

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



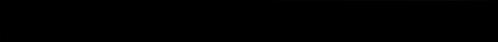
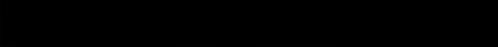
U.S. Citizenship
and Immigration
Services

PUBLIC COPY

81



FILE: WAC 07 144 53181 Office: CALIFORNIA SERVICE CENTER Date: **JUL 07 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 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 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 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 an April 1, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered programmer analyst position and time allocations as follows:

- Software development cycle, including design, development, and unit testing (30%);
- Requirement gathering, development of new reports, writing functional specification and program specification, technical design, coding reviews and drafting detailed unit test plans (30%);
- Running various reports, monitoring process scheduler, and implementing password controls (10%);
- Creating, planning, designing and executing test scenarios, test cases, test script procedures, and debugging (15%); and
- Working with the Quality Control team during integration testing and resolving any issues uncovered during the debugging process (15%).

The record also includes a certified labor condition application (LCA) submitted at the time of filing listing the beneficiary's work location in Sterling Heights, 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 submitted the following evidence to show that the petitioner is the employer: an employment contract between the petitioner and the beneficiary; a statement from the petitioner indicating that the proposed employment pertains to an in-house project; copies of the petitioner's job announcements; the petitioner's website information; and documentation of past employment practices. Counsel also submitted quarterly wage reports, federal income taxes, business licenses, and a company profile.

The director denied the petition on the basis of his determination that the record contains inconsistencies and deficiencies and thus the petitioner had not demonstrated that a specialty occupation is available for the beneficiary. Specifically, the employment agreement indicated that the beneficiary could be placed with a client, which conflicted with the June 16, 2007 letter from the petitioner's president asserting that the beneficiary would work in-house at the petitioner's location. In addition, the amounts of salaries and wages reflected on the petitioner's 2005 and 2006 federal income tax returns were not consistent with the number of programmer analyst positions filed by the petitioner.

On appeal, counsel asserts that the director misread the June 16, 2007 letter from the petitioner's president, and that there are no inconsistencies in that letter and the employment agreement. Counsel also asserts that the director's request for employment contracts and evidence of ability to pay the wages to the beneficiary contradicts guidance in the memorandum from Louis Crocetti Jr., Associate Commissioner, INS Office of Examinations, *Supporting Documentation for H-1B Petitions*, HQ 214h-C (November 13, 1995). Counsel states that the petitioner's 2005 and 2006 federal income tax returns reflect a significant increase in revenue, which clearly shows the need for professional workers and the ability to pay the beneficiary's salary. Counsel submits copies of previously submitted documentation as evidence.

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 March 20, 2007 employment agreement.¹ See 8 C.F.R. § 214.2(h)(4)(ii).

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

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).

properly exercised her discretion to request additional information regarding the beneficiary's ultimate employment, as the nature of the petitioner's business is information technology consulting 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.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 counsel's assertion on appeal that the petitioner will employ the beneficiary to work on an in-house project, as discussed in the June 16, 2007 letter from the petitioner's president. In the same June 16, 2007 letter, the petitioner's president indicated that the beneficiary would be working on an in-house project and that attached to the letter was "a copy of the statement of work prepared by [the petitioner] and Tenth Planet Technologies relating to the project to which [the beneficiary] will be assigned." The evidence of record, however, does not contain the said attachment/statement of work prepared by the petitioner and Tenth Planet Technologies. Nor does the record contain any evidence that the beneficiary's specific duties related to the in-house project require the theoretical and practical application of a body of highly specialized knowledge. 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)). In addition, the petitioner's president stated the following in his April 1, 2007 letter: "[The beneficiary] will work with client management . . . customers, and staff to define system goals, and create necessary maps, graphs, models, and other material to document and present necessary steps and procedures to realize system goals. He will . . . conduct necessary training of staff, clients, and customers in the use of the system components." This description of duties from the petitioner's president suggests that the beneficiary would provide services at an off-site location, which conflicts with the petitioner's president's June 16, 2007 statement that the petitioner had no intention of placing the beneficiary with any client or short-term consulting assignments with any third-party clients. Moreover, the AAO notes that the March 20, 2007 employment agreement stated that the beneficiary would perform services as directed by the petitioner or its clients, and that the beneficiary would work at locations specified by the petitioner. This agreement suggests that the beneficiary would provide services at an off-site location. The record contains no explanation for these inconsistencies/deficiencies. 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

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."

reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

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.

When a petitioner is acting as an employment contractor, the entity ultimately using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, CIS will determine whether the duties require 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.

In the April 1, 2007 letter attached to the petition, the petitioner's president provided an overview of the types of duties the beneficiary might be required to provide as a software programmer, which included, in part, working with client management, customers, and staff to define system goals, creating necessary maps, graphs, models, and other material, as well as training clients and customers in the use of the system components. It is noted that the evidence of record does not include any work orders or statements of work requesting the beneficiary's services. It is not possible to conclude from the brief description of the duties associated with the beneficiary's ultimate employment that the beneficiary's employment will include the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation.

As discussed above, the record of proceeding lacks evidence that establishes the specific work that the beneficiary would perform on the in-house project discussed above and that such work would require the theoretical and practical application of at least a bachelor's degree level of knowledge in a specific specialty.

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.³

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. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). 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. at 165.

In this matter without a comprehensive description of the beneficiary's actual duties from the entities utilizing the beneficiary's services, and without concrete information as to the specific duties that the beneficiary would perform with regard to the petitioner's in-house project, the AAO is precluded from determining that the offered position is one that would normally impose the minimum of 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).

In that the record does not offer a comprehensive description of the duties the beneficiary would perform for the petitioner's in-house project and for the petitioner's clients, the petitioner has also failed to satisfy any of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, 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 the two alternate prongs of the second criterion. Absent a detailed listing of the duties the beneficiary would perform in-house and under contract to third parties, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion; and absent such evidence the petitioner cannot 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

³ 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. Thus, without a detailed job description regarding the work to be performed on a specific project, the AAO is unable to determine whether the project requires the theoretical and practical application of a body of highly specialized knowledge.

petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the petitioner has not demonstrated compliance with the terms and conditions of the labor condition application, in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(B). As discussed above, the petitioner did not submit the requested evidence in the director's RFE pertaining to contracts, statements of work, work orders, and/or service agreements between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work, work orders, or service agreements listing the location of the end-client business. 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. at 165. As the beneficiary's ultimate worksite remains unclear, 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). For these additional reasons, 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. 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.