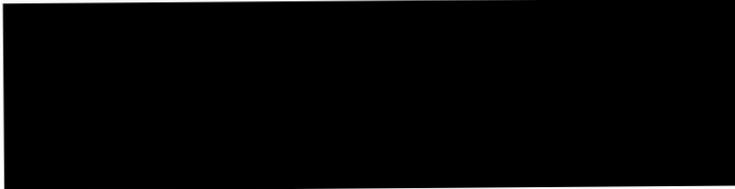


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FILE: WAC 07 148 54945 Office: CALIFORNIA SERVICE CENTER Date: **OCT 30 2008**

IN RE: Petitioner:
Beneficiary:



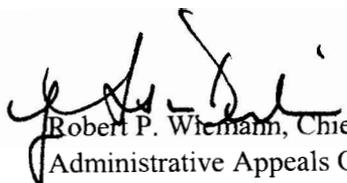
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.


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 development services, was established in 2006, and claims to employ one person and to have \$750,000 in gross annual income when the petition was filed. It seeks to employ the beneficiary as a systems analyst. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 September 27, 2007, the director denied the petition, determining that the petitioner had not established: that it was an employer or an agent; that the Form ETA 9035E, Labor Condition Application (LCA) was valid for all work locations; and that the proffered position was a specialty occupation. On appeal, the petitioner asserts that it is capable of employing the beneficiary in a specialty occupation and submits a brief and documentation for consideration.

The record of proceeding before the AAO includes: (1) the Form I-129 filed April 2, 2007 and supporting documents; (2) the director's June 12, 2007 request for evidence (RFE); (3) the petitioner's August 31, 2007 response to the RFE; (4) the director's September 27, 2007 denial decision; and (5) the Form I-290B and counsel's brief in support of the appeal.

To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields 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.

The term "employer" is defined 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.

The AAO disagrees with the director's finding that the petitioner would not act as 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.

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).

The petition may not be approved, however, as the petition does not establish that the beneficiary will be employed in a specialty occupation, that the employer has submitted an itinerary of employment, and that the petitioner had work available for the beneficiary when the petition was filed.

In a March 31, 2007 letter appended to the petition, the petitioner indicated it is a software consulting and placement firm that has in-house projects and also provides "skilled professionals to handle projects effectively at our client's location." The petitioner provided an overview of the occupation of a systems analyst indicating that the day-to-day responsibilities included:

- Computer System Analysis – 35% of time;
- Write Code and develop Programs – 20% of time;
- Systems Design – 20% of time;
- Unit and Systems Testing – 15% of time; and
- Attending Meetings – 10% of time.

The petitioner submitted an LCA identifying the occupation as a systems analyst performing work in Troy, Michigan.

On June 12, 2007, the director requested, among other items: clarification of the petitioner's employer-employee relationship with the beneficiary; copies of signed contracts between the petitioner and the beneficiary, if any; a complete itinerary of services or engagements specifying the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested; copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed that specifically lists the beneficiary on the contracts and provides a detailed description of the duties the beneficiary will perform.

In an August 31, 2007 response to the director's RFE, the petitioner stated that the beneficiary would be working on a project at HCL Global Systems, Inc., (HCL) located in Farmington Hills, Michigan. The petitioner noted further that the project is "Project s20 (SQL Server to Oracle)." The petitioner attached a copy of a contract entered into on August 17, 2007 with HCL and an undated Purchase Order and Scope of Work. The purchase order identified the beneficiary as a consultant in a team of 16, described the Project s20 product as a product used by the finance sector to keep track of employees' details, and described the beneficiary's job duties as:

Write complex queries, optimize database queries, develop templates for user interface, develop interactive reports, customize computer programs, develop remote enabled function modules for uploading customer master data, modify the print programs for operational efficiency, generate conversion programs, test computer programming, end user training and prepare training manuals.

The purchase order did not identify the start date or end date for the beneficiary's employment as the consultant.

The director denied the petition for the reasons noted above. On appeal, the petitioner reiterates that the beneficiary will be working on the s20 project for HCL and that HCL's offices in Farmington Hills, Michigan is within the commuting area of Troy, Michigan, the work location specified on the LCA. The petitioner resubmits the first page of the contract with HCL and the purchase order from HCL and provides on appeal HCL's informal business/project plan.

Although the petitioner will act as the beneficiary's employer, the petitioner clearly states that it places individuals with third party companies to perform work for those third party companies. Thus, the evidence of record establishes that the petitioner is an employment contractor and that the petitioner will place the beneficiary at different work locations to perform services according to various agreements with third-party companies. In such a situation, 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. 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 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 AAO does not consider the purchase order and scope of work an itinerary in this instance as this document does not include the start or end date of the proposed employment.

In addition, the AAO observes that the contract entered into with HCL is dated subsequent to the date of filing the petition. Thus, the contract was not in existence and the proposed employment was speculative when the petition was filed. The 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). 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 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 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

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."

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 initially provided an overview of the occupation of a systems analyst, paraphrasing elements of the Department of Labor's *Occupational Outlook Handbook's (Handbook)* discussion of the occupation of computer systems analyst. The AAO determines, however, that 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, rather than an overview of the duties of the occupation. A generalized description, such as those contained in the *Handbook*, is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In the instant matter, the petitioner did not offer a description of the actual duties of the petition when it filed the petition, as the job did not yet exist.

Moreover, 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, the ultimate end user of the beneficiary's services provided a general statement regarding the beneficiary's duties in relation to a specific project; however, such a general description is insufficient to allow CIS to examine and determine that the described duties incorporate 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 a minimum for entry into the occupation as required by the Act.

Further, based on the *Handbook's* statements, a baccalaureate or higher degree or its equivalent in a specific specialty is not the normal minimum requirement for entry into the position of a systems analyst. The AAO acknowledges that the *Handbook* reports: [t]raining requirements for computer systems analysts vary depending on the job, but many employers prefer applicants who have a bachelor's degree." However, employer preference is not synonymous with the "normally required" language of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). The *Handbook* also recognizes: "[d]espite the preference for technical degrees, however, people who have degrees in other majors may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation." The petitioner in this matter has failed to provide a definitive description of the duties the beneficiary would perform for the ultimate end user of the beneficiary's services. The record does not provide sufficient information to determine whether the proposed position would include duties that required a bachelor's degree in a specific discipline or would require only a general degree, an associate's degree, or certification and experience. The petitioner has failed to establish that the occupation is an occupation that would require the services of an individual with a baccalaureate or higher degree or its

equivalent in a specific discipline as the normal minimum requirement for entry into the position. Accordingly, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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, the petitioner has not established that the proposed position qualifies 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). For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has also failed to establish that the LCA is valid for all work locations. As the record does not contain an itinerary of employment, it cannot be determined that the LCA is valid for all the locations of employment. Although the AAO notes that the petitioner could file an amended LCA if the petitioner placed the beneficiary in a different location, the failure of the petitioner to provide an itinerary indicating the amount of time the beneficiary would be employed at the Farmington Hills, Michigan location prohibits a determination that the LCA is valid for all work locations. For this additional reason, the petition may not be approved. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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. 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.