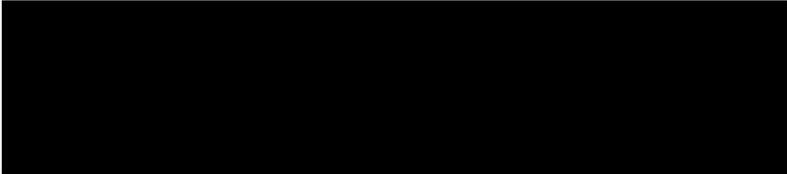


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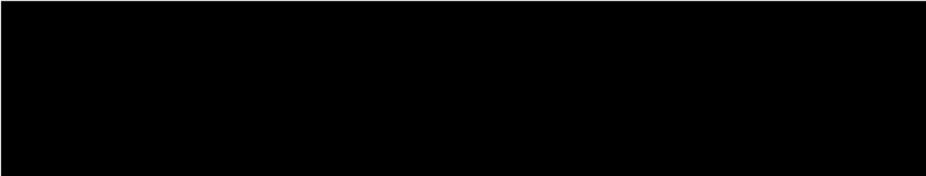
FILE: WAC 04 240 53228 Office: CALIFORNIA SERVICE CENTER Date: NOV 03 2006

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 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 development and consultancy company. It seeks to employ the beneficiary as a business analyst and to classify her 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 ground that the record failed to establish that the petitioner intends to employ the beneficiary in a specialty occupation.

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.

The petitioner describes itself as a provider of information technology services to international clients. The petitioner states that its business was established in 1994, has 30 employees and a gross annual income of

\$5.4 million, and proposes to employ the beneficiary for three years, at an annual salary of \$60,000, as a business analyst. The proffered position is described by the petitioner, both in its initial letter to the service center and in its response to the RFE, as follows:

As a Business Analyst with [the petitioner, the beneficiary] will be responsible for interacting with developers and the product marketing to analyze the user requirements, functional specifications to understand [the] product and its features. She will analyze business applications to automate or improve existing systems, confer with personnel involved to determine current operational procedures, identify problems, and learn input and output requirements. [The beneficiary] will analyze users' data, general modes of operation, existing operation procedures and problems, and devise methods and approaches to meet the users' needs based upon knowledge of data processing techniques, management information, and statistical, audit, and control systems. Further, she will be responsible for analyzing market sourcing and evaluating best business development opportunities, positioning the company as a preferred provider, identifying local and domestic market trends for short- and long-term expansion. [The beneficiary] will be responsible for staffing projects, interface with a variety of clients, determine functional and technical requirements, recruit suitable individuals, negotiate contracts and agreements, and manage the post-placement customer relationship. She will write comprehensive test plans and lead all aspects of internal management and technical program activities.

According to the petitioner, a master's degree in business or the equivalent is required to perform the job. The beneficiary is qualified for the position, the petitioner declared, by virtue of her three degrees in Australia, including a bachelor's degree in mass communication from Murdoch University in Perth, awarded on May 22, 2002; a postgraduate diploma in business (public relations) from Curtin University of Technology in Perth, awarded on September 5, 2003; and a master's degree in public relations, likewise from Curtin University of Technology, awarded on February 13, 2004, in addition to more than two years of relevant work experience.

In the RFE the director noted the petitioner's statement in the Form I-139 that it had only 30 employees, and referred to CIS records indicating that many more H petitions than that had been filed by the petitioner. The director requested copies of withdrawal notices for H employees who were no longer working for the petitioner.

In response to the RFE the petitioner submitted some additional documentation requested by the director, but did not submit the requested withdrawal notices for former H-1B employees or otherwise respond to the information cited by the director that the number of H-1B petitions filed by the petitioner far exceeded its number of employees.

In his decision the director stated that CIS records showed the petitioner had filed at least 300 petitions, most of which sought H-1B status for the beneficiaries, that 100 of those petitions had been filed in the previous three years, and that most of the petitions had been granted. The director 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 contrasted the number of H-1B petitions filed and granted with the petitioner's statement in the

Form I-129 that it currently had just 30 employees and the petitioner's Form DE-6 quarterly wage and withholding reports from the fourth quarter of 2003 through the third quarter of 2004 which listed quarterly employee totals ranging from 19 to 21 during that time period. Given the wide discrepancy between the number of H-1B petitions granted and the number of documented employees, the director determined that the record failed to establish that the petitioner has an actual employment position available for the beneficiary that qualifies as a specialty occupation, as required under 8 C.F.R. § 214.2(h)(4)(ii). The director concluded that the petitioner's statements regarding the number of its employees were not true and correct, and expressed doubt that the petitioner would honor the terms and conditions of H-1B employment if the instant petition were approved. In the director's view, the petitioner's "misrepresentation" and "aberrant filing practices" undermined the credibility of all its supporting evidence that it would employ the beneficiary in a specialty occupation for the requested period of H-1B classification. Based on the evidence of record, the director concluded that the beneficiary is ineligible for H-1B classification.

On appeal the petitioner submits an excerpt from the company website and its federal income tax filing for 2003. The petitioner contends that it has filed fewer than 300 petitions, and is checking its records to determine the actual figure. All H-1B employees who left the company have done so by resignation rather than involuntary termination, the petitioner states, and withdrawal notices have been filed for at least some of them. The petitioner submits copies of two withdrawal notices for approved H-1B workers that were sent to the California Service Center in April 2004, as well as a notice of withdrawal issued by the service center in August 2003 on a not-yet-approved H-1B petition. Counsel explains that the petitioner had a total of 33 employees nationwide in October 2004, of which 24 were located in California, and points out that the previously submitted Form DE-6 filings only covered the petitioner's California employees. Additional tax documentation is submitted which substantiates the petitioner's claim of those additional employees in other states.

CIS regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. *See* 8 C.F.R. § 103.2(b)(8). Thus, the petitioner was put on notice of the required evidence and given a reasonable opportunity to furnish it for the record before the visa petition was adjudicated by the service center. The petitioner failed to submit all of the requested evidence in the original petition and in its response to the RFE. On appeal the petitioner has submitted some additional evidence. Consistent with the ruling in *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988), the AAO need not consider this evidence in adjudicating the instant appeal.

Though it need not consider the new evidence submitted on appeal, for the sake of completion the AAO will review it. The documentation submitted on appeal does not adequately address the issues discussed in the director's decision. The petitioner has not confirmed how many H-1B petitions it filed and how many were approved. Despite the petitioner's assertion that it was checking its records, no further evidence has been furnished to refute CIS records which indicate that 300 or more petitions have been filed, 100 in the last three years, and that most were approved. While copies of two withdrawal notices for H-1B employees have been submitted, the petitioner has not provided similar documentation for its other H-1B employees who no longer worked for the company at the time the instant petition was filed. The regulation at 8 C.F.R. § 214.2(h)(11)(i)(A) provides that "[t]he petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of the Act and paragraph (h) of this section." The petitioner has failed to immediately notify CIS concerning the changes in the terms and conditions of employment of the beneficiaries of the approved petitions whom it

no longer employs. Nor has any evidence been submitted that the petitioner has paid the transportation costs of any former H-1B employees returning to their home countries. Going on record without supporting documentation does not satisfy the petitioner's burden of proof. *See 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)). Thus, the petitioner has still not provided evidence to explain the wide gap between the number of H-1B petitions filed and approved and its actual number of employees, who total no more than 33. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92, (BIA 1988). Moreover, doubt cast on any aspect of the petitioner's evidence reflects on the reliability of the petitioner's remaining evidence. *See id.*

In view of the petitioner's failure to resolve the discrepancy between the number of approved H-1B petitions and its actual employee total, the AAO agrees with the director that the evidence submitted by the petitioner in support of its claim to have a position available for the beneficiary requiring a baccalaureate degree in a specific specialty lacks reliability. *See Matter of Ho, id.*

The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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.