apply and be used interchangeably to describe the duties of any general information technician whose duties may normally require a bachelor's degree in a specific discipline or may require a two-year certificate in a specific computer discipline or may require a two-year associate's degree, or may only require experience. CIS must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business and clients' projects 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.

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. Neither the petitioner nor the third-party contract 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, 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.

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 director also found that the record did not establish that the LCA is valid for all work locations. As the record does not indicate an itinerary of employment for the beneficiary, it cannot be determined 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. 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.