

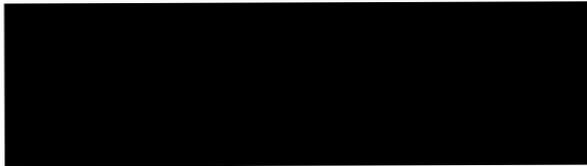


U.S. Citizenship  
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Services

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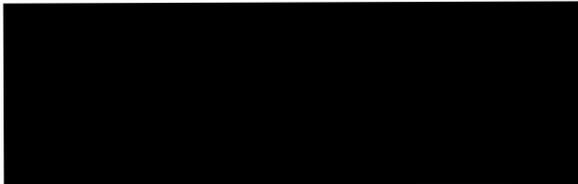
FILE: WAC 07 148 51154 Office: CALIFORNIA SERVICE CENTER Date: **SEP 29 2008**

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:



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. It claims to employ over 125 personnel and to have \$13.1 million in gross annual income when the petition was filed. It seeks to employ the beneficiary as a software QA tester.<sup>1</sup> 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 September 18, 2007, the director denied the petition. On appeal, counsel for the petitioner submits a brief and documents in support of the appeal.

The record includes: (1) the Form I-129 filed April 2, 2007 and supporting documents; (2) the director's May 11, 2007 request for further evidence (RFE); (3) counsel's August 2, 2007 response to the director's RFE and supporting documentation; (4) the director's September 18, 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:

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<sup>1</sup> In the March 29, 2007 letter submitted in support of the petition, counsel for the petitioner referred to the proffered position as a software engineering position and as a software QA tester position. The Form I-129 petition and the Form ETA 9035E, Labor Condition Application, refer to the proffered position as a software QA tester position.

- (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 29, 2007 letter appended to the petition, counsel for the petitioner stated that the petitioner sought to employ the beneficiary in the position of "Software Engineer."<sup>2</sup> Counsel, on behalf of the petitioner stated:

As a Software QA Tester[,] [the beneficiary][,] will customize computer systems to meet specific information-technology needs for the end client. Responsibilities will include but not [be] limited to: gather requirement, conduct analysis, create application test plans and test cases based on the business requirements and design, technical documentation, design oversight, build and test support, system deployment, and in-house technical support. Duties will include: Planning, designing, installing and developing new computer systems; Analyze systems and develop and validate software requirements; Develop and analyze test cases to ensure that System Analysis is accurate and maps to user requirements; Work with

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<sup>2</sup> Counsel also included the name of a different individual as the beneficiary of this petition in the letter submitted in support of the petition.

development team or clients to troubleshoot, resolve, document problems, perform various types of systems analysis through testing, execute test cases/scripts, validate and present output results, test bug fixes, create test plans and processes for User Acceptance Testing; Perform various software tests (Integration, Regression, Acceptance), evaluate and write test summaries and reports.

The record also includes a Form ETA 9035E, Labor Condition Application, (LCA) listing work locations for a "software QA tester" in Santa Clara, California and Urbandale, [sic] Iowa.

On May 11, 2007, the director requested, among other items: evidence establishing that a specialty occupation existed and that the beneficiary's work would be under the control of the petitioner; an itinerary that specified 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 that the temporary employment is requested; and contractual agreements, statements of work, work orders, service agreements, letters from authorized officials of the ultimate client companies where the work will actually be performed, that provide a comprehensive description of the beneficiary's proposed duties.

In an August 2, 2007 response, counsel for the petitioner provided a description of "in-house product development" projects for an unrelated company identified as "ESI." Counsel also stated: "[t]he present beneficiary has been working on a project for end client ARMO Solutions, Inc." and that the purchase order is valid from October 2007 for a period of 18 months and is extendable beyond that date after review of the project. Counsel stated further: "[b]ased on current work at the client site, the Beneficiary is likely to work there till the end of his H-1B tenure." In support of these statements, counsel submitted a copy of the project task order that showed the beneficiary as the representative, the client as ARMO Solutions Inc., the start date as October 16, 2007, the duration as 18 months, and the position/duties as software QA tester. The purchase order is dated May 22, 2007. Counsel also submitted a copy of the first and last page of a master contract between the petitioner and ARMO Solutions Inc. dated June 22, 2006 that listed ARMO Solutions Inc.'s location in Parsippany, New Jersey. Counsel then indicates that the beneficiary will work from the offices of the petitioning company and "[p]etitioner [c]ompany believes that the Beneficiary will work at their office site for the end client till the requested period of time," and in the alternative, if the beneficiary's services are not required for the project before the H-1B termination date, the petitioning company would absorb the beneficiary's services in their other ongoing in-house software application development projects and the beneficiary would work at the petitioner's offices in Santa Clara, California and Urbandale, Iowa for the entire duration of his H-1B classification. Counsel repeated the description of the beneficiary's duties and added that the beneficiary would work with new computer systems using Siebel technology. Counsel also cited a December 29, 1995 memorandum signed by Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, that clarified legacy Immigration and Naturalization Service's regulations regarding the requirement of itineraries, and an unpublished decision from the AAO.

On September 18, 2007, the director denied the petition. The director noted that the petitioner's California State Employment Development Department, Forms DE-6, Quarterly Wage and Withholding Reports for the last two quarters of 2006 showed that many of the petitioner's H-1B employees worked part-time, thus it did not appear the petitioner had a *bona fide* position to offer the beneficiary. The director observed that the

purchase order submitted in response to the director's RFE was dated May 22, 2007, after the April 2, 2007 filing date of the petition. Citing the regulation at 8 C.F.R. § 103.2(b) and *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), the director found that the petitioner had not established eligibility when the petition was filed. The director determined that the petitioner: had not established that it was an employer or an agent; had not established the proffered position as a specialty occupation; and had not provided a Form ETA 9035E, Labor Condition Application (LCA) valid for all work locations.

On appeal, counsel for the petitioner asserts: that there is an existing qualifying project and the need for an H-1B employee; that the petitioner is a qualified United States employer; that the petitioner is owned by a holding company and provides software product development in two locations, Santa Clara, California and Urbandale, Iowa and also provides party rentals out of a location in Rancho Cucamonga, California; and that not all employees are involved in product development work and some consulting, implementation and integration issues require a large number of petitioner's employees to be based out of the client locations throughout the United States. Counsel also notes that ARMO Solutions Inc. has entered into a consulting service agreement with Redback Networks and that "[t]he beneficiary is and will be working on is [sic] an independent project which will be done on site at Redback Networks's [sic] premises and petitioner's premises." Counsel avers that due to confidentiality reasons, the master agreement and statements of work regarding the project between ARMO Solutions Inc and Redback Networks was not released to the petitioner. Counsel provides, in its place, a copy of an undated letter signed by the director of technology for ARMO Solutions Inc. indicating that the beneficiary has been selected to enable the petitioner to provide a set of product solutions required by its clients. The ARMO Solutions director states further that the beneficiary will be required to "architect and develop custom solutions and this may take much longer than the current visibility of the next couple of years."

Counsel also contends that the petitioner is an employer, that the proffered position is a specialty occupation, and that a request for submission of contracts should not be a normal requirement for the approval of an H-1B petition filed by an employment contractor. Counsel repeats citations to the December 29, 1995 memorandum signed by Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications and an unpublished decision from the AAO.

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.<sup>3</sup> 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 petition does not establish: that the petitioner had employment available for the beneficiary when the petition was filed; that the beneficiary will be employed in a specialty occupation; that the employer has submitted an itinerary of employment; and that the LCA is valid for all work locations.

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<sup>3</sup> 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).

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 (5<sup>th</sup> 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. Although the title of a particular position is not the critical element in determining whether a position is a specialty occupation, the title of the proffered position provides some insight on the various duties that the petitioner expects the beneficiary to perform.

In this matter, the petitioner has identified the proffered position as a software QA tester, although counsel has also identified the position as software developer and a software engineer. Although the duties of some computer positions may overlap; it is the description of the specific duties that enable CIS to analyze whether the position is a specialty occupation. The AAO notes that the Department of Labor's *Occupational Outlook Handbook (Handbook)* lists 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. The general nature of the petitioner's description of the proffered position and the interchangeable references to computer related positions suggests that the petitioner did not have specific employment available for the beneficiary when the petition was filed. In addition, counsel's description of "in-house product development" projects for an unrelated company identified as "ESI," and the indefinite assertions regarding the possible locations<sup>4</sup> of the beneficiary's employment confirms that the petitioner sought to hire the beneficiary for speculative possible employment in an undefined computer-related position.<sup>5</sup> As the record does not identify the exact nature of the beneficiary's employment or identify the location(s) of the beneficiary's employment, the petitioner has not established eligibility for this classification when the nonimmigrant visa petition was filed. The AAO also observes that 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).

The AAO finds 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 at different work locations to perform services according to various agreements with third-party companies. The AAO notes counsel's acknowledgment that a large number of the petitioner's employees are based at the petitioner's clients' locations throughout the United States. In such an instance, 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.

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<sup>4</sup> The LCA shows that the beneficiary will work in Santa Clara, California or Urbandale, Iowa. Counsel indicates that the beneficiary will in-house for ESI, or for ARMO Solutions Inc. at their offices in New Jersey, or at Redback Network's premises in an unknown location.

<sup>5</sup> 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."

While the Aytes memorandum cited at footnote 3 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. The petitioner in this matter, through counsel, alluded to possible work locations at the petitioner's offices, at the offices of a third party client, and on appeal at the third party client's client. The speculative and indefinite employment for the beneficiary not only fails as an itinerary, it reinforces the need for one. As the petitioner has not submitted an itinerary, the petition may not be approved.

In addition, although the petitioner will be the beneficiary's actual employer it is also an employment contractor and the record does not contain a detailed description of the beneficiary's actual daily duties from the ultimate end-user of the beneficiary's services. The petitioner has provided a broad statement of the beneficiary's potential duties. Moreover, the record does not include a detailed description of the services the beneficiary would perform for ARMO Solutions Inc. or its client, Redback Networks. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> 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 petitioner has not provided consistent evidence of the actual duties comprising the beneficiary's services for the end user client or clients. Thus, CIS is unable to determine 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.

As the record does not contain documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients or the petitioner's clients' 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. 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)(1).

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, or the petitioner's client'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 alternate prongs of the second criterion. Absent a detailed listing of the duties the beneficiary would perform under a contract existing when the petition was

filed, 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.

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 may not be approved.

The petitioner has also failed to establish that the submitted certified LCA is valid for all work locations. The petitioner, through counsel, has indicated that the beneficiary will work in the two locations specified on the LCA, but in response to the RFE indicated that the beneficiary would work for ARMO Solutions Inc., at their offices. The record shows that ARMO Solutions Inc. has offices in New Jersey but does not show that the firm has offices in other locations. In addition, the record does not include any evidence of the location of Redback Network's offices. The record does not provide consistent information regarding the beneficiary's actual work location. 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). Again, when a petitioner is an employment contractor, the petitioner must provide an itinerary detailing the actual names and addresses of the actual end-users of the beneficiary's services and the time period the beneficiary would be working for various end-users. As the record does not contain an itinerary of employment, as required in this instance, it cannot be determined that the LCA is valid for all the locations of employment. For this additional reason, the petition may not be approved.

The AAO acknowledges counsel's citation to the December 29, 1995 Aytes memorandum. In this matter, however, based on the confusing record regarding the beneficiary's actual work and work location, the director was required to request and the petitioner was required to provide an itinerary of definite employment. The AAO also acknowledges counsel's reference to an unpublished decision. Counsel has not furnished evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Beyond the decision of the director, the AAO observes that the beneficiary's start date for employment, even if considering the purchase order for services between the petitioner and ARMO Solutions Inc., is October 16, 2007, more than six months after the petition was filed on April 2, 2007. The regulation at 8 C.F.R. § 214.2(h)(9)(i)(B) indicates that a petition may not be filed or approved earlier than six months before the date of actual need for the beneficiary's services or training. Thus, the petitioner has failed to comply with this regulation.

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.