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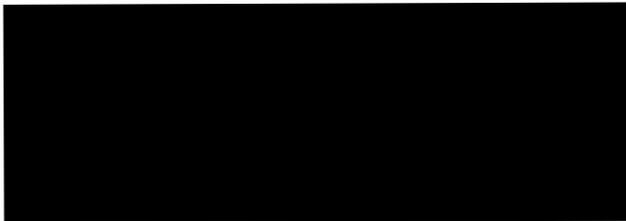
FILE: WAC 07 144 54099 Office: CALIFORNIA SERVICE CENTER Date: **NOV 25 2008**

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)

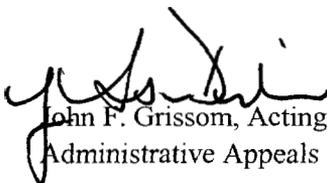
ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).


John F. Grissom, Acting 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 an information technology consulting and software development business that seeks to employ the beneficiary as a programmer analyst. 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, or that a specialty occupation is available for the beneficiary.

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 counsel's letter and supporting documentation. The AAO reviewed the record in its entirety before reaching 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 an April 16, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered programmer analyst position as follows:

1. Develop customer software for enterprise resource planning needs;
2. Customize functional modules, such as financial accountancy, material management, human resources management, sales and distribution, and production planning;
3. Code in programming languages that suit the particular front-end package;
4. Write algorithms required to develop programs using systems analysis and design;
5. Prepare flowcharts and entity-relationship models and diagrams to illustrate the sequence of steps that programs must follow and to describe logical operations;
6. Use graphic files and text data from a database to present on the web;
7. Collect user requirements and analyze necessary coding;
8. Evaluate the existing system's software, hardware, business bottlenecks, configuration and networking issues, and client requests for enhancements and new business functions;

9. Interface programming and debugging, and execute programs; and
10. Monitor the database using backup, archive and restoring procedures.

The record also includes a certified labor condition application (LCA) submitted at the time of filing, listing the beneficiary's work location in Southfield, Michigan as a programmer analyst.

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 director also requested the petitioner's 2005 and 2006 federal income tax returns and quarterly wage reports for all the petitioner's employees for the last two quarters.

In response to the RFE, counsel submitted the following documentation: a July 22, 2007 itinerary from the petitioner's business development manager, indicating that initially the beneficiary will be assigned to work in-house on the web-based development project "MSQS R1.0" (MSQS) and later on the project "MSQS R2.0"; a letter dated July 26, 2007, from the project manager of Superior Quote, Inc., indicating that the beneficiary will work on the MSQS project at the petitioner's facility along with a team of seven software developers; the "MSQS Project Charter" describing the project's overview, goals and objectives, analysis, and conditions; a contractor agreement, dated March 28, 2006, between the petitioner and Superior Quote, Inc., for the petitioner to provide programming, systems analysis, engineering, technical writing or other specialized personnel, pursuant to a purchase order executed by both parties; the petitioner's brochure; printouts from the petitioner's website; the petitioner's 2006 federal and state income tax returns; the petitioner's wage payment reports for January through April 2007; and the petitioner's articles of incorporation.

The director denied the petition on the basis of her determination that the petitioner had not submitted any evidence of the specific project to which the beneficiary is assigned, including a comprehensive description of the beneficiary's proposed duties from an authorized representative of the petitioner's client or clients for whom the beneficiary would work. Therefore, there was no evidence that the petitioner qualifies as a U.S. employer or agent, or that a specialty occupation is available for the beneficiary.

On appeal, counsel states that the petitioner is the actual employer of the beneficiary, that the proposed duties demonstrate that the proffered position is a specialty occupation, and that the beneficiary will be working in-house, in accordance with the details described by the petitioner. As supporting documentation, counsel submits: an April 16, 2007 letter from the petitioner's business development manager, asserting that a letter from the president of Superior Quote, Inc. will be submitted "most likely within a week" confirming the beneficiary's project, work location, and responsibilities; and copies of previously submitted documentation, namely, the July 22, 2007 itinerary from the petitioner's business development manager and the July 26, 2007 letter from the project manager of Superior Quote, Inc.

Preliminarily, the AAO finds that 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 April 16, 2007 letter and March 28, 2006 contractor agreement.¹ See 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the AAO withdraws the director's contrary finding.

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, according to the information in the petitioner's April 16, 2007 letter, the petitioner is a consulting business that provides its clients with services and equipment that meet their requirements. Moreover, 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**.² 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.

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.

The AAO acknowledges the July 22, 2007 itinerary from the petitioner's business development manager, asserting that the beneficiary will initially work on the web-based development project "MSQS R1.0" and later on "MSQS R2.0"; the July 26, 2007 letter from the project manager of Superior Quote, Inc., asserting that the beneficiary will work as a programmer analyst with a team of seven software developers on the MSQS project at the petitioner's development facility; the "MSQS Project Charter" describing the project's overview, goals and objectives, analysis, and conditions; and the March 28, 2006 contractor agreement between the petitioner and Superior Quote, Inc., for the petitioner to provide programming, systems analysis, engineering, technical writing or other specialized personnel, pursuant to a purchase order executed by both parties. The record, however, does not contain a purchase order for the beneficiary, as stipulated in the March 28, 2006 contractor agreement between the petitioner and Superior Quote, Inc. Moreover, although the record contains a general overview of the MSQS project in the "MSQS Project Charter", the record does not contain a comprehensive description of the proposed MSQS project and the beneficiary's duties associated with this project from an authorized representative of Superior Quote, Inc. 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)). Without documentary evidence to support the claim, the assertions of

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."

counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Of further note, although the July 26, 2007 letter from the project manager of Superior Quote, Inc. asserts that the beneficiary will be working with a team of seven software developers at the petitioner's development facility, the record does not contain evidence that the petitioner employs a team of seven software developers. It is noted that the petitioner's 2006 federal income tax return reflects \$37,580 in compensation of officers, \$208,268 in salaries and wages, and \$362,023 in "contract services – outside companies." Again, 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)). The AAO agrees with the director that the record does not support a finding that the petitioner has provided evidence of the conditions and scope of the proposed duties and the proffered position, and that the petitioner will employ the beneficiary in a specialty occupation for the requested period. Again, 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)).

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.

In this matter, 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. *See Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The record does not contain a purchase order for the beneficiary, as stipulated in the March 28, 2006 contractor agreement between the petitioner and Superior Quote, Inc. Nor does the record contain a comprehensive description of the proposed MSQS project and the beneficiary's duties associated with this project from an authorized representative of Superior Quote, Inc. As the petitioner has not submitted a credible itinerary, it has not established that it had three years' worth of H-1B level work for the beneficiary to perform when the petition was filed. Accordingly, the petitioner has not established that the beneficiary will be employed in a specialty occupation.

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. The general overview of the beneficiary's duties associated with the petitioner's project with the petitioner's client, Superior Quote, Inc., is insufficient to determine whether the duties of the proffered position could be performed by an individual with a two-year degree or certificate or could only be performed by an individual with a four-year degree in a computer-related field. As the position's duties remain unclear, the record does not establish the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).

In that the actual duties of the beneficiary remain unclear, the petitioner does not meet the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a purchase order/job description detailing the specific duties from the entity for whom the beneficiary will perform services, 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 a descriptive listing of the programmer analyst duties the beneficiary would perform for the particular client to which assigned, 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. Absent a detailed description of the substantive work that the beneficiary would perform for the particular client to which assigned, the record fails to establish the level of specialization and complexity required by this criterion.

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 or that the beneficiary is coming to the United States to perform services in a specialty occupation as required by the statute at section 101(a)(15)(H)(i)(b) of the Act; 8 U.S.C. § 1101(a)(15)(H)(i)(b).

In view of the foregoing, the petitioner has not overcome the director's objection. For this reason, the petition may not be approved.

The burden of proof in this proceeding 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.