

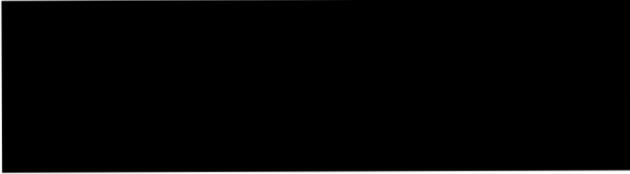
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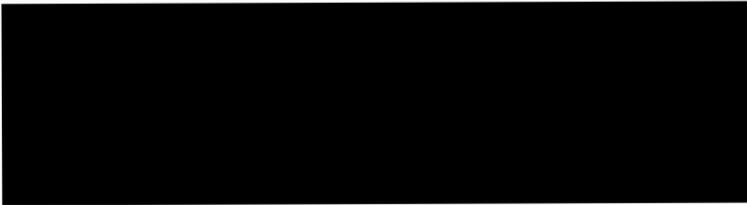


FILE: WAC 07 145 52196 Office: CALIFORNIA SERVICE CENTER Date: JUL 07 2008

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:



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 that reads "Robert P. Wiemann".

Robert P. Wiemann, 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 The decision of the director will be withdrawn. The petition will be remanded.

The petitioner is a software development and consulting 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.

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 and the petitioner's responses to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief 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 a March 27, 2006 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered programmer analyst position as follows: Plan, analyze, and develop computer systems and programs; evaluate user requests for new or modified programs; consult with users to identify current operating procedures and clarify program objectives; formulate a plan and outline the steps required to develop the program using structured analysis and design; write, update, and maintain computer programs or software packages to handle specific jobs; conduct trial runs of programs and computer applications; analyze and review programs, identify errors and rewrite them; and assist users in solving operating problems, recommend solutions, and determine whether program requirements have been met.

The record also includes a certified Labor Condition Application (LCA) submitted at the time of filing listing the beneficiary's work location in Livonia, 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.

In response to the RFE, counsel stated, in part, that the AAO has held that a petitioning consulting firm that pays the beneficiary directly and guarantees full-time employment need not submit contract documentation. The petitioner's president stated that the petitioner will be the actual employer, which is demonstrated by a sample contractual agreement. The following documentation was submitted as supporting documentation: a list of the

current employment status of the petitioner's previously approved H-1B employees; a sample employee contract; quarterly wage reports for the first quarter of 2007; a federal income tax return for 2006; and a lease agreement and floor plan.

The director denied the petition on the basis of her determination that the petitioner had failed to establish that it qualifies for classification as either a U.S employer or an agent.

On appeal, counsel states that the petitioner will be the actual employer. Counsel also states that the petitioner has previously submitted a standard employment letter that demonstrates its obligation to pay and its powers to select, engage, dismiss, and control its employees. Counsel asserts that the contractual evidence requested by the director is immaterial to a proper decision, as the petitioner is the actual employer, not an agent. As supporting documentation, counsel submits: a contract between the petitioner and SpinSci Technologies, LLC (SpinSci), dated March 30, 2007, for the petitioner to perform software engineering services by assisting in software development at SpinSci or its client's facilities; and a purchase order, signed on March 30, 2007, naming the beneficiary to perform on-site software consulting services for "Saber Corporation/State of Ohio – ERIC Project," from April 2, 2007 through September 7, 2007 "(appx.)."

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 forth in the petitioner's March 27, 2006 letter submitted at the time of filing and in the petitioner's sample employment agreement.<sup>1</sup> See 8 C.F.R. § 214.2(h)(4)(ii). Thus, the petitioner has overcome the grounds for denial cited by the director.

The petition may not be approved, however, because the director has not determined whether the proffered position qualifies as a specialty occupation, whether the petitioner has complied with terms and conditions of the LCA, or whether the beneficiary qualifies to perform the duties of a specialty occupation.

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 the nature of the petitioner's business is locating and placing aliens with computer backgrounds into positions with firms that use computer programmers and/or analysts to complete their projects and 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.<sup>2</sup> The AAO concludes that, although the

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<sup>1</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).

<sup>2</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."

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 supporting documentation submitted by counsel on appeal, namely, the contract between the petitioner and SpinSci, dated March 30, 2007, and the purchase order, signed on March 30, 2007, naming the beneficiary to perform on-site software consulting services for "Saber Corporation/State of Ohio – ERIC Project," from April 2, 2007 through September 7, 2007 "(appx.)." The record, however, does not contain 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, in this matter, Saber Corporation/State of Ohio, will suffice to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). Although information on the purchase order indicates that the beneficiary will be assigned to the ERIC Project, the record does not contain a detailed description of that project from the Saber Corporation/State of Ohio, the end-user of the beneficiary's services. The petitioner must provide some evidence of the daily tasks the end-user requires from the beneficiary. To recite generalities, rather than specifics substantiated by the requirements of the particular petitioner, leads to the absurd result of petitioners indiscriminately labeling and summarizing positions in an effort to obtain specialty occupation classification. The petitioner and its clients or clients' clients utilizing the beneficiary's services must detail the expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. Such descriptions must correspond to the needs of the petitioner and its clients or clients' clients 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, however, must rely on a detailed, comprehensive description demonstrating what the petitioner and the ultimate end-user expect from the beneficiary in relation to its business and to third party projects, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty. Due to the broad array of vocational and educational tracks as well as simple experience leading to employment in the computer field, the petitioner must demonstrate that the beneficiary's work includes the theoretical and practical application of specialized knowledge attained only through study at the bachelor's level in a specific discipline. In this matter, the petitioner has failed to provide such evidence. 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)). Thus, as the nature of the proposed duties is unclear, the petitioner has not established that the offered position is one that would normally impose the minimum of

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a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).<sup>3</sup>

It is also noted that although information on the petition that was signed by the petitioner's human resources manager on March 29, 2007, reflects that the petitioner has six employees and a gross annual income of \$400,000, the petitioner's quarterly wage report for the first quarter of 2007 reflects only four employees, and the petitioner's 2006 federal income tax return reflects only \$102,320.00 in gross receipts or sales. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. 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. at 165. In addition, although counsel asserts on appeal that the petitioner currently has 14 employees and a projected gross annual income of \$1 million for 2007, counsel does not submitted in evidence in support of these assertions. Without documentary evidence to support the claim, the assertions of 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).

In that the record does not provide a sufficient job description from the Saber Corporation/State of Ohio, the end-user of the beneficiary's services, 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 job description detailing the specific duties, 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 under contract, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion.

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<sup>3</sup> Moreover, 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 described in the March 30, 2007 contractual agreement the petitioner and SpinSci 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.

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.

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. Moreover, the AAO notes that the petitioner has only demonstrated the existence of a position from April 2, 2007 through September 2, 2007.

Nor has the petitioner demonstrated that it will comply with the terms and conditions of the certified LCA. The LCA submitted at the time of filing lists the work location as Livonia, Michigan, the location of the petitioner. However, the evidence of record indicates that the proposed worksite is Saber Corporation/State of Ohio. The record, however, does not contain an address for Saber Corporation/State of Ohio. Thus, it has not been shown that the work would be covered by the location on the LCA. Nor has the petitioner demonstrated that the beneficiary is qualified to perform a specialty occupation, as the record does not contain an evaluation of the beneficiary's credentials from a service that specializes in evaluating foreign educational credentials as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(3).

As the director did not address these issues, the petition will be remanded to the director for further action. The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the proffered position qualifies as a specialty occupation, whether a position exists for the entire period of requested employment, whether the LCA is valid for the location of employment, whether the beneficiary qualifies to perform the duties of a specialty occupation, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record at it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's July 26, 2007 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.